Bills Committee on Broadcasting (Amendment) Bill 2003

Administration's Response to the Issues Raised at the Meeting on 1 March 2004

Purpose

To set out the Administration's response to issues raised at the Bills Committee meeting held on 1 March 2004.

Defence clauses (Para. 5(a) of Minutes)

2. In different legislation, there are clauses that provide for a defence for the person charged to prove that he/she took reasonable precautions and exercised all due diligence to avoid the commission of the offence. It will also be a defence if he/she acted under the employer's instructions and he took all reasonable steps to ensure that no offence would be committed.

3. Examples of such defence clauses in local legislation are sections 12(1)(f) and 12(1A)(b) of the Water Pollution Control Ordinance (Cap. 358) and section 46A(1) of the Dutiable Commodities Ordinance (Cap. 109). There are also similar defence clauses in UK legislation such as the Dumping At Sea Act 1974 (Overseas Territories) Order 1975, Plant Protection Products Regulations 1995 and Food And Environment Protection Act 1985. An extract of the relevant provisions is at **Annex A**.

A

4. We propose similar defence clauses in the Bill for both the employer and employee, modeling on relevant provisions in existing legislation. In essence, if the employer is charged, it will be a defence if he/she shows that he/she took all practical steps to prevent the commission of the offence. If the employee is charged, it will be a defence if he/she was acting in accordance with his/her employer's instruction and he/she had no reasonable grounds to believe that the concerned device was an unauthorized decoder. We consider that the defence clauses are reasonable, appropriate and balanced for both the employer and employee.

The Committee Stage Amendments (CSAs) Proposed by the Hon. MA Fung-kwok (Para. 5(b) of Minutes)

5. The purpose of the draft CSAs is to make it an offence for a person to possess or use without lawful authority or reasonable excuse an unauthorized decoder to view any pay television programme service provided under a licence with intent to avoid payment of any subscription applicable to the viewing of the service.

6. It is also proposed that in proceedings for the offence, it will be a defence for the person charged to prove that he did not know and had no reasonable grounds to believe that the decoder was an unauthorized decoder. As for the proposed penalty, any person who commits the offence will be liable on summary conviction to a fine at level 2 (i.e. $5,000).

The charging effect of the proposed CSAs

7. Under Rule 57(6) of the Rules of Procedures (RP) of the Legislative Council (Extract at **Annex B**), an amendment to a bill, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong, shall be proposed only by the Chief Executive (CE), a designated public officer under Rule 9 of RP, or a Member who has the written consent of the CE to make such a proposal. This is known as the "charging effect" rule.

B

8. Although the CSAs would create a criminal offence, potentially involving an increase in administrative costs, this would be achieved without new and distinct expenditure. As such, the proposed amendments would not have a charging effect for the purposes of Rule 57(6) of the RP.

The Administration's position

9. As stated in the Administration's Response to the Chairman's Request at the Meeting on 26 November 2003 (LC Paper No. CB(1)650/03-04(01)), the existing problem of unauthorized reception in

Hong Kong largely stems from the Hong Kong Cable Television Limited (HKCTV)'s analogue service, which is vulnerable to unauthorized access. Our approach of targeting primarily dealers and commercial users of unauthorized decoders, and encouraging operators to deploy adequate protective measures to contain the problem is in line with the practice in many advanced economies.

10. We consider that legislative means to criminalize domestic/private unauthorized reception would only be justifiable as the last resort when unauthorized reception is still rampant after less intrusive and socially acceptable solutions (e.g. digitization) have been exhausted.

Enforcement problems

11. Enforcement of the proposed provisions would be difficult and intrusive as enforcement agents have to enter domestic premises, with the necessary warrant, should they reasonably believe that the offence is being or has been committed on the premises. This may explain why in jurisdictions such as the US, the UK and Canada where there are criminal sanctions against unauthorized reception of pay TV services, enforcement actions have been targeting dealers of illicit devices instead of end-users.

12. In Canada, the most acute problem is the use of illicit equipment for reception of satellite direct-to-home television from a distributor who is not authorized in Canada. It is illegal for any person to use such equipment. The difficulty of enforcing the law against the end-user was discussed at the Standing Committee on Canadian Heritage (Standing Committee) of the House of Commons of the Canadian Parliament. Although the offence is not exactly the same as that proposed by the Hon. MA Fung-kwok, the Standing Committee's deliberation may shed light on the difficulty in enforcing the proposed offence against domestic/private end-users. The views expressed by the industry and the enforcement agent, the Royal Canadian Mounted Police (RCMP), are –

Mr David McLennan, President and Chief Executive Officer of Bell Express Vu (a licensed satellite TV service provider):

"With respect to where we should be focusing our efforts on the black market and grey market, that starts with enforcing it at the level at which this product is being sold. We need to up the temperature on satellite dealers and retailers who are advertising and selling this product. That's where it starts."

Mr Janet Yale, President and Chief Executive Officer, Canadian Cable Television Association, echoed this view:

".....this is a very difficult public relations battle to win, and one of the reasons why we don't say that the solution is to charge individuals who have bought the dishes. .....So our answer is not to punish the consumers who are buying these cards but to go after the dealers who are selling them."

RCMP:

".....the RCMP continue to investigate the grey market with a focus on persons or companies operating illegally on a commercial scale."

13. The above statements are recorded in Chapter 16 of *Our Cultural Sovereignty – The Second Century of Canadian Broadcasting* published by the Standing Committee in June 2003. The relevant extract is attached at **Annex C**. The full report can be downloaded from the Canadian Parliament website at www.parl.gc.ca.

C

Latest situation

14. Digitization has effectively rendered unauthorized analogue decoders useless. Service providers can also regularly change scrambling technologies to make illicit digital decoding devices useless. As at end of January 2004, HKCTV has completed about 80% of its digitization project (530,000 out of 650,000 subscribers are receiving digital service). We consider that digitization has so far effectively contained the problem.

Conclusion

15. The Administration does not condone pirated viewing. While the Administration will provide an appropriate legal framework against piracy, the industry has a key role to play to combat piracy by using adequate protective measures to guard against pirated viewing. We do not consider that digitization is the panacea to the problem. But it will make pirated viewing very difficult and costly. Also, we have not ruled out criminalization of domestic/private pirated viewing. However, we maintain that such criminal liability should be introduced only when pirated viewing is still rampant after HKCTV has completed its digitization project. The Administration strongly objects to the CSAs.

March 2003
Communications and Technology Branch
Commerce, Industry and Technology Bureau

Section of Enactment

Chapter:	358	Title:	WATER POLLUTION CONTROL ORDINANCE	Gazette Number:	
Section:	**12**	Heading:	**Defences**	Version Date:	30/06/1997

(1) A person does not commit an offence under section 8(1), 8(2), 9(1) or 9(2) if he proves that-

(a) the discharge or deposit in question is an existing discharge or deposit-
(i) in respect of which an application under section 14 has been made and the prescribed application fee paid when required and the applicant has not been notified of a refusal to grant a licence as required by section 15(2); or
(ii) which is made under, and in accordance with, a licence granted under section 15, 16 or 23A; or (Replaced 67 of 1990 s. 8. Amended 83 of 1993 s. 8)
(b) the discharge or deposit in question is made under, and in accordance with, a licence granted under section 20; or
(c) where section 2(3) applies, the matter was deposited pursuant to an approval under subsection (2) and in accordance with the terms and conditions thereof; or
(d) (Repealed 67 of 1990 s. 8)
(e) the discharge or deposit was made in an emergency in order to avoid danger to life or property and as soon as was reasonably practicable he informed the Authority thereof in writing; or
(f) he acted under instructions given to him by his employer and he exercised the care and took the steps that the court, having regard to his position as an employee, considers reasonable in the circumstances to avoid the occurrence of the prohibited discharge or deposit. (Replaced 67 of 1990 s. 8)

(1A) A person does not commit an offence under section 8(1A) if he proves that-

(a) the discharge or deposit was made in an emergency in order to avoid danger to life or property and as soon as was reasonably practicable he informed the Authority thereof in writing; or
(b) he acted under instructions given to him by his employer and he exercised the care and took the steps that the court, having regard to his position as an employee, considers reasonable in the circumstances to avoid the occurrence of the prohibited discharge or deposit. (Added 67 of 1990 s. 8)

(1B) A person does not commit an offence under section 8 or 9 in respect of a discharge-

(a) that is licensed under the Waste Disposal Ordinance (Cap 354); or
(b) that complies with the Waste Disposal (Livestock Waste) Regulations (Cap

354 sub. leg.). (Added 67 of 1990 s. 8)

(2) The Authority may by order published in the Gazette approve the making of any particular kind of deposit as a farming practice to which the provisions of subsections (1)(a), (1)(b) and (1A) of section 8, or either of those provisions, do not apply so far as it is made in such areas by such persons and in such manner as may be specified in the order. (Amended L.N. 74 of 1986; 67 of 1990 s. 22; 83 of 1993 s. 8)

(3) The power of the Authority under subsection (2) extends to practices employed in all kinds of farming, including agriculture, animal husbandry and fish farming. (Amended L.N. 74 of 1986; 83 of 1993 s. 8)

條文內容

▼

章：	358	標題：	水污染管制條例	憲報編號：	
條：	12	條文標題：	免責辯護	版本日期：	30/06/1997

(1) 任何人如證明下述情事，則不犯第8(1)、8(2)、9(1)或9(2)條所訂的罪行—

(a) 所涉的排放或沉積爲現有的排放或沉積—

(i) 而有人已就該現有的排放或沉積根據第14條提出申請以及應規定繳付訂明的申請費用，且申請人並未獲第15(2)條規定的拒絕批給牌照的通知；或

(ii) 而該現有的排放或沉積是根據並按照根據第15、16或23A條批給的牌照作出的；或 (由1990年第67號第8條代替。由1993年第83號第8條修訂)

(b) 所涉的排放或沉積是根據並按照根據第20條批給的牌照作出的；或

(c) 凡第2(3)條適用，物質的沉積是依據根據第(2)款作出的批准並按照該項批准的條款及條件作出的；或

(d) (由1990年第67號第8條廢除)

(e) 排放或沉積是在緊急情況下爲避免危及生命或財產而作出的，該人並已在合理切實可行範圍內，盡早以書面通知監督；或

(f) 他按僱主所給予的指示行事，並已謹慎行事和已採取步驟，而法庭在顧及他作爲僱員的地位後，認爲在該情況下，爲避免受禁止的排放或沉積發生而如此行事和如此採取步驟是合理的。 (由1990年第67號第8條代替)

(1A) 任何人如證明下述情事，則不犯第8(1A)條所訂的罪行—

(a) 排放或沉積是在緊急情況下爲避免危及生命或財產而作出的，該人並已在合理切實可行範圍內，盡早以書面通知監督；或

(b) 他按僱主所給予的指示行事，並已謹慎行事和已採取步驟，而法庭在顧及他作爲僱員的地位後，認爲在該情況下，爲避免受禁止的排放或沉積發生而如此行事和如此採取步驟是合理的。 (由1990年第67號第8條增補)

(1B) 凡屬以下排放，任何人不會就該排放而犯第8或9條所訂的罪行—

(a) 已根據《廢物處置條例》(第354章)領有牌照者；或
(b) 符合《廢物處置(禽畜廢物)規例》(第354章，附屬法例)的規定者。 (由1990年第67號第8條增補)

(2) 監督可藉在憲報刊登的命令，批准作出任何個別種類的沉積，作爲第8條第(1)(a)、(1)(b)及(1A)款的條文或其中任何條文所不適用的農作方法，但只限於由命令所指明的人，按命令所指明的方式，在命令所指明的地區所作出的沉積。 (由1986年第74號法律公告修訂；由1990年第67號第22條修訂；由1993年第83號第8條修訂)
(3) 監督根據第(2)款具有的權力，延伸至所有農作種類所採用的方法，包括農業、畜牧業及養魚業所採用的方法。 (由1986年第74號法律公告修訂；由1993年第83號第8條修訂)

前一條文　　下一條文　　轉換語言　　返回法例名單

Section of Enactment

Chapter:	109	Title:	DUTIABLE COMMODITIES ORDINANCE	Gazette Number:	
Section:	**46A**	Heading:	**Liability for acts of servants**	Version Date:	30/06/1997

(1) Where an offence against this Ordinance is committed by a servant of a licensee, the licensee shall, without prejudice to the liability of any other person, also be guilty of that offence but shall not be liable to any term of imprisonment.
(2) Where a prosecution is brought against a licensee by virtue of this section in respect of an offence committed by a servant, it shall be a defence -

(a) in the case of an offence against section 61, 71, 72 or 73, if the licensee shows that he exercised such control over the servant as would ensure that the servant was not likely to act in contravention of that section; or (Amended 40 of 1974 s. 8; 34 of 1976 s. 6)
(b) in the case of any other offence, if the licensee shows that he took all practicable steps to prevent the commission of the offence.

(3) Where a licence is granted to any person wholly or partly for the benefit of a company reference to "licensee" in this section shall be read as including references to the company.
(Added 3 of 1970 s. 20)

條文內容

章： 109 標題： 應課稅品條例 憲報編號：
條： **46A** 條文標題： 對受僱人的作為負上的法律責任 版本日期： 30/06/1997

(1) 凡持牌人的受僱人犯本條例所訂罪行，在不損害任何其他人的法律責任的原則下，該持牌人亦屬犯該罪行，但不得處以監禁。
(2) 凡就某受僱人所犯罪行而憑藉本條對持牌人提起檢控，持牌人如提出以下證明，即可以此作爲免責辯護—

(a) (如屬第61、71、72或73條所訂的罪行)持牌人證明已對該受僱人有所管制，以確保該受僱人相當可能不會違反該條行事；或 (由1974年第40號第8條修訂；由1976年第34號第6條修訂)
(b) (如屬任何其他罪行)持牌人證明已採取所有切實可行的步驟，以防止該罪行發生。

(3) 如牌照是完全或部分爲某公司的利益而批予任何人的，則本條中凡提述“持牌人”之處，須理解爲包括提述該公司。

(由1970年第3號第20條增補)

1975 No 1831

DUMPING AT SEA ACT 1974 (OVERSEAS TERRITORIES) ORDER 1975
1975 No 1831

SCHEDULE 1
Articles 3 and 4

Made 12 November 1975
Laid before Parliament 19 November 1975
Coming into Operation 10 December 1975

Dumping at Sea Act 1974 (Overseas Territories) Order 1975, 1975 No 1831, Sch. 1

SCHEDULE 1 Provisions of the Dumping at Sea Act 1974 as extended to the Territories specified in Schedule 2 hereto and to the Solomon Islands

1 Restrictions on dumping in the sea

(1) Subject to the provisions of this section, no person, except in pursuance of a licence granted under section 2 below and in accordance with the terms of that licence--

(a) shall dump substances or articles in the territorial waters of the Territory; or

(b) shall dump substances or articles in the sea outside the territorial waters of the Territory from a British ship, aircraft, hovercraft or marine structure; or

(c) shall load substances or articles on to a ship, aircraft, hovercraft or marine structure in the Territory or its territorial waters for dumping in the sea, whether in such waters or not; or

(d) shall cause or permit substances or articles to be dumped or loaded as mentioned in paragraphs (a) to (c) above.

(2) Subject to subsections (3) to (5) below, substances and articles are dumped in the sea for the purposes of this Act if they are permanently deposited in the sea from a vehicle, ship, aircraft, hovercraft or marine structure, or from a structure on land constructed or adapted wholly or mainly for the purpose of depositing solids in the sea.

(3) A discharge incidental to or derived from the normal operation of a ship, aircraft, vehicle, hovercraft or marine structure or of its equipment does not constitute dumping for the purposes of this Act unless the ship, aircraft, vehicle, hovercraft or marine structure in question is constructed or adapted wholly or mainly for the purpose of the disposal of waste or spoil and the discharge takes place as part of its operation for that purpose.

(4) A deposit made by, or with the written consent of, a harbour authority or lighthouse authority, for the purpose of providing moorings or securing aids to navigation, does not constitute dumping for the purposes of this Act.

(5) A deposit made by or on behalf of a harbour authority in the execution of works of

maintenance in their harbour does not constitute dumping for the purposes of this Act if it is made on the site of the works.

(6) Subject to subsections (7) to (9) below, any person who contravenes subsection (1) above shall be guilty of an offence and liable--

(a) on summary conviction to a fine of not more than ?00 or to imprisonment for a term of not more than six months or to both; or

(b) on conviction on indictment, to imprisonment for not more than five years, or a fine, or to both.

(7) It shall be a defence for a person charged with an offence under subsection (6) above to prove--

(a) that the substances or articles in question were dumped for the purpose of securing the safety of a ship, aircraft, hovercraft or marine structure or of saving life; and

(b) that he took steps within a reasonable time to inform the Governor that the dumping had taken place and of the locality and circumstances in which it took place and the nature and quantity of the substances or articles dumped,

unless the court is satisfied that the dumping was not necessary for any of the purposes mentioned above and was not a reasonable step to take in the circumstances.

(8) It shall be a defence for a person charged with an offence under subsection (6) above to prove--

(a) that he acted under **instructions given to him by his employer,** or

(b) that he acted in reliance on information given to him by others without any reason to suppose that the information was false or misleading,

and in either case that he took all such steps as were reasonably open to him to ensure that no offence would be committed.

(9) It shall be a defence for a person charged with an offence under subsection (6) above in relation to substances or articles dumped outside the territorial waters of the Territory from a British ship, aircraft or hovercraft to prove that they were loaded on to it in a Convention State and that the dumping was authorised by a licence issued by the responsible authority in that State.

2 Licences

(1) In determining whether to grant a licence the Governor shall have regard to the need to protect the marine environment and the living resources which it supports from any adverse consequences of dumping the substances or articles to which the licence, if granted, will relate; and the Governor shall include in a licence such conditions as appear to him to be necessary or expedient for the protection of that environment and those resources from any such consequences.

(2) The Governor may revoke a licence if it appears to him that the holder is in breach of a condition included in it.

(3) The Governor may vary or revoke a licence if it appears to him that the licence ought to be varied or revoked because of a change of circumstances relating to the marine environment or the living resources which it supports, including a change in scientific knowledge.

(4) The Governor may require an applicant for a licence to pay such fee on applying for it

1995 No 887

*** THIS DOCUMENT IS CURRENT THROUGH 8 DECEMBER, 2003 ***

PLANT PROTECTION PRODUCTS REGULATIONS 1995
1995 No 887

Made - - - 22 March 1995

Plant Protection Products Regulations 1995, SI 887, s. 23

23 General defence of due diligence

(1) In any proceedings for an offence under these Regulations it shall be a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.(2) Without prejudice to the generality of paragraph (1) above, a person is to be taken to have established the defence provided by that paragraph if he proves--

(a) that he acted under **instructions given to him by his employer;** or(b) that he acted in reliance on information supplied by another person without any reason to suppose that the information was false or misleading,

and in either case that he took all such steps as were reasonably open to him to ensure that no offence would be committed.

(3) If in any case the defence provided by paragraph (1) above involves an allegation that the commission of the offence was due to an act or omission by another person, other than the giving of instructions to the person chargedwith the offence by his employer, or to reliance on information supplied by another person, the person charged shall not, without leave of the court, be entitled to rely on that defence unless within a period ending seven clear days before the hearing, he has served on the prosecutor a notice giving such information identifying or assisting in the identification of that other person as was then in his possession.

NOTES:

Amendment

Revoked, in relation to Scotland, by SSI 2003/579, reg 29, Sch 5.

Date in force: 31 December 2003: see SSI 2003/579, reg 1(1).

1985 CHAPTER 48

*** THIS DOCUMENT IS CURRENT THROUGH 20 NOVEMBER, 2003 ***

FOOD AND ENVIRONMENT PROTECTION ACT 1985
1985 CHAPTER 48

PART IV GENERAL AND SUPPLEMENTARY

Royal Assent [16 July 1985]

Food and Environment Protection Act 1985, Ch. 48, s. 22 (Eng.)

22 General defence of due diligence

(1) In any proceedings for an offence under this Act it is a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

(2) Without prejudice to the generality of subsection (1) above, a person is to be taken to have established the defence provided by that subsection if he proves--

(a) that he acted under **instructions given to him by his employer;** or

(b) that he acted in reliance on information supplied by another person without any reason to suppose that the information was false or misleading,

and in either case that he took all such steps as were reasonably open to him to ensure that no offence would be committed.

(3) If in any case the defence provided by subsection(1) above involves an allegation that the commission of the offence was due to an act or omission by another person, other than the giving of instructions to the person charged with the offence by his employer, or to reliance on information supplied by another person, the person charged shall not, without leave of the court, be entitled to rely on that defence unless within a period ending seven clear days before the hearing, he has served on the prosecutor a notice giving such information identifying or assisting in the identification of that other person as was then in his possession.

NOTES:

Initial Commencement

To be appointed

To be appointed: see s 27(1).

Appointment

Appointment: 1 January 1986: see SI 1985/1698, art 2.

Annex B

Extract from the Rules of Procedures of the Legislative Council
節錄自香港特別行政區立法會議事規則

57. Amendments to Bills

(6) An amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by -

(a) the Chief Executive; or

(b) a designated public officer ; or

(c) a Member, if the Chief Executive consents in writing to the proposal.

57. 法案的修正案

(6) 立法會主席或全體委員會主席如認為任何修正案的目的或效力可導致動用香港任何部分政府收入或其他公帑, 或須由該等收入或公帑負擔, 則該修正案只可由以下人士提出 ?? *(1999年第107號法律公告)*

(a) 行政長官；或

(b) 獲委派官員；或

(c) 任何議員, 如行政長官書面同意該提案。

The Current Legal Status of Grey Market Satellite Systems

On 26 April 2002, the Supreme Court of Canada held that grey market satellite reception in Canada is illegal.[38] Specifically, the Court held that section 9 of the *Radiocommunication Act* prohibits the decoding of all encrypted satellite signals, with a limited exception. It based this decision on principles of statutory interpretation and an examination of the language used by Parliament in creating the provision, together with a view to the overall objectives and regulatory regime for broadcasting in Canada.

The Court held that the *Radiocommunication Act* forbids the activity of decoding an encrypted subscription signal, and thus the prohibition "is directed towards the reception side of the broadcasting equation."[39] This prohibition captures the decoding of any encrypted signal, subject to the exception that the person receiving the signal has received authorization from the lawful distributor. Here the Court is quite clear in stating that "if no lawful distributor exists to grant such authorization, the general prohibition must remain in effect."[40] The only parties with the lawful right to distribute the signals in Canada — and thus grant authorization — are those licenced by the CRTC to do so: Bell ExpressVu or Star Choice. Therefore, reception of satellite signals emanating from U.S. broadcasters to Canadian residents through grey market systems is against the law in Canada.

In further support of this view that section 9(1)(c) of the Act creates an absolute prohibition against decoding, followed by a limited exception, the Supreme Court looked to the broader context of the overall regulatory regimes of telecommunications and broadcasting in Canada. It stated that the *Radiocommunication Act* and the *Broadcasting Act* operate in tandem as part of a single regulatory scheme. The *Broadcasting Act*, the Court said, evinces a clear cultural orientation. As such, the wording of the *Radiocommunication Act*, when read in the context of the objectives of *Broadcasting Act*, furthers broadcasting policy objectives by encouraging broadcasters to comply with the regulatory process before they could grant authorization to have their signals decoded and collect subscription fees: why, asked the court, "would Parliament provide for Canadian ownership, Canadian production, Canadian content in its broadcasting and then simply leave the door open for unregulated, foreign broadcasting to come in and sweep it aside? What purpose would have been served?"[41]

Lastly, this particular interpretation provides protection to the holders of copyright and complements the scheme of the *Copyright Act*. An absolute

prohibition against decoding except where authorization is granted by the person with the lawful right to transmit and authorize decoding of the signal extends protection to the holders of copyright in the program itself, since it would prohibit the unauthorized reception of signals that violate copyright.

Implications

One of the major concerns as a result of this decision was a fear that the several hundred thousand Canadians who own grey market satellite systems would be vulnerable to criminal charges because they were in breach of the *Radiocommunication Act*. It is worth remembering that these systems were legitimately purchased and all U.S. subscription fees paid in full. Given that the Act provides for criminal sanctions of imprisonment and onerous fines for every person found to be in violation of the statute, many were afraid that they could expect a knock on their door and a visit from the police and that their satellite equipment would be confiscated. Indeed, this line of argument was pursued by counsel on behalf of grey market satellite system vendors at the Supreme Court hearing of this appeal.

The Court, however, was not convinced that that particular scenario would in fact occur. The language used by the Court here is instructive, and it is helpful to set it out and examine it in full.

The Court first stated, "I am not, however, persuaded that this plays an important role in the interpretive process here."[42] In other words, the Court felt that this is an issue tangential to the legal substance of this appeal, which focused narrowly on how to properly interpret the wording of section 9(1)(c). The Court then went on to say:

> In any event, I do not think it correct to insinuate that the decision in this appeal will have the effect of automatically branding every Canadian resident who subscribes to and pays for U.S. DTH broadcasting services as a criminal. The penal offence in s. 10(1)(b) requires that circumstances "give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9" (emphasis in original), and allows for a "lawful excuse" defence. Section 10(2.5) further provides that "[n]o person shall be convicted of an offence under paragraph 9(1)(c) ... if the person exercised all due diligence to prevent the commission of the offence".[43]

Put another way, prior to this decision, the legality of ownership and use of grey market satellite systems was in question — which is why the issue made it to the Supreme Court of Canada — and you cannot criminalize activity that is not clearly criminal. As there were some legitimate reservations as to whether this activity was in breach of the law, it would be impossible to say that those who acted prior to the date of this decision (26 April 2002) were obtaining or using the systems for the purpose of contravening section 9 of the *Radiocommunication Act*. If you did not know the equipment was clearly illegal, there would be no intent to use the equipment for the purpose of violating the Act. This line of argument fails as of the date of the ruling, as the law on this is now clear.

Finally on this issue, the Court concluded by stating that "[s]ince it is neither necessary nor appropriate to pursue the meaning of these provisions absent the proper factual context, I refrain from doing so."[44] This means that as this appeal focused very narrowly on a statutory interpretation issue, the criminal law liability and sanctions aspects of the legislation will be left to another time when the facts and context of the case raise them directly.

A further aspect of this criminalization issue is whom can be captured by it: grey market system vendors or owners? According to the wording of the *Radiocommunication Act*, both. Sections 10(1)(*b*) and 10(2.1) create summary conviction offences for every person providing equipment for the purposes of contravening s. 9 [vendors] **and** for every person who in fact contravenes s. 9(1)(*c*) [owners/users of decoding devices] [emphasis added]. Again, though, given the cautionary language of the Court with respect to the effects of this decision, it would appear unlikely that action would be taken against owners.

However, vendors may be another matter. Canadian satellite signal distributors and others have consistently maintained that they seek action against the vendors rather than the end users. For example, Mr. David McLennan, President and Chief Executive Officer of Bell ExpressVu, told the Committee that:

> With respect to where we should be focusing our efforts on the black market and grey market, that starts with enforcing it at the level at which this product is being sold. We need to up the temperature on satellite dealers and retailers who are advertising and selling this product. That's where it starts. If I can go back to the ... Supreme

> Court decision, I think that's just an important catalyst to being able to turn the temperature up on the law enforcement side.[45]

Ms. Janet Yale, President and Chief Executive Officer, Canadian Cable Television Association, echoed this view:

> You're absolutely right; this is a very difficult public relations battle to win, and one of the reasons why we don't say that the solution is to charge individuals who have bought the dishes. If there is advertising in the newspaper that says to come and buy this dish, and buy these cards, people naturally assume that if it weren't appropriate to buy them, they wouldn't be available for sale. So our answer is not to punish the consumers who are buying these cards but to go after the dealers who are selling them.
>
> Second, we try to educate the public on the fact that this is theft, pure and simple — theft. It's no different from stealing something out of a store, because the people who have created this product are not being compensated. So we almost have to create victims of this crime and point out to people that there are real victims, Canadian artists and creators, which means jobs in Canada, if not yesterday then certainly tomorrow.[46]

A *Globe and Mail* newspaper article the morning after the decision stated that:

> The broadcasting industry, government and RCMP alike say they'll be targeting commercial vendors of decoders rather than individual owners of satellite dishes or subscribers to U.S. satellite services. 'Our primary focus is the dealers. It's not our intention to root around trying to find subscriber lists', said Ian Gavanagh, vice-president of Bell ExpressVu.[47]

This position was repeated by RCMP media relations officer Corporal Benoit Desjardins. He stated that "the RCMP continue to investigate the grey market with a focus on persons or companies operating illegally on a commercial scale."[48] This focus on dealer activity rather than individual satellite dish owners has been consistently followed by law enforcement and Canadian satellite industry officials in the months after the Supreme Court of Canada decision.[49]