Sullivan on the Construction of Statutes

Fifth Edition

by

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> ... once it is established that the office is in need of significant structural reform, a requirement of "grandfathering" incumbents serves only to delay that reform. ...
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> Moreover, public confidence in the administration of justice could be harmed by retaining those individuals who do not meet the qualifications for eligibility that an independent Judicial Council, with intimate knowledge of the duties of office, have determined to be the minimum necessary.[213]

These cases illustrate an important point. Whenever the application of new legislation is restricted to protect a vested right, the benefit sought by the legislature in enacting the new legislation is at least delayed and may be significantly curtailed. On the face of it, this is an undesirable consequence. Unless the unfairness of the interference is still more undesirable, this consequence may suffice to rebut the presumption.

REGULATIONS

It is presumed that the legislature does not intend to delegate a power to legislate retroactively, retrospectively or to interfere with vested rights. As Southin J.A. put it in *Casamiro Resource Corp. v. British Columbia (Attorney General)*,[214] such a delegation would be out of keeping with Canadian notions of decent legislative behaviour.

In practice, this means two things: (1) regulations and other forms of delegated legislation are presumed only to apply prospectively and not to interfere with vested rights; and (2) delegated legislation that claims to have retroactive application or to interfere with vested rights is presumed to be invalid. Both presumptions are rebuttable.

In *Nova, An Alberta Corp. v. Amoco Canada Petroleum Co. Ltd.*,[215] the Supreme Court of Canada was concerned with the validity of an order made by the Public Utilities Board pursuant to Alberta's *Public Utilities Board Act*. The Act provided that utilities were to fix their own rates, but upon receiving a complaint and after holding an investigation, the Board was empowered by order to vary a utility's rates for a specified period of up to 12 months. The issue was whether the Board was authorized to make orders that were retroactive to the date of the complaint. Although there was no language in the Act that expressly provided for the retroactive variation of rates, the Court concluded that the legislature must have contemplated the making of such orders. In reaching this conclusion, the Court relied primarily on its analysis of the statutory scheme. Under this scheme the utility was obliged to set "just and reasonable" rates; if its rates did not meet this standard, the intervention of the Board was required. Unless the Board's orders were retroactive, a utility would be permitted to keep the

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213 *Ibid.*, at paras. 49-50.

214 [1991] B.C.J. No. 1097, 80 D.L.R. (4th) 1, at 10 (B.C.C.A.).

215 [1981] S.C.J. No. 92, [1981] 2 S.C.R. 437 (S.C.C.).

proceeds gained from charging excessive rates prior to and during the investigation period, which could be lengthy. This would permit unreasonable rate increases, contrary to the purpose of the *Act*. The Court therefore concluded that by necessary implication the Board was empowered to make retroactive orders.[216]

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[216] *Ibid.*, at 10-11.