

IN THE SUPREME COURT OF BELIZE, 2012

CLAIM NO. 809 of 2011

SPEEDNET COMMUNICATIONS LIMITED

CLAIMANT

AND

PUBLIC UTILITIES COMMISSION

DEFENDANT

Hearings

2012

27th February

25th September

26th November

Mr. Andrew Marshalleck SC and Ms. Naima Barrow for the claimant.

Mr. Fred Lumor SC for the defendant.

LEGALL J.

JUDGMENT

1. During the trial of this matter, the parties made lengthy attempts to settle it, but the attempts failed, and the trial resumed. The main issue in the trial is the interpretation of the word “channel” in the phrase “\$100 per channel” as appears in the schedule to the Telecommunications (Licensing, Classification, and Fee Structure)

Regulations 2002, No. 110 of 2002 (the Regulations). The relevant part of the schedule is as follows:

**FEE STRUCTURE
FREQUENCY AUTHORIZATION**

	Application Fees	Licence Fees		
		First Year		Annually
	(A)	(B) One grant of licence	(C) Attend of first year	(D)
Mobile Cellular	\$1,000	\$5,000 less fee in column (A)	\$1,000 per channel less fee in column (B)	\$1,000 per channel
Paging	\$1,000	\$2,500 less fee in column (A)	\$1,000 per channel less fee in column (B)	\$1,000 per channel
Point to Point Links HF VHF UHF SHF				\$100 per channel

2. I shall refer to the above as the Schedule. Under regulations 7(7) and 8(1) of the Regulations, an applicant for Frequency Authorization is required to pay a fee set out in the Schedule. Although regulations

7(7) and 8(1) require an applicant to pay a fee, no application fee is stated in the Schedule in relation to point to point links, (see bottom left) though the Schedule states application fees in relation to mobile cellular and paging. There is therefore no authorization in the Schedule for the Public Utilities Commission (PUC) to receive or collect any specific application fees for the granting of a licence, or specific fees at the end of the first year, with respect to point to point links. But there is a specific annual fee of \$100 per channel in relation to point to point links as appears in the Schedule. The question is this: What does the word “channel” that appears in the phrase “\$100 per channel,” in the Schedule, mean? The word, unfortunately, is not defined in the Schedule, nor in the Regulations which were made on 26th September, 2002 by the Public Utilities Commission, and signed by its chairman. Neither does a definition of the word “channel” appear in the principal Act, the Belize Telecommunications Act 2002, No. 16 of 2002. The failure to define the word “channel” has contributed to the dispute in this claim.

3. The facts in relation to the claim are as follows. The claimant, a telephone company incorporated in Belize, with about ninety thousand customers, applied to the defendant, a statutory body established by the Public Utilities Commission Act, Chapter 223, for Frequency Authorization for the purpose of carrying on its business, as required by regulation 7(1) of the Regulations. By letter dated 2nd August, 2010 the defendant approved the application, and stated that the fee for the Frequency Authorization in accordance with the Regulations, was \$238,000, calculated on the basis of 238 channels at

\$1000 for each channel. The defendant considered that the claimant's application was for 238 channels. The claimant replied on 11th August, 2010, claiming that there was an error in the above calculation, as the claimant had applied for frequency authorization for thirteen (13) point to point radio links, and that the annual channel fee for each point to point radio link, according to the Schedule, was \$100 and not \$1000 per channel. Since the claimants applied for thirteen channels, the fee, according to the claimant should be \$1300, for which the claimant enclosed a cheque. The defendant admitted that the charge of \$1000 each for 238 channels was an error; but proceeded to charge an increased fee of \$792,000 by letter to the claimant dated 29th October, 2010. The letter from the defendant gave a breakdown showing how this amount was reached as follows:

No of Links	B/W per link (MHz)	channels/link	cost/channel	Total
11	14	466	BZ\$100	BZ\$512,600
3	28	933	BZ\$100	BZ\$279,900
14	238	7925		BZ\$792,500

4. I have had some difficulty understanding, from the above table, how the sum of \$792,500 was arrived at. It seems that the point to point links for 466 channels are eleven, and for 933 channels are 3 links. When the 466 are multiplied by 11, the total is 5126; and when 933 are multiplied by 3 the total is 2799. By adding 5126 and 2799 there is a total of 7925 channels. Since the Schedule states that it is \$100

per channel, the total, according to the defendant, is $7925 \times 100 = \$792,500$. In effect, the defendant found that the claimant applied for 14 point to point links, and this explains the multiples of 11 and 3 above, which amounted, according to the defendant, to 7925 voice channels which, the defendant submits, is what is meant by the word channel in the phrase ‘100 per channel’ in the Schedule. The claimant disagrees. Its submission is that the word channel in the phrase means radio frequency channel, and not voice channel, in which case its application was for 13 radio frequency channels at a \$100 each amounting to it \$1,300. The claimant complied and paid the amount of \$792,500; but brought this claim for declarations that the fees payable under the Schedule were \$100 per radio frequency channel; that the defendant unlawfully charged and received \$792,500; and an order for the refund of that amount.

5. In order to interpret the said word “channel” in the phrase “\$100 per channel” it is important to understand the difference between voice channel and radio frequency channel. Mr. Avery, the chairman of the PUC gave the difference in his affidavit which, except for paragraph 18 thereof, is not disputed by the claimant. Due to the technical nature of the difference which Mr. Avery seeks to simply explain, it is advisable that I should quote him in toto as stated in the affidavit as follows:

“5. A Radio Frequency Channel (RFC), or Channel, may best be described as a specified range or band of frequencies that is designated for the transporting or

transmitting of signals for a specific or designated purpose.

6. Fairly simple examples of a Radio Frequency Channel (RFC), or Channel, would be the channel designations for a television set designed to receive over-the-air broadcasts or the frequency designations for a simple radio.
7. Channel 7 in Belize transmits signals through the air that are received by the television set, which then converts those signals to images and sounds produced by the television set. The Radio Frequency Channel that is used to transmit the signals is the range or band from 174 MHz to 180 MHz.
8. To receive the signals, a person must set his television set to channel 7 on the channel selector. By so doing, the television set then picks up the signals within the range or band from 174 MHz to 180 MHz. A similar thing occurs if the person sets the channel selector to channel 5, except that the range or band of frequencies is from 76 MHz to 82 MHz.
9. KREM Radio in Belize transmits signals through the air that are received by a radio, which then converts those signals to sounds produced by the radio. The Radio Frequency Channel that is used to transmit the signals is the range or band from 96.4 MHz to 96.6 MHz. The mid-point of the range of frequencies is 96.5 MHz.
10. To receive the signals, a person must set his radio to 96.5 MHz on the frequency selector. By so doing, the radio then picks up the signals within the range or band from 96.4 MHz to 96.6 MHz. A similar thing occurs if the person sets the frequency selector to 88.9 MHz for LOVE FM, except that the range or

band of frequencies is from 88.8 MHz to 90.0 MHz.

11. In the examples above, each channel for television represents a Radio Frequency Channel and each frequency designation for radio also represents a Radio Frequency Channel. However, the Radio Frequency Channels, or Channels, for television cover a wider range or band of frequencies (6MHz) than for radio (0.2 MHz). This is necessary because television broadcasts are required to transport or transmit more signals in the same time as do radio broadcasts.
12. In the case of a telecommunications company providing cellular service, signals are similarly transported or transmitted over a range or band of frequencies.
13. Cellular sites, which include the antennas that transmit and receive signals to and from a cellular phone, must be capable of doing so with multiple phones at the same time. This is done by dividing the total range or band of frequencies within which the antennas operate into smaller increments, which are referred to as 'voice channels'. Each phone in use at a specific time is provided with two (2) voice channels {one (1) to receive and one (1) to transmit} within the total range or band of frequencies.
14. The telecommunications company must then transport or transmit the signals from each phone to its main switch for communication with another phone. This is done by use of point-to-point links, where bulk signals are sent from (1) antenna to another over a range or band of frequencies.
15. Similar to a cellular site, the range or band of frequencies is divided into smaller increments, which are referred to as 'voice channels'. Each phone in use at a specific

time is provided with two (2) voice channels {One (1) to receive and one (1) to transmit} within the total range or band of frequencies for a particular point-to-point link.

16. In both examples for the telecommunications company, the Radio Frequency Channels, or Channels, are broken down into smaller channels, or 'voice channels'.
17. It follows that the more phones that are expected to be in use at a specific point in time, the larger the range or band of frequencies (the Radio Frequency Channel) that will be required to transport or transmit the signals from each phone.
18. Therefore, a Radio Frequency Channel, or Channel, does not have a specific size. However, a 'voice channel' does according to the type of technology being used to transport or transmit signals. The Public Utilities Commission designates a size of 30 KHz for a 'voice channel'."

6. Since radio frequency channel is not fixed, but is variable in size, and may use up a large portion of spectrum, the makers of the schedule could not, according to the defendant, have intended a fixed fee for radio frequency channel which is unfixed and variable in size. Therefore the words "\$100 per channel" in the Schedule could not mean, according to the defendant, \$100 per radio frequency channel which is unfixed; but mean voice channel which is fixed. The drafters of the Schedule would not have intended to charge a fixed fee for radio frequency channel which size is not fixed and which size can vary substantially. Since a voice channel is fixed and has a specific

size of 30 KHz designated by the defendants, the words “\$100 per channel” in the Schedule mean \$100 per voice channel, according to the defendant.

7. Moreover, says the defendant, radio frequency spectrum is a scarce resource as recognized by section (2)(c) of the Belize Telecommunications Act 2002 which states that a licence is required to enable a person to “operate any system that uses scarce resources such as radio frequency spectrum;” and considering the scarcity of the resource and the competition, the drafters of the Regulations and the Schedule meant that an applicant should pay according to the amount of radio frequency spectrum it intends to use. In addition, since radio frequency spectrum is unfixed, unlimited, the drafters could not have intended by the Regulations and Schedule that an applicant, such as the claimant, should pay \$1,300 for the amount of spectrum applied for by the claimant. Moreover, says the defendant, the claimant’s interpretation of the word channel, considering that Radio frequency spectrum is unlimited, “could lead to hoarding of frequencies by a telecommunications provider in order to deny other providers the use of the scarce radio frequency spectrum that is necessary for them to also provide services to the public”: see Avery’s third affidavit.
8. The defendant further states that its letter dated 24th September, 2004 to the claimant shows the above interpretation of the word channel, in billing the claimant, which the claimant at that time did not challenge or dispute. The defendant states that it had used the same interpretation of the word channel, in billing Belize Telemedia

Limited in the amount of \$83,000 for 83 channels, a competitor of the claimant, as shown in a letter dated 13th October, 2011.

9. Mr. Ernesto Torres, the Chief Executive Officer of the claimant, and recognized by the defendant as experienced, and employed in the field of telecommunications longer than the Chairman of PUC, stated in the witness box that he did not agree with Mr. Avery in paragraph 18 of his affidavit above, that radio frequency channel did not have a specific size. To support his position, Mr. Torres, relies on a document stated to have been prepared by the International Telecommunication Union, in which Mr. Torres states the word channel is defined. He relies for that definition, on a document numbered page 9 that forms part of the ITU Radio Regulations Recommendations F 1399-1. The document is given in the appendix to this judgment. Mr. Torres in his evidence gives an explanation of the document, disagreeing with Mr. Avery that radio frequency channel is fixed, and therefore it can have a fixed fee. He explains the document in answer to a question by Mr. Marshalleck SC as follows:

“MR. MARSHALLECK: Q. Could you explain to us that page 9, I don’t want to limit you in any way so just explain what it means?”

A. Yes, it is trying to show in a very simple manner an example of how you get from the frequency band to the channel. That’s what it’s trying to do. So if you look at the top bar figure two it has frequency band, and it goes across Application A, B, A and B. Applications in this definition are referring to the different type of services, mobile

services, aeronautical services, cellular services, that's the applications. So the frequency band is a contiguous portion of the spectrum that's where it starts. Then that frequency band can be broken down into sub-bands and have a Sub-band A and a Sub-band B, or you can have Sub-band C as well but the example they are limited to two. So you can see that Sub-band A has now been assigned to application A, it could be mobile it could be aeronautical. Sub-band B is allocated or assigned to Application B which is another application. And the reason for that is to make sure that different services use the spectrum in an efficient way and to avoid interference between one another. From the sub-bands now you go to what is called a frequency block a further sub-division and the block now is the sub-band being broken down into blocks into contiguous portion of the spectrum but smaller obviously, and those blocks then are assigned to an operator or two and then - -
the block is further broken down into the RF channels.

THE COURT: That's the smaller blocks here.
WITNESS: That's the smaller blocks. If you look at it, Your Honour, it says - - you see the little lines drawn the block - -

THE COURT: I see that, yes.
WITNESS: It's broken down into RF channels.

THE COURT: Radio frequency channels.
WITNESS: Exactly.
THE COURT: Good. Go ahead.
WITNESS: And then the radio frequency channels are broken down even further and those slots are the voice channels.

THE COURT: Oh, I see. Good.
WITNESS: So it is a very simple illustrative diagram of how you

get from the spectrum to the voice channel. And the definitions are given if you notice at you have 4.3.2 gives you a radio frequency channel and then you have a transmission channel in 4.3.3 referring to the slots which are the voice channels in the most simplest of terms.”

10. So, according to Mr. Torres interpretation of the document, radio frequency channels do have specific sizes according to the ITU Radio Regulations Recommendations. With respect to Mr. Torres’ evidence on his interpretation of the ITU Regulations Recommendations, it has to be noted, not only that the ITU Regulations are recommendations, but also that Mr. Torres has not been called, and did not testify, as an expert in the field of telecommunications, though he may have the experience which may have entitled him to give his opinion as an expert on the document. Another consideration is that, though there may be no dispute that the document is an ITU production, the person or persons who prepared it and their skill, experience and training in the area of telecommunications are unknown. No person from the ITU was called to give evidence in this matter. In such a situation, I attach no weight to any alleged truthfulness of the statements in the document which was not tendered as an exhibit in the case, but was disclosed.

11. The claimant further submits that the said word “channel” in the phrase “100 per channel” in the Schedule is ambiguous, and since it is a revenue provision, it should be interpreted in favour of the subject – in this case, the claimant. In *R v. Winstanley 1 C & J 433* cited by the claimant in support of this submission, a trader obtained a mortgage for a property and later became bankrupt and the property was put up for sale by his assignees with the concurrence of the mortgagee. The question for the court was, upon the sale subject to the mortgage, whether the whole of the estate of the bankrupt was to be considered as the property of the bankrupt or whether it is a mixed sale of the property of the bankrupt and also of the mortgagee. The court, on its construction of ambiguous relevant legislation, decided that the whole of the estate was to be considered as being the estate of the bankrupt. It was, in the course of arriving at that decision, the court said that if there was any doubt about ambiguous words in legislation made by the Crown, “let not the individual suffer, but let the public,” and “if there is any ambiguity let the Crown suffer and not the subject”: see *Bayley B at p 1493*. In this case before me, the Regulations were neither made by the Crown nor the government nor the legislature. It was made by the defendant, a statutory corporation. It is not tax legislation made by the Crown or the legislature. I think these matters distinguish *Whitstanley* from the case before me, which lays down that where the Crown is a party to litigation involving ambiguous tax legislation “Let not the individual suffer, but let the public.”

12. The other case relied on by the claimant is *Inland Revenue Commissioners v. Ross and Coneter and C Bladnoch Distillery Co. (Ltd.) 1948 1 AER 616*. This case involved claims by the Crown or government against the defendant distillery companies for excess profits tax in respect of transactions in stocks of whisky under section 24 of the Finance Act 1943 UK. The question was whether shareholders of the companies were liable for payment of the excess profits tax under the said section 24 (1)(b) of the Act. The court said that the answer to the question would depend on a proper interpretation of the section. It was against this background that the court made the pronouncement, relied on by learned counsel for the claimant, to the effect that if a provision in a taxing statute was “reasonably capable of two alternative meanings, the court will prefer a meaning more favourable to the subject.” Since the word channel, in the Schedule is ambiguous, it should, according to the claimant, be interpreted in its favour. But their Lordships made the pronouncement above in relation to a tax legislation, in litigation between the Crown and the subject. In this case before me, those matters do not exist.

13. The claimant further submitted that the word “channel” should be given its ordinary meaning as contained in the Oxford English Dictionary. According to the dictionary, channel means “a band of frequencies used in radio and television transmission.” Based on this definition, the word channel in the Schedule, according to the claimant, means radio frequency channel; and therefore the proper fee for 13 such channels is \$1300. But this definition does not assist the

claimant because, as we saw above, radio frequencies are wider in scope and include voice frequencies or channels, upon which the defendant relies to justify the amount of fees it has charged.

14. Where a provision in a statute or subsidiary legislation is ambiguous or reasonably capable of one or more meanings, the common law for centuries has laid down that the court should strive to ascertain the intention of the legislature or the body that made the provision. The intention may be determined by considering the legislative provision as a whole and trying to extract from the provision, the intention and reasons for making the provision. The makers of legislation, whether statute or subsidiary legislation, are to be taken to have an intention in every piece of legislation they make. The duty of the court, that is tasked to interpret the legislation where there is ambiguity, is to find out and declare that intention. In *AG for Canada v. Hallett L Carey Limited 1952 AC 427* Lord Radcliffe held that:

“There are many so called rules of construction that courts of law have resorted to in their interpretation of Statutes but the paramount rule remains that every statute is to be expounded according to its manifest and expressed intention”:
see p 449

15. This case before me, as far as I am aware, is unique, in the sense that in this case the defendant is the maker of the Regulations and the Schedule; and its chairman, in his evidence considered above, has testified as to the meaning of the word channel as used in the words

“\$100 per channel” as appear in the Schedule. According to his evidence above, the word channel therein means voice channel, not radio frequency channel. As I understand the submission of the defendant it would be unreasonable, inconceivable and perhaps discriminatory for the claimant to pay \$1300 per annum for radio frequency channel, the size of which is unlimited; and therefore it could not be the intention to charge a fixed fee for something unlimited or variable in size, such as a radio frequency channel: that could not be the intention of the makers of the Regulations including the schedule. The burden is on the claimant to prove, on a balance of probabilities, the claim in this matter and that the word channel as used in the phrase “\$100 per channel” in the Schedule means radio frequency channel. Considering my decision on the ITU document, and the issues raised above, I am not satisfied, on the evidence, that the claimant has satisfied this burden.

16. The claimant has, perhaps with some justification, complained of the high amount of fees it was requested to pay, and paid. The claimant says that “a definition of the term “channel” will be required to provide clarity to this issue.” I agree that the Regulations, after consultation with relevant parties, ought to be amended to define the word channel as used in the Schedule for the benefit of the industry as a whole.
17. It is true that costs follow the event; but the court has a discretion. In the exercise of that discretion, the court is entitled to consider the conduct of the parties. In this matter, each party to bear its own costs.

For all of the above reasons, I have no alternative but to dismiss the claim. I therefore make the following orders:

- (1) The claims in the claim form in this matter are dismissed.
- (2) Each party to bear its own costs.

Oswell Legall
JUDGE OF THE SUPREME COURT
26th November, 2012

APPENDIX
Document Clause 9

P.T.O.

