

Date: 20000125
Docket: S.H. No. 159733A

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: GE Capital Canada Retailer Financial Services Company (Re),
2000 NSSC 161

BETWEEN:

**GE CAPITAL CANADA RETAILER FINANCIAL
SERVICES COMPANY**

APPELLANT

- and -

**IN THE MATTER OF AN APPEAL pursuant to Section 32
of the *CONSUMER PROTECTION ACT*, R.S.N.S. 1989, c. 92**

RESPONDENT

D E C I S I O N

HEARD BEFORE: **The Honourable Justice Walter R. E. Goodfellow in
the Supreme Court of Nova Scotia on January 12th,
2000**

**WRITTEN
DECISION:** **January 25th, 2000**

COUNSEL: **J. Scott Barnett - Solicitor for the Appellant
Reinhold Endres, Q.C. - Solicitor for the Respondent**

GOODFELLOW, J.:

BACKGROUND

- [2] GE Capital Canada Retailer Financial Services applied the 22nd of January, 1998 for registration as a lender pursuant to s.11 of the *Consumer Protection Act*, R.S.N.S., 1999, c. 92.
- [3] The Deputy Registrar of Credit rendered her decision October the 7th, 1999 concluding she could not approve the application.
- [4] GE appeal seeking an Order directing the Deputy Registrar of Credit registering it as a lender pursuant to the *Act*.

GROUNDS OF APPEAL

- (A) the Deputy Registrar's decision was based on irrelevant considerations, including but not limited to the possibility that third parties may breach the provisions of the *Consumer Protection Act* if the Appellant's Application for Registration as a Lender is granted;

- (B) the Deputy Registrar erred in law by failing to properly apply Section 12(1) of the *Consumer Protection Act* in respect of the Application of the Appellant;
- (C) the Deputy Registrar erred in law by misinterpreting the meaning of “lender” as defined in Section 2(h) of the *Consumer Protection Act*.
- (D) such other grounds of appeal as may appear.

AFFIDAVIT - DUNCAN de CHASTELAIN - December 20th, 1999

[5] This Affidavit was filed December 23rd, 1999 in support of the Appeal.

AFFIDAVIT OF DEPUTY REGISTRAR OF CREDIT - December 23rd, 1999

[6] This affidavit was filed in opposition of the Appeal.

CONSUMER PROTECTION ACT, R.S.N.S. 1989, c.92

[7] The Appellant submits the following are the key provisions for consideration:

Section 11(1) states clearly that “[e]very person who carries on business as a lender shall register under this Act.” Under the CPA, “lender” is defined as “a person who extends credit” (s. 2(h)). Furthermore, “credit” is defined in s. 2(d) as follows:

“credit” means credit for which a borrower is required to pay and that is

(i) given under an agreement between a seller and a buyer to purchase goods or services by which all or part of the purchase price is payable after the agreement is entered into,

or

(ii) given by the advancement of money,

and concludes a transaction where a person, acting in the course of his business, acquires from another person the other person’s right to any income tax refund or other payment by the Government of Canada or the Government of the Province which is due or will become due to the other person, but does not include credit extended

(iii) on the security of a mortgage of real property,

(iv) in respect of the sale of goods intended for resale, or

(v) for industrial or business purposes of the borrower;

Other key defined terms include the following:

- *“borrower” means “a person who receives credit” (s. 2(a))*
- *“buyer” means a person who purchases goods or services on credit and includes his agent, but does not include a person of a class or classes to whom this Act is declared by the regulations not to apply” (s. 2(b))*
- *“person” means “an individual, an association of individuals, a partnership or a corporation and includes an agent of any of them” (s. 2(k))*
- *seller” means “a person who is in the business of selling goods or services to buyers and includes his agent, but does not include a person or class of persons to whom this Act is by the regulations declared not to apply” (s. 2(n))*

Further to the requirements that lenders register under the *Act*, s. 12(1) states that *“[u]pon receipt of an application in the prescribed form from an applicant who satisfies the requirements of the regulations the Registrar shall register a lender”*.

[8] The Respondent refers to the following sections:

Interpretation of Section

10 (1) In this Section,

- (a) “borrower” means a natural person who receives credit;
- (b) “buyer” means a natural person who purchases goods or services on credit;
- (c) “credit” means credit for which a borrower is required to pay and that is
 - (i) given under an agreement between a seller and a buyer to purchase goods or services by which all or part of the purchase price is payable after the agreement is entered into, or
 - (ii) given by advancement of money;
- (d) “goods” includes tokens, coupons or other documents of things issued or sold by a seller to a buyer, that are exchangeable or redeemable for goods or services;

(e) “lender” means a person who has a business or in the course of business extends credit or includes his agent;

(f) “seller” means a person who is in the business of selling goods or services to buyers and includes his agent.

Registration

11 (1) Every person who carries on business as a lender shall register under this *Act*.

Appeal

32 Any person aggrieved by a decision, order or direction of the Registrar may within thirty days after receiving notice of the decision, order or direction appeal therefrom to the judge of the county court for the district in which the person resides or carries on his principal business and the judge on the hearing of the appeal may confirm, vary or set aside the decision, order or direction. R.S., c. 92, s.32.

INTERPRETATION ACT, R.S., c. 235

Law always speaking

“shall” or “may”

9 (3) In an enactment, “shall” is imperative and “may” is permissive.

Interpretation of enactment

9 (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

STANDARD OF REVIEW

[9] In *Pezim v. British Columbia (Superintendent of Insurance)*, [1994] 2

S.C.R. 557, the court, at pp. 588-9, identified one of the central issues as:

what is the appropriate standard of review of decisions of a tribunal where there is no privative clause (and there is no privative clause here), but there is a statutory right of appeal, and where the case turns on a question of interpretation.

[10] In *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 (*Bell Canada*), ... dealt with a statutory right of appeal rather than an application for judicial review, Gonthier J., writing for this Court, stated the following at pp. 1745-46:

It is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. In principle, a court is entitled, on appeal, to disagree with the reasoning of the lower tribunal.

However, within the context of a statutory appeal from an administrative tribunal, additional consideration must be given to the principle of specialization of duties. Although an appeal tribunal has the right to disagree with a lower tribunal on issues which fall within the scope of the statutory appeal, crucial deference should be given to

the opinion of the lower tribunal on issues which fall squarely within its area of expertise. [Emphasis added.]

[11] Consequently, even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that some deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise.

[12] In *Spectrum Pension Plan v. Superintendent of Pensions (R.S.)* (1998), 161 N.S.R. (2d) 1, Justice Hallett, delivering the judgment of the court after commenting at length on *Pezim*, concluded in a similar fashion, at paras. 115-116:

It is essential to consider the five factors referred to in *Syndicat national* [Bibeault] in determining how much deference Hamilton, J., ought to have accorded the decision of the Superintendent in the face of the very broad statutory right of appeal to the Supreme Court.

Where there is such a broad scope of appeal, one starts with the premise that the standard of review on a question of law is correctness but the courts ought to defer to the Superintendent's decision on a particular issue, if the expertise of the Superintendent, vis-à-vis, the

particular issue before the Superintendent is greater than that of the reviewing Court. Absent that, the court ought to show little, if any, deference to such a decision (see the comments previously quoted from Sopinka's decision for the majority in *Bradco*).

In deciding the standard of judicial review applicable to the Superintendent's decision, I will consider the five factors identified in *Syndicat national*, supra [statutory language, purpose of the legislation, reasons for the existence of the statutory office, expertise, and nature of the problem].

[13] I also reviewed *Director of Investigation and Research, Competition Act v. Southam Inc. et al* (1997), 209 N.R. 20 where the court identified a third standard of judicial review more deferential than "correctness" and less deferential than "patently unreasonable", called: "reasonableness simpliciter".

[14] This functional and pragmatic approach to determining the standard of review was endorsed by the Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* (1998), 226 N.R.. 201,

where the court also endorsed the “spectrum” of standards for review, from correctness to patent unreasonableness, to reasonableness simpliciter, at para. 27.

[15] The several different factors which the court must consider, none of which alone dispose of the question, but which give an indication of the appropriate level of deference to be shown by the court, are as follows, paras. 30-38:

- (i) the existence of absence of a privative clause;
- (ii) the expertise of the decision maker whose decision is under review;
- (iii) the purpose of the legislation as a whole, and the applicable provisions in particular, and
- (iv) the nature of the problem, whether or not the problem involves a question of fact or law or mixed law and fact.

[16] There area areas of the *Statute* under consideration, the *Consumer Protection Act*, where a measure of expertise is clearly within the domain of the Registrar. For example, if a determination under review relates and

relies upon the functions of the Registrar set out in s. 4 which includes the conduct of studies, surveys, consultations, investigations, etcetera. The Registrar is to perform duties and exercise the powers imposed or conferred upon him, not only by the *Act*, but the Regulations and the Regulations empower the Registrar, for example, to specify the nature of the form to be utilized in an application for registration.

- [17] There are other aspects which are purely questions of law and the court is dealing with a statutory appeal without a privative clause.
- [18] There are areas involving strict interpretation of the language of the *Statute* and the standard of correctness applies in any such area. The uniform reasonableness of application requirements is more appropriately within the domain, knowledge, and to some extent, expertise of the Registrar, bearing in mind the mandatory “shall” requirement of s.12(1) after the Registrar has provided her approved application form.

ISSUES

- 1. ARE PETRO-CANADA AND ESSO/IMPERIAL OIL LENDERS UNDER THE *CONSUMER PROTECTION ACT*?**
- 2. SHOULD GE BE REQUIRED TO MEET THE FURTHER CONDITIONS LAID DOWN BY THE DEPUTY REGISTRAR FOR THE APPLICATION FORM AND THE ACTUAL CREDIT CARD?**

ISSUE I

- 1. ARE PETRO-CANADA AND ESSO/IMPERIAL OIL LENDERS UNDER THE *CONSUMER PROTECTION ACT*?**

[19] In this case, you have the seller, the oil company, either Petro Canada or Imperial Esso, has a contract of sale to the purchaser. The second contract is between the seller and the lender, GE Capital Canada Retail Financial Services Company, and the third contract is between the purchaser and GE Capital Canada Retail Financial Services Company.

[20] We have therefore three separate contracts between three separate and distinct parties and each of the distinct parties is a party to two of the three contracts but neither a party nor privy to the third contract. GE Capital Canada operates in accordance with its agreements with the retailers by accepting, processing, approving or rejecting applications for credit by the retailers' customers. GE Capital Canada issues the credit card direct to the retail customers that it has approved for credit and the credit card receivables are owned by GE Capital Canada pursuant to their credit contract with the retailers' customers. GE Capital Canada extends the credit to the customers of the retailers and the retailer accepts the card in full satisfaction of the cost of purchase by its customers and obtains its payment through its contract with GE Capital Canada.

[21] This is a relatively standard commercial arrangement that has been in effect for many decades and is described by Professor M. H. Ogilvie in *Canadian Banking Law*, p. 665:

The tripartite scheme consists of three separate contracts: between the card issuer and the consumer card holder, the card issuer and the participating merchant, and the consumer and the merchant. The

contractual obligations of the first two contracts are determined by the cardissuer, while the third contract is an ordinary contract for the sale of goods or of services. Essentially, in the tripartite scheme, the cardholder enters into a contract of sale with the merchant on the understanding that after presentation of the card and approval of the value of the sale by the cardissuer, that the cardissuer will pay the merchant the value of the sale. The cardholder will then pay the cardissuer on a monthly basis, the value of that sale and of all other sale contracts entered into either in stipulated minimum instalments or otherwise in part or in whole. Credit is extended to the cardholder by the cardissuer and interest is charged on accounts outstanding, pursuant to agreement.

- [22] There is no legal impediment with the tripartite arrangement. Re: *Charge Card Services Ltd.* (1988) 3 All England Reports 702. The litigation in this appeal flows out of a tripartite scheme where the *Charge Card Services Ltd.* which had a contract with garages for the sale of Petro and associated products and credit contracts with the purchasers who purchased such products direct from the garages. The *Charge Card Services Ltd.* company

went bankrupt and the garages, who had supplied fuel to customers, had not been paid by the company and the garages attempted to maintain that they only accepted payment by the credit card as a conditional discharge of the purchaser's obligation to pay and sought recovery direct from the purchasers. The relationship between the garages and purchasers was governed by their contract which is at best oral in the majority of cases or by practice. The court held the use of the credit card did not differ in any material respect from an ordinary credit card sale and that the transaction was one in which the garage was accepting payment by card in substitution for payment by cash - that is, an unconditional discharge of the price. The garage was accepting the lender company's obligation to pay it instead of cash from a purchaser. The court concurred with the trial judge that the cardholder's obligations to the garages were absolutely not conditionally discharged by the garage accepting the voucher signed by the cardholder. The court went on to state that this conclusion reflects the popular perception of the role of credit cards in modern retail trade as plastic money.

[23] Given the definition of "lender" in the Act, neither Petro Canada nor Esso are lenders as neither extends any credit, but simply accepts the credit card

which is subject to contract between the purchaser and GE in full satisfaction of the purchaser's obligation for payment of the products purchased.

[24] Accordingly, the Registrar's direction that Petro Canada and Esso must seek registration as lenders under the *Act*, is an error in law.

ISSUE II

2. SHOULD GE BE REQUIRED TO MEET THE FURTHER CONDITIONS LAID DOWN BY THE DEPUTY REGISTRAR FOR THE APPLICATION FORM AND THE ACTUAL CREDIT CARD?

[25] I want to commend Ms. Merry, the Deputy Registrar of Credit, for taking a pragmatic approach to the difference in the name advanced for registration, GE Capital Canada Retail Financial Services and the name of the corporate entity used on credit card applications, see letter March 10th, 1998 from Program Administration Officer, indicating the name used by **GE Capital**

Canada Retail Financial Services on its existing supply of credit card applications - then carries on - was Canadian Electric Capital Canada Inc. (“GECC”) of General Electric Capital Canada Inc. (“GE Capital”) and therefore, the name of the corporate entity on the credit card did not totally reflect the name of the applicant, GE Capital Canada Retailer Financial Services Company. Ms. Merry, by letter of July 22nd, 1998, confirmed the Registrar would permit the Company to use up their existing supply on the understanding that the supply would be exhausted by the end of the year and requiring the applicant to confirm such in writing for filing. Subsequently, a request was made for an extended period due to the apparent volume of existing application forms, etcetera, and that is a matter to be determined exclusively by the Registrar.

[26] There is a mandatory duty upon the Registrar to register. Section 12(1) sets out the Registrar shall registrar a lender and this requirement must be applied provided the Registrar receives an application in the prescribed form which satisfies the requirements of the Regulations.

[27] The underlying and fundamental purpose of the *Consumer Protection Act* and its Regulations is disclosure of the cost credit. There are a number of subsidiary purposes directed, for example, under s.72, there shall be no refusal to lend or sell on a discriminatory basis solely because the borrower or buyer is a woman. Additionally, I agree with the Registrar that an underlying fundamental prerequisite of disclosing the cost of credit is that a borrower must be able to appreciate who the lender is, as the borrower's contract for credit is enforceable against the lender and *vice versa*. A scheme that did not disclose who the lender is would not be within the spirit and intent of the *Consumer Protection Act* and Regulations.

[28] Having said that, what transpired here is the Deputy Registrar provided the prescribed form and no where in the prescribed form is there any specific reference to specific prerequisites of disclosure of who is the lender. In its documentation with the retail customer, i.e., application for credit, statements of account, credit cards, etcetera. This secondary disclosure prerequisite is not specified in the application for registration as a lender. A lender meeting all the prerequisites of the Regulations, which under Regulation 2 simply indicates application shall be made to the Registrar in a

form as the Registrar may from time to time specify along with the prescribed fee, requires the application of s.12(1) of the *Act prima facie* is entitled to registration.

[29] With respect to disclosure as to who is the lender, it is noted in the material provided in this appeal that the application for a credit card to GE Capital Canada Retailer Financial Services Company in relation to Petro Canada, lists GE Capital Canada in one of its designations or other approximately forty-two places in the application form. In the application form by the consumer in relation to the Esso card, GE Capital is mentioned on several occasions and specifically spells out that in the agreement GE Capital means GE Capital Canada Retailer Financial Services Company. It sets out specifically the address of GE. These application forms are very explicit and no one who takes the time to read them or even glance at them would be left in any doubt to who is extending credit. It is my assessment that the concern of the Deputy Registrar, in relation to the documentation for applications, statements of account and credit cards, primarily flows from a failure of an appreciation of the legitimate tripartite scheme.

[30] The Registrar does provide examples of credit cards which do have an indication as to the owner of such card, i.e., the lender, and these examples are of Leon's credit card which contains on its reverse under conditions a clear indication that AVCO Financial Services Canada Limited owns the card and similarly with Charm Diamond Centre, Beneficial is designated on the reverse of the card. The reverse of the Esso card clearly states "this card is the property of General Electric Capital Canada Retailer Financial Services Company and must be returned upon request. Deemed cardholder is recommended for credit at all business identified by these signs in North America only". The regular statements of account for Imperial Oil makes reference to GE Capital Canada Retailer Financial Services Company as a licensee of the trademark of Imperial Oil and the Petro Canada statements of account makes reference to GE Capital Canada in several places and at the end of the statement recites, "this account is owned by GE Capital Canada Retailer Financial Services Company".

[31] The Deputy Registrar wishes yet additional indications on the various forms disclosed, who the lender is, and with respect, there is more than ample disclosure in existence on both the application forms and statements of

account to meet any secondary intent and purpose of the *Act* for disclosure as to who is the lender.

[32] Accordingly, an Order will go forth directing the Registrar to register General Electric Canada Retailer Financial Services Company as a lender as it relates to Esso credit cards. Once Petro Canada has a similar identification on the reverse of the GE credit card to meet what appears to be a uniform reasonable requirement of the Registrar with respect to the credit card itself, General Electric Canada Retailer Financial Services Company shall be registered as a lender, as it relates to Petro Canada credit cards. The credit card is the most continuing visible evidence of the contract between the borrower and the lender. The Registrar's requirement for consistency in this regard should not be subject to review by the Court.

[33] I await an Order from counsel.

J.