

CANADA / JUDGMENT

Canada (Attorney General) v. Thouin

2017 SCC 46

COURT

Supreme Court of Canada

DECIDED

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Canada (Attorney General) v. Thouin

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Report

[2017] 2 SCR 184

Case number

36869

Judges

McLachlin, Beverley; Abella, Rosalie Silberman; Moldaver, Michael J.; Wagner, Richard; Gascon, Clément; Brown, Russell; Rowe, Malcolm

On appeal from

Quebec

Notes

SCC Case Information: 36869

Decision Content

SUPREME COURT OF CANADA

Citation: Canada (Attorney General) v. Thouin, 2017 SCC 46, [2017] 2 S.C.R. 184

Appeal Heard: May 24, 2017

Judgment Rendered: September 28, 2017

Docket: 36869

Between:

Attorney General of Canada

Appellant

and

Daniel Thouin and Automobile Protection Association

Respondents

And Between:

Ultramar Ltd., Olco Petroleum Group ULC, Irving Oil Limited, Alimentation Couche-Tard inc., Dépan-Escompte Couche-Tard inc., Couche-Tard inc., Global Fuels Inc., Global Fuels (Québec) Inc., Philippe Gosselin & Associés ltée, Céline Bonin and Claude Bédard

Appellants

and

Daniel Thouin and Automobile Protection Association

Respondents

- and -

Attorney General of Quebec

Intervener

Official English Translation

Coram: McLachlin C.J. and Abella, Moldaver, Wagner, Gascon, Brown and Rowe JJ.

Joint Reasons for Judgment:

(paras. 1 to 44)

Gascon and Brown JJ. (McLachlin C.J. and Abella, Moldaver, Wagner and Rowe JJ. concurring)

Canada (Attorney General) v. Thouin, 2017 SCC 46, [2017] 2 S.C.R. 184

Attorney General of Canada Appellant

v.

Daniel Thouin and

Automobile Protection Association Respondents

- and -

Ultramar Ltd., Olco Petroleum Group ULC,

Irving Oil Limited, Alimentation Couche-Tard inc.,

Dépan-Escompte Couche-Tard inc., Couche-Tard inc.,

Global Fuels Inc., Global Fuels (Québec) Inc.,

Philippe Gosselin & Associés ltée,

Céline Bonin and Claude Bédard Appellants

v.

Daniel Thouin and

Automobile Protection Association Respondents

and

Attorney General of Quebec Intervener

Indexed as: Canada (Attorney General) v. Thouin

2017 SCC 46

File No.: 36869.

2017: May 24; 2017: September 28.

Present: McLachlin C.J. and Abella, Moldaver, Wagner, Gascon, Brown and Rowe JJ.

on appeal from the court of appeal for quebec

Civil procedure — Evidence — Immunity — Class action against oil companies and retailers who had been subjects of investigation by Competition Bureau — Motion for permission to examine chief investigator from Competition Bureau and for order requiring Attorney General of Canada to disclose evidence obtained in investigation — Objection based on Crown immunity — Whether chief investigator may be required to submit to discovery under Quebec rules of civil procedure in proceedings in which neither Crown nor chief investigator is party — Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 27 — Interpretation Act, R.S.C. 1985, c. I-21, s. 17 .

Crown law — Prerogatives — Immunity — Civil procedure — Obligation to provide discovery — Whether Parliament has lifted common law Crown immunity from discovery and, if so, to what extent — Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 27 — Interpretation Act, R.S.C. 1985, c. I-21, s. 17 .

The respondents instituted a class action against the appellant oil companies and retailers further to allegations of a conspiracy to fix gasoline retail prices in certain regions of Quebec, which allegations had already been investigated by the Competition Bureau of Canada. In their class action, the respondents sought permission to examine the Competition Bureau's chief investigator and an order requiring the Attorney General of Canada, as the Competition Bureau's legal representative, to disclose to them all intercepted communications and all documents in the investigation file. The appellants countered by raising the common law immunity from discovery on the ground that neither the Crown nor the chief investigator was a party in the class action.

The Superior Court granted the respondents' motion, granting permission to summon the chief investigator to be examined on discovery solely for the purpose of obtaining information about any knowledge he had specific to the territory covered by the class action. It also ordered the disclosure of any recordings and documents relevant to the proceedings in this case. The Court of Appeal dismissed the appeal, concluding that Crown immunity could not be relied on in this case because of s. 27 of the Crown Liability and Proceedings Act ("CLPA"), which provides that "the rules of practice and procedure of the court in which proceedings are taken apply in those proceedings". The Court of Appeal held that s. 27 establishes a general rule that applies in any proceedings by, against or involving the Crown.

Held: The appeal should be allowed.

Crown immunity, which originated in the common law, can be overridden only with clear and unequivocal legislative language. Both Parliament and the provincial legislatures have gradually placed limits on this immunity in order to draw the legal position of the Crown and its servants closer to that of other Canadian litigants in, among other areas, that of civil liability. It is up to the courts to give meaning to legislative provisions that narrow the limits of the immunity and to determine its scope, where necessary.

Section 17 of the Interpretation Act serves as a starting point in each case in which the Crown might have immunity by confirming that unless the immunity is clearly lifted, the Crown continues to have it. It must therefore be determined whether, in the instant case, Parliament has lifted the common law Crown immunity from discovery and, if so, to what extent.

Section 27 of the CLPA provides that the Crown is subject to the "rules of practice and procedure of the court" where proceedings in which it is a party are taken. The effect of this section is that the Crown's immunity is lifted in such cases and that the rules of civil procedure, including those on discovery, apply to the Crown. Parliament made a clear choice when it introduced s. 27 into the CLPA, thereby imposing the application of such rules on the Crown in proceedings in which it is a party. However, s. 27 does not indicate a clear and unequivocal intention on Parliament's part to lift the Crown's immunity by requiring the Crown to submit to discovery in proceedings in which it is not a party.

When s. 27 is considered in light of its words and of all the sections of the CLPA, together with its legislative history, it is clear that it applies only to proceedings in which the Crown is a party. The words "in which proceedings are taken" and "those proceedings" in s. 27 necessarily refer to the

provisions of the same subpart of the CLPA that concern “proceedings against the Crown”. That Act has evolved such that the obligation to submit to discovery in proceedings in which one is a party now applies to the Crown, but it does no more than that. In the absence of a clear and unequivocal expression of legislative intent, it is not open to the courts to depart from a recognized common law rule in this regard. Given that neither the Crown nor the chief investigator is a party in the proceedings in this case, the chief investigator may refuse, on the basis of the Crown’s immunity from discovery, to submit to the examination on discovery in question.

Cases Cited

Overruled: *Temelini v. Ontario Provincial Police (Commissioner)* (1999), 44 O.R. (3d) 609; considered: *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287; referred to: *Canada Deposit Insurance Corp. v. Code* (1988), 49 D.L.R. (4th) 57; *Lizotte v. Aviva Insurance Co. of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.

Statutes and Regulations Cited

Code of Civil Procedure, CQLR, c. C-25, arts. 398 para. 1(3), 402.

Crown Liability Act, R.S.C. 1970, c. C-38, s. 14.

Crown Liability Act, S.C. 1952-53, c. 30.

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, Part II, ss. 23, 24, 25, 26, 27, 34.

Crown Liability and Proceedings (Provincial Court) Regulations, SOR/91-604, ss. 7, 8.

Crown Proceedings Act, 1947 (U.K.), 10 & 11 Geo. 6, c. 44.

Federal Courts Act, R.S.C. 1985, c. F-7.

Interpretation Act, R.S.C. 1970, c. I-23, s. 16.

Interpretation Act, R.S.C. 1985, c. I-21, s. 17.

Authors Cited

Brun, Henri, Guy Tremblay et Eugénie Brouillet. *Droit constitutionnel*, 6e éd. Cowansville, Que.: Yvon Blais, 2014.

Canada. House of Commons. *House of Commons Debates*, vol. IV, 2nd Sess., 34th Parl., November 1st, 1989, p. 5414.

Côté, Pierre-André, in collaboration with Stéphane Beaulac and Mathieu Devinat. *The Interpretation of Legislation in Canada*, 4th ed. Toronto: Carswell, 2011.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Hogg, Peter W., Patrick J. Monahan and Wade K. Wright. *Liability of the Crown*, 4th ed. Toronto: Carswell, 2011.

Horsman, Karen, and Gareth Morley, eds. *Government Liability: Law and Practice*. Aurora, Ont.: Cartwright Law Group, 2007 (loose-leaf updated May 2017, release 25).

Pépin, Gilles, et Yves Ouellette. *Principes de contentieux administratif*, 2e éd. Cowansville, Que.: Yvon Blais, 1982.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

APPEAL from a judgment of the Quebec Court of Appeal (Émond, Mainville and Parent JJ.A.), 2015 QCCA 2159, [2015] AZ-51241727, [2015] Q.J. No. 14822 (QL), 2015 CarswellQue 13777 (WL Can.), affirming a decision of Godbout J., 2015 QCCS 1432, [2015] AZ-51166343, [2015] J.Q. no 2923 (QL), 2015 CarswellQue 3026 (WL Can.). Appeal allowed.

Bernard Letarte and Pierre Salois, for the appellant the Attorney General of Canada.

Louis P. Bélanger, Sidney Elbaz, Sylvain Lussier, Frédéric Plamondon, Louis-Martin O'Neill, Pierre-Luc Cloutier, Sébastien C. Caron, Michel C. Chabot and Guillaume Lavoie, for the appellants Ultramar Ltd., the Olco Petroleum Group ULC, Irving Oil Limited, Alimentation Couche-Tard inc., Dépan-Escompte Couche-Tard inc., Couche-Tard inc., Global Fuels Inc., Global Fuels (Québec) Inc., Philippe Gosselin & Associés ltée and Claude Bédard.

Written submissions only by Louis Belleau and Luc Jobin, for the appellant Céline Bonin.

Guy Paquette, Claudia Lalancette, Pierre LaTraverse and Jasmine Jolin, for the respondents.

Stéphane Rochette, for the intervener.

English version of the judgment of the Court delivered by

Gascon and Brown JJ. —

I. Introduction

- [1] Crown immunity is deeply entrenched in our law. The Court has held that to override this immunity, which originated in the common law, requires clear and unequivocal legislative language. Over the years, both Parliament and the provincial legislatures have gradually placed limits on this immunity in order to draw the legal position of the Crown and its servants closer to that of other Canadian litigants. This is true in, among other areas, that of civil liability. Ultimately, it is up to the courts to give meaning to legislative provisions that narrow the limits of the immunity and to determine its scope, where necessary.

- [2] The issue in this appeal is whether, under the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 (“CLPA”), the obligation to submit to discovery in proceedings in which one is not a party applies to the federal Crown (“Crown”). More specifically, we must determine whether a chief investigator from the federal government’s Competition Bureau (“chief investigator”) may be required to submit to discovery under the rules of civil procedure that apply in Quebec in proceedings in which neither the Crown nor the chief investigator is a party. If so, we must then determine whether, in ordering the examination on discovery of the chief investigator, the Superior Court and the Court of Appeal erred with respect to the principles governing civil procedure in Quebec, including that of proportionality.
- [3] For the reasons that follow, we are of the view that the courts below erred in their interpretation of the CLPA. Provincial rules on discovery do not apply to the Crown in proceedings in which it is not a party. The chief investigator may therefore refuse, on the basis of the Crown’s immunity from discovery, to submit to the examination on discovery at issue in this case.

II. Facts

- [4] The respondent Daniel Thouin is the designated member in a class action instituted by the respondent Automobile Protection Association (“respondents”) against the appellant oil companies and retailers. The group on whose behalf he is acting consists of various people who claim to have purchased gasoline in 14 cities or regions of Quebec and who were allegedly the victims of a conspiracy by those oil companies and retailers to fix gasoline prices. The case proceeded in parallel with a similar class action concerning other cities or regions, that of Simon Jacques, Marcel Lafontaine and the Automobile Protection Association.
- [5] The representatives in the two actions applied for permission to examine the chief investigator and for an order requiring the Attorney General of Canada (“AGC”), as the Competition Bureau’s legal representative, to disclose to them all intercepted communications and all documents in the Bureau’s file from its “Octane” investigation. That investigation had been launched in response to allegations that certain oil companies and retailers, including the appellants, had conspired to fix gasoline prices. During the 10 years of the “Octane” investigation, which began in 2004, the Bureau recorded more than 220,000 private communications.

III. Decisions of the Courts Below

A. Judgment of the Superior Court — 2015 QCCS 1432

- [6] Godbout J., who heard the motion, granted permission to summon the chief investigator to be examined on discovery solely for the purpose of obtaining information about any knowledge he had specific to the territory covered by the class action, and also ordered the disclosure of any recordings and documents relevant to the proceedings in this case.

- [7] The AGC argued that the Crown had immunity under the CLPA given that it was not a party in the proceedings, but Godbout J. nonetheless granted permission to summon the chief investigator. He drew a parallel between the motion before him in Mr. Thouin's case and the one that had been at issue in this Court in *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287. In his view, this Court had confirmed in *Jacques* that a judge could order the Crown to disclose all communications intercepted during the "Octane" investigation to the plaintiffs under art. 402 of the Code of Civil Procedure, CQLR, c. C-25 ("C.C.P."), which was then in force. He found that, like art. 402 of the C.C.P., the provision at issue in *Jacques*, art. 398 para. 1(3) C.C.P., which concerns examination on discovery, excludes the immunity, because both articles are in the same chapter of the C.C.P., entitled "Special Proceedings Relating to Production of Evidence" (paras. 19-20 (CanLII)).

B. Judgment of the Court of Appeal — 2015 QCCA 2159

- [8] The Court of Appeal, per Émond J.A., was instead of the view that this Court had not ruled on Crown immunity under the CLPA in *Jacques*, which meant that this question remained unresolved. The Court of Appeal therefore undertook its own interpretation of the CLPA in order to determine whether that Act expressly lifts the Crown's immunity under s. 17 of the Interpretation Act, R.S.C. 1985, c. I-21, thereby making it possible to apply the C.C.P.'s rules on examination on discovery to the Crown even in proceedings in which it is not a party.
- [9] The Court of Appeal rejected the interpretation proposed by the AGC to the effect that all the provisions of Part II of the CLPA, including s. 27, which provides that "the rules of practice and procedure of the court in which proceedings are taken apply in those proceedings", apply only to proceedings against the Crown. Relying in part on the rule of consistent expression (*expressio unius est exclusio alterius*), it found that the absence of clear language expressly limiting the application of s. 27 to proceedings against the Crown supported the absence of Crown immunity and the possibility of requiring the Crown to submit to discovery in this case. In the court's opinion, s. 27 establishes a general rule that applies in any proceedings by, against or involving the Crown. If Parliament had intended the rule in s. 27 to apply only to proceedings by or against the Crown, it would have said so, as it did elsewhere in the CLPA.
- [10] The Court of Appeal concluded that s. 27 of the CLPA therefore lifts the Crown's immunity and that the chief investigator could be examined on discovery under the C.C.P. even though the Crown was not a party in the proceedings. The court was also of the view that the motion judge had properly considered the question of proportionality of the examination on discovery. In light of the great deference owed to case management decisions, it found that appellate intervention was not warranted.

IV. Issues

[11] The AGC and the other appellants — oil companies and retailers — argue that the Court of Appeal erred in holding that Quebec rules of civil procedure apply to the Crown by virtue of s. 27 of the CLPA and that the chief investigator can as a result be examined on discovery even though the Crown is not a party in the proceedings. The central question in this appeal is whether Parliament has clearly and unequivocally lifted Crown immunity in such a case. In the event that we answer this question in the affirmative, the appellants further argue that the examination was permitted improperly and in violation of the principles of the C.C.P. on the disclosure of evidence, including that of proportionality.

V. Relevant Legislative Provisions

[12] Crown immunity is recognized in s. 17 of the Interpretation Act , which reads as follows:

17 No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

[13] The respondents counter with s. 27 of the CLPA , the effect of which, they argue, is that the rules of practice and procedure of, in this case, the Quebec courts can apply to the Crown even in proceedings in which it is not a party. The Court of Appeal adopted this same interpretation. Section 27 of the CLPA reads as follows:

27 Except as otherwise provided by this Act or the regulations, the rules of practice and procedure of the court in which proceedings are taken apply in those proceedings.

[14] Section 34 of the CLPA is also relevant to this appeal. It authorizes the Governor in Council to make regulations concerning the procedure that applies in proceedings involving the Crown:

34 The Governor in Council may make regulations

- (a) prescribing rules of practice and procedure in respect of proceedings by, against or involving the Crown, including tariffs of fees and costs;
- (b) prescribing forms for the purposes of proceedings referred to in paragraph (a);
- (c) respecting the issue of certificates of judgments against the Crown;
- (d) making applicable to any proceedings by, against or involving the Crown all or any of the rules of evidence applicable in similar proceedings between subject and subject; and
- (e) generally respecting proceedings by, against or involving the Crown.

[15] The parties in this appeal also cite s. 7 of the Crown Liability and Proceedings (Provincial Court) Regulations, SOR/91-604 ("Regulations"):

7 Subject to sections 37 to 39 of the Canada Evidence Act, where, under the provincial rules, there is [a] provision under which, if an action were an action between a corporation (other than an agency of the Crown) and another person, an officer or servant of the corporation could be examined for discovery, such officer or servant of the Crown or an agency of the Crown, as the case may be, as may be designated for the purpose by the Deputy Attorney General or after such designation by order of the court, may be examined for discovery during an action subject to the same conditions and with the same effect as would apply to the examination for discovery of the officer or servant of a corporation.

VI. Analysis

A. Crown Immunity

- [16] Crown immunity has evolved over time in English and Canadian legislation and case law. At common law, the Crown could in times past be sued in contract or on a proprietary claim (K. Horsman and G. Morley, eds., *Government Liability: Law and Practice* (loose-leaf), at p. 1-40). However, it had “a number of prerogatives that rendered civil litigation against it very difficult” (ibid.). This was because the Crown was exempt from several obligations that applied to ordinary litigants, including the obligation to provide documentary or oral discovery (ibid.).
- [17] Thus, because of its immunity, the Crown was historically exempt from the obligation to submit to discovery in proceedings in which it was a party. This was the case even though it could require the opposing party to be examined for discovery, and even where it was acting as plaintiff (Morley, at p. 1-40; see also P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 90). This particular immunity was recognized in Canadian court decisions that predated the statutory provisions on Crown liability. The Alberta Court of Appeal explained the immunity as follows in *Canada Deposit Insurance Corp. v. Code* (1988), 49 D.L.R. (4th) 57:

In my view, the rule that the Crown and its agents are not subject to discovery does not arise from the assertion of a Crown prerogative but from an accident of history. Nevertheless, I am bound by precedent to require statutory authority, strictly construed, authorizing discovery of a Crown agent or officer. [p. 61]

- [18] If this immunity meant that the Crown was not then required to submit to discovery in proceedings in which it was a party, it stands to reason that, at common law, the Crown was certainly not required to do so in proceedings in which it was not a party.
- [19] That being said, there is a presumption that the common law remains unchanged absent a clear and unequivocal expression of legislative intent. In *Lizotte v. Aviva Insurance Co. of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521, this Court summarized the case law on this point and noted “that it must be presumed that a legislature does not intend to change existing common law rules in the absence of a clear provision to that effect” (para. 56; see also *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42,

[2003] 2 S.C.R. 157, at para. 39; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1077; and R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 504-5).

- [20] In this regard, s. 17 of the Interpretation Act now serves as a starting point in each case in which the Crown might have immunity. It reads as follows: “No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty’s rights or prerogatives in any manner, except as mentioned or referred to in the enactment.” In short, unless the immunity is clearly lifted, the Crown continues to have it. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, the Court recognized that s. 17 is indeed the starting point for the analysis regarding immunity and that, as a result, where there are no express words in an Act to the effect that the Act applies to the Crown, “it . . . remains to be decided whether the Crown is bound by necessary implication” (p. 50).
- [21] In the past, language similar to the words “except as mentioned or referred to” in s. 17 had been used in s. 16 of the Interpretation Act, R.S.C. 1970, c. I-23, which provided that no enactment could bind the Crown, “except only as therein mentioned or referred to”. In *Oldman River and in Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, the Court interpreted this wording and concluded that a legislature must use express language to lift Crown immunity unless it can be inferred that the purpose of the Act would be wholly frustrated if the Crown were not bound (see also H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at para. IX.90).
- [22] With these principles in mind, it must therefore be determined whether, in the instant case, Parliament has lifted the common law Crown immunity from discovery and, if so, to what extent.

B. Limits on the Crown’s Immunity From Discovery

- [23] In about 1950, Parliament, drawing on the Crown Proceedings Act, 1947 (U.K.), 10 & 11 Geo. 6, c. 44, that had been enacted in the United Kingdom, began to impose limits on the scope of the common law Crown immunity. In 1953, it passed the Crown Liability Act, S.C. 1952-53, c. 30 (Morley, at p. 1-41; Hogg, Monahan and Wright, at p. 9), which had the effect of expanding Crown liability and thus bringing the Crown’s legal position closer to that of ordinary litigants. That Crown Liability Act was the predecessor of the CLPA that is at issue in this appeal. Today, Crown immunity still exists at the federal level in the context of civil proceedings, but only within the limits set in the CLPA and the Federal Courts Act, R.S.C. 1985, c. F-7, the scope of which Parliament remains free to change (Brun, Tremblay and Brouillet, at paras. IX.72 and IX.73). It follows that the Crown is not in exactly the same legal position as ordinary litigants, since it still retains certain residual privileges and immunities under the current legislation.

- [24] From this perspective, it should be noted that s. 27 of the CLPA now provides that the Crown is subject to the “rules of practice and procedure of the court” where proceedings in which it is a party are taken. The effect of this section is that the Crown’s immunity is lifted in such cases and that the rules of civil procedure, including those on discovery, apply to the Crown. Parliament made a clear choice when it introduced s. 27 into the CLPA , thereby imposing the application of such rules on the Crown in proceedings in which it is a party.
- [25] The respondents argue that s. 27 of the CLPA lifts Crown immunity in the case of provincial rules of procedure even in proceedings in which the Crown is not a party. Like the AGC and the other appellants, we disagree with the respondents’ assertions. Section 27 of the CLPA does not indicate a clear and unequivocal intention on Parliament’s part to lift the Crown’s immunity by requiring the Crown to submit to discovery in proceedings in which it is not a party. Our reasoning is based on the recognized principles of statutory interpretation.

C. Interpretation of the CLPA

- [26] The Court observed in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, that “there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; see also Sullivan, at p. 14). In the case at bar, this modern approach to interpretation favours the appellants’ position.
- (1) Wording of Section 27 of the CLPA
- [27] The language used in s. 27 of the CLPA is clear as regards the possibility of requiring the Crown to submit to discovery in proceedings in which it is a party. However, that language is far from unequivocal as regards the same possibility in proceedings in which the Crown is not a party. Indeed, the respondents conceded this point at the hearing in this Court (transcript, at p. 125). Only clear language to the effect that the rules of procedure of the court where proceedings in which the Crown is a third party are taken apply to the Crown could have justified an order that the chief investigator submit to discovery in this case. Section 27 simply provides that “the rules of practice and procedure of the court in which proceedings are taken apply in those proceedings”. At first blush, this section does not apply where the Crown is not a party. Its words do not show a clear and explicit intention to bind the Crown in all proceedings in which it is involved. This is particularly clear when the words of the section are interpreted in the context of the CLPA as a whole.
- (2) Context and Structure of the CLPA and the Regulations
- [28] When s. 27 is considered in light of all the sections of the CLPA , it is clear that it applies only to proceedings in which the Crown is a party. The part of the Act in which the section is found and the structure of the CLPA as a whole support this conclusion, and this is true in both official languages.

- [29] Section 27 is in Part II of the Act, which is entitled “Proceedings” (“Contentieux administratif” in French), and more specifically in a subpart entitled “Procedure”. Part II, which governs proceedings in administrative litigation, sets out the rules that apply at each stage, addressing in turn the topics of jurisdiction, procedure, costs, execution of judgment, interest, tenders, and prescription and limitation. As is explained in the academic literature, the French expression “contentieux administratif” relates to proceedings in which the Crown is a party (G. Pépin and Y. Ouellette, *Principes de contentieux administratif* (2nd ed. 1982), at p. 1).
- [30] The purpose of the subpart entitled “Procedure” is equally clear: to establish rules with respect not only to the initiation of proceedings against the Crown (s. 23), but also to defences (s. 24) and to the applicable procedure in such proceedings (ss. 25 and 26). Section 27 completes the circle for proceedings against the Crown by identifying the rules of practice and procedure that will apply to them. Sections 23 to 27, which make up this subpart, thus set out the rules relating to proceedings in which the Crown is a party. Section 27, which is the last section in this subpart, simply specifies what rules apply in such proceedings. It is clear from the subpart’s other provisions that s. 27 can apply only if the Crown is a party. A failure to consider s. 27 in light of these other provisions, which concern “proceedings against the Crown” (“poursuites visant l’État”), would result in a distorted picture of that section.
- [31] In our view, the words “in which proceedings are taken” and “those proceedings” in the English version of s. 27 necessarily refer to the provisions of the same subpart that concern “proceedings against the Crown” (ss. 23, 24, 25 and 26). This is also clearly the case in the French version of the CLPA, in which the words “les instances” must necessarily refer to “poursuites exercées contre lui” (ss. 24 and 25) and “procès instruits contre l’État” (s. 26).
- [32] Finally, s. 34, which is in the subpart entitled “Regulations”, simply creates a mechanism by which Crown immunity may be lifted. This section does not in itself provide a basis for arguing that s. 27 applies in proceedings in which the Crown is not a party. The immunity must still have been expressly lifted. The words “by, against or involving” used in s. 34 could have been used in s. 27 to lift the immunity in proceedings by, against or “involving” the Crown, but they were not.
- [33] Moreover, despite the making of the Regulations, which the parties cite and the relevant provision of which is reproduced above, we agree with the appellants that s. 7 of these regulations can apply only in proceedings in which the Crown is a party. This section merely equates the Crown with a corporation and applies “where, under the provincial rules, there is [a] provision under which, if an action were an action between a corporation (other than an agency of the Crown) and another person, an officer or servant of the corporation could be examined for discovery”. On its face, this section is not a rule of practice in respect of proceedings involving the Crown other than as a party. It does not lead to a different conclusion than the one that results from the application of the principles of interpretation to s. 27 of the CLPA.

(3) Legislative History

[34] The legislative and parliamentary history also supports the position of the AGC and the other appellants in this appeal. The legislative history of the CLPA is important in this case because the question before the Court relates to Crown immunity, and Crown immunity may not be lifted without clear statutory language. The parliamentary history is also important for the purpose of clarifying what Parliament intended when it amended the provision at issue in this case (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at pp. 462-68, and *Rizzo & Rizzo Shoes Ltd. (Re)*, at para. 35).

[35] The legislative history reveals that s. 14 of the Crown Liability Act, R.S.C. 1970, c. C-38, is the predecessor of the current s. 27 of the CLPA. In this regard, certain passages drawn from the parliamentary history that led to the revision of the CLPA are very helpful. These include the following:

[translation] Parliament used the reform to specify which rules of procedure would apply to proceedings involving the Crown in the provincial courts in question. In this regard, Minister of Justice Doug Lewis stated the following in the House of Commons:

...

Sixth, consequent upon the increased role of provincial courts in the area of Crown proceedings, it is necessary that there be legislation dealing generally with practice and procedure when the Crown is a party to litigation. [Emphasis in original.]

(See A.F., at para. 50, quoting House of Commons Debates, vol. IV, 2nd Sess., 34th Parl., November 1, 1989, at p. 5415.)

[36] These words confirm the intention that emerges from the CLPA. That Act has evolved such that the obligation to submit to discovery in proceedings in which one is a party now applies to the Crown, but it does no more than that.

[37] Thus, both the fact that Parliament has not imposed a clear obligation to submit to discovery in proceedings in which the Crown is not a party and the legislative and parliamentary history of s. 27 of the CLPA favour the recognition of a residual immunity in such cases.

[38] It should be noted that this view is shared by Hogg, Monahan and Wright. In their opinion, the Crown's immunity from discovery continues to exist in proceedings in which the Crown is not a party:

In Canada, the United Kingdom Act became the basis for the Uniform Model Act of 1950, which in turn became the basis for provincial Crown proceedings statutes. Each province has now subjected the Crown to discovery. So has the federal Parliament.

...

These statutory provisions have not completely abolished the Crown's immunity from discovery. . . . In the United Kingdom, New Zealand, most Australian jurisdictions, the Canadian federal jurisdiction and British Columbia, the Crown is subject to discovery whenever it is a "party". Even in these jurisdictions, the Crown would be immune from discovery if it was not a party. [Footnotes omitted; pp. 91-92.]

(4) Case Law of Appellate Courts

[39] We note that in the instant case, the Court of Appeal cited *Temelini v. Ontario Provincial Police (Commissioner)* (1999), 44 O.R. (3d) 609, in support of its conclusion that s. 27 of the CLPA lifts the Crown's immunity and that the rule it establishes applies to any proceeding that might involve the Crown, whether as a party or otherwise (C.A. reasons, at paras. 56-57 (CanLII)). After considering other cases in which the Ontario Court of Appeal's decision in *Temelini* had been cited, it applied that court's reasoning to the case at bar. With all due respect, we are of the opinion that the Ontario Court of Appeal's interpretation in *Temelini* is wrong. Regardless of the modern trend toward limiting Crown immunity (C.A. reasons, at para. 54), the interpretation of the CLPA does not lead to the conclusion that Parliament lifted the Crown's immunity in proceedings in which the Crown is not a party. The decisions in the case at bar and in *Temelini* were based on the presumption of consistent expression (C.A. reasons, at paras. 53 and 56). Given our interpretation of the CLPA, the presumption of consistent expression cannot on its own suggest that Parliament has changed the common law; a clear expression of its intention to do so is required.

[40] We conclude that the common law immunity from discovery continues to apply to the Crown in proceedings in which it is not a party.

D. The Question Raised by This Case Was Not Decided in *Jacques*

[41] In closing, we wish to be clear that the Court of Appeal was right to conclude that this Court had not, in *Jacques*, decided the question with respect to Crown immunity under the CLPA that is raised by the instant case (C.A. reasons, at para. 17). The issue in *Jacques* was instead whether a party in a civil proceeding can request the disclosure of recordings of private communications intercepted by the state in the course of a criminal investigation. To resolve it, the Court considered ss. 29 and 36 of the Competition Act, R.S.C. 1985, c. C-34, and s. 193 of the Criminal Code, R.S.C. 1985, c. C-46, and held that they did not preclude the disclosure of the recordings. The Court did not address Crown immunity under the CLPA.

[42] Nonetheless, we note that *Jacques* confirmed that, in other areas of civil procedure, the immunity has been lifted even in proceedings in which the Crown is not a party. This is true, as the AGC concedes in the case at bar, for the disclosure of documents, as s. 8 of the Regulations requires the Crown to submit, as if it were an ordinary litigant, to an application for disclosure such as the ones provided for in art. 402 of the C.C.P.; it was such an application that was at issue in *Jacques*. As the AGC also concedes in this Court, the immunity has also been lifted where the Crown is summoned to testify at trial; this has been

recognized both judicially (Canada Deposit Insurance Corp.) and in the academic literature (Hogg, Monahan and Wright, at p. 92). Of course, the application of provincial rules of civil procedure to the Crown remains subject in each of the situations in question to the limits imposed by, among other principles, the proportionality rule and the prohibition against fishing expeditions. However, given that the respondents' proceeding in this case concerns neither of those situations, there is no need to address this other aspect of the dispute between the parties.

VII. Conclusion

- [43] Section 27 of the CLPA does not clearly and unequivocally lift the Crown's common law immunity from discovery in proceedings in which the Crown is not a party. In the instant case, that immunity meant that the Crown could not be required to submit to discovery under the Quebec rules of civil procedure. In the absence of a clear and unequivocal expression of legislative intent, it is not open to the courts to depart from a recognized common law rule in this regard. The chief investigator could refuse, on the basis of the Crown's immunity from discovery, to submit to the examination on discovery at issue in this case.
- [44] We would therefore allow the appeal, set aside the decisions of the courts below and dismiss the respondents' motion for the examination on discovery of the chief investigator, with costs to the appellants throughout.

Appeal allowed with costs throughout.

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