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BEHIND THE SCENES OF THE COMMA DISPUTE

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Last week the Canadian Radio-television and Telecommunications Commission issued its second ruling in the dispute between Bell Aliant and the cable unit of Rogers Communications Inc. Although the dispute may well continue, the first phase—known to the world as “the comma dispute”—is over.

While it was surely a nuisance to the companies involved, I’ll look back on it fondly as a moment when, incongruously enough, contract drafting found itself blinking in the spotlight. And it so happens that I was involved in the drama.

I’m a lawyer who specializes in contract language. Among other things, I maintain a blog on that topic and give contract-drafting workshops in Toronto under the auspices of Osgoode Hall Law School’s professional-development arm.

In August 2006, one of my astute blog readers notified me of the article in this newspaper that alerted the world to the commission’s first ruling in this dispute. That ruling found in favor of Bell Aliant, on the strength of a comma in the contract provision in question. I promptly posted on my blog my off-the-cuff thoughts on the ruling.

Shortly afterwards, I was contacted by Rogers’ outside counsel—would I be interested in acting as an expert for Rogers in this dispute? Of course I would! I set about preparing what was described in one newspaper account as “a 69-page affidavit, mostly about commas.” (To those who questioned my sanity, I’d point out that most of the affidavit consisted of attachments.)

The commission was doubtless relieved that in its second ruling on this dispute, it was able to find in favor of Rogers without having to revisit the question of punctuation. Instead, it decided that the dispute should be governed by the French-language version of the contract, which provided for a markedly different arrangement than did the English-language version. From the commission’s perspective, its chief virtue was that unlike the English-language version, it wasn’t open to conflicting interpretations. [Note that neither party had a hand in crafting either the English-language version or the French-language version, both of which were imposed by Canadian federal authorities.]*

But as a narrative device, this outcome left something to be desired. English-usage buffs the world over have been debating for months the significance of the infamous comma, and by skirting the issue the commission has deprived them of—dare I say it—closure.

And I haven’t seen any account of this dispute that comes remotely close to identifying the issues. For example, Lynne Truss, author of the bestseller *Eats, Shoots, and Leaves: A Zero Tolerance Approach to Punctuation*, unequivocally sided with Bell Aliant but without offering any explanation.

In an attempt to fill this aching void, here's why I think any knowledgeable and even-handed observer would have resolved the comma aspect of the dispute in favor of Rogers.

First, let's revisit the contract language at issue:

Subject to the termination provisions of this Agreement, this Agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party.

The dispute concerned whether the closing modifier—the phrase *unless and until terminated by one year prior notice in writing by either party*—modifies both preceding clauses or just the immediately preceding clause.

Echoing an argument offered by Bell Aliant, the commission noted that based on “the rules of punctuation,” the presence of a comma immediately before the word *unless* meant that the closing modifier modified both preceding clauses. The led the commission to side with Bell Aliant in concluding that under the contract Bell Aliant could terminate on one year's notice during the initial five-year period.

In alluding to “the rules of punctuation,” the commission could only have been referring to the interpretive principle known as the Rule (or Doctrine) of the Last Antecedent.

Although courts had invoked this principle previously, the Rule of the Last Antecedent is associated with one Jabez Sutherland, a U.S. lawyer, who in 1891 said, “Referential and qualifying phrases, where no contrary intention appears, refer solely to the last antecedent.”

He went on to propose a specific test: “Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.”

This test has been parroted in at least one Canadian legal text and has been invoked in some Canadian case law. This is presumably how Bell Aliant came to invoke it.

But the Rule of the Last Antecedent is not in fact a “rule of punctuation.” Instead, it's one of the canons of construction used by courts, sporadically and inconsistently, to resolve what would otherwise be ambiguities in statutes and contracts.

Anyone contemplating invoking the Rule of the Last Antecedent should consider that it's inconsistent with how writers use commas and how manuals of style say writers should use commas.

Manuals of style recognize that the comma is used to indicate a slight break in a sentence. But according to the Rule of the Last Antecedent, adding a comma after a series of antecedents not only doesn't sever the modifier from the last noun or phrase in the series,

it in fact operates remotely on all the antecedents, binding them to the modifier. Nothing in the general literature on punctuation suggests such a mechanism.

Instead, it's clear that no particular significance can be attributed to the comma at issue. The language following the comma—*unless and until terminated by one year prior notice in writing by either party*—constitutes a dependent (or subordinate) clause, with *unless and until* acting as the dependent (or subordinating) conjunction. It's a standard recommendation in manuals of style that a dependent clause that follows an independent (or main) clause shouldn't be preceded by a comma if it's essential to the meaning of the independent clause—in other words, if it's restrictive—as is the case here. Such guidance makes no distinction for independent clauses that contain several antecedents.

On the other hand, it's nevertheless commonplace—in this newspaper and elsewhere—for a comma to be used in this context, again regardless of whether the independent clause contains several antecedents.

Given the lack of any indication that writers use or do not use a comma before *unless* to indicate the reach of the dependent clause, it would be entirely arbitrary to use the presence of a comma before *unless* as an indication that the dependent clause modifies all of several preceding antecedents.

Sutherland himself suggested that the Rule of the Last Antecedent shouldn't be relied on as the sole basis for resolving an ambiguity. And the Canadian legal text that mentions the comma test hedges by stating that a comma before the qualifying words “ordinarily” indicates that they are meant to apply to all antecedents.

These caveats simply confirm that the Rule of the Last Antecedent in general, and the comma test in particular, can't be relied on to resolve ambiguity. The only reasonable choice available to any court or other adjudicative body is to roll up its sleeves and get on with the mucky business of trying to figure out what the parties intended. Unless, like the commission in this dispute, it has access to a nifty escape hatch.

* The sentence in brackets was added after publication.

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