

Cour fédérale



Federal Court

Date: 20120529

Docket: T-1288-10

Citation: 2012 FC 650

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, May 29, 2012

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

**COMMISSIONER OF OFFICIAL
LANGUAGES OF CANADA AND
DR. KARIM AMELLAL**

Applicants

and

CBC/RADIO-CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] In 2009, the Canadian Broadcasting Corporation/Société Radio-Canada [Corporation] made substantial nationwide budget cuts. Francophones in the region of southwestern Ontario, including Dr. Karim Amellal, complained to the Commissioner of Official Languages of Canada [Commissioner] about the negative impact of the decrease in local or regional content in CBEF Windsor's radio programming.

[2] Following his investigation, the Commissioner concluded that the Corporation had failed to comply with subsection 41(2) of the *Official Languages Act*, RSC, 1985, c 31 (4th Supp) [OLA], which requires that federal institutions take “positive measures”, because it had not held prior consultations with the official language minority community [OLMC] of southwestern Ontario or conducted an analysis of the impact of its decision on that community. In 2010, the Commissioner instituted this proceeding under Part X of the OLA, and Dr. Amellal was added as an applicant.

[3] Today, the Corporation is asking the Court to summarily dismiss this proceeding on the ground that its programming services (radio and television) are subject to the *Broadcasting Act*, SC 1991, c 11 [BA] and that the Canadian Radio-Television and Telecommunications Commission [CRTC] has exclusive jurisdiction in those matters. Alternatively, the CRTC is in a better position [TRANSLATION] “to make informed decisions” regarding the negative impact of budget cuts on CBEF Windsor’s regional programming.

[4] The applicants are of the opinion that there is no conflict between the BA and the OLA, and that the Federal Court has concurrent jurisdiction with the CRTC and is in a better position to decide whether the Corporation breached its duty, set out at subsection 41(2) of the OLA, to take “positive measures” to enhance the vitality of Canada’s English and French linguistic minority communities and assist their development. This requirement applies not only to the Corporation’s communications with the public but also to its programming, such that, in the event of noncompliance, the Federal Court may grant such remedy as it considers appropriate and just (section 77 of the OLA).

[5] In order to resolve the dispute in a manner that is fair, while being as inexpensive and expeditious as possible, the parties have agreed that in this application to the Federal Court for a remedy, the trial judge will rule on the preliminary jurisdictional issue raised by the Corporation, if the evidence in the record so permits.

BACKGROUND

[6] Created in 1936 by an Act of Parliament, and modelled on the BBC, the Corporation is Canada's national public broadcaster. The Corporation has to provide, in both official languages, radio and television services incorporating a wide range of programming that informs, enlightens and entertains (paragraph 3(1)(l) of the BA). We will return later to the particular aspects of its mandate. In June 2011, the Corporation had approximately 8,660 employees, 82 radio stations and 27 television stations producing programs all over the country.

[7] The French-language radio networks are La Première Chaîne and Espace Musique. The network programs are produced primarily in Montréal and broadcast on all of the affiliated stations. La Première Chaîne, with its local and/or regional programming, is broadcast throughout the country by some 20 radio stations, including CBEF in Windsor, Ontario. Approximately 80 percent of La Première Chaîne's weekly programming is national in character.

[8] In the 1990s, CBEF Windsor, which interests us here, had approximately 25 employees. It is the only French-language radio station in southwestern Ontario, where approximately 35,000 Francophones live. In this environment dominated by English and the Anglo-Saxon and

American cultures, Francophones rely heavily on the preservation of a community-based, good-quality public radio service where they can share information and views and see a reflection of who they are. In 2001, when the Corporation's licences were last renewed, CBEF broadcast about 36.5 hours a week of local or regional Windsor programs.

[9] As a Crown corporation, the Corporation has some independence from government control. It is funded both by the public purse and commercial revenues (subscription fees and advertising). Approximately 60 percent of the funding comes from the budget, allocated to it on a yearly basis from parliamentary appropriations. Therefore, every year, the Corporation submits its corporate plan to the Minister of Canadian Heritage [Minister], who is responsible for tabling a summary before each House of Parliament (sections 54 and 55 of the BA).

[10] Although labour and operational costs continue to increase every year, it indeed appears that the amount of public funding allocated to the Corporation does not follow the same upward trend, remaining steady at approximately \$1 billion annually. Consequently, to balance its operating budget, the Corporation has to be able to rely on commercial revenues. However, under the current licensing conditions, the Corporation is not authorized to run commercial advertising on the radio, with the result that this essential public service necessarily runs a deficit.

[11] In 2009, however, the Corporation faced a considerable shortfall of \$171 million, apparently attributable to the expected decrease in advertising revenue—to which must be added the shortfall between the funding obtained from the Treasury Board for its salary base and the

actual increase in wages, as well as other factors, such as increased production costs. Since it was not authorized to borrow funds, the Corporation had to explore other options—all of which were rejected by the government. It was therefore forced to eliminate positions throughout the country, reduce its programming costs and freeze discretionary spending.

[12] Consistent with its Recovery Plan, the Corporation abolished approximately 800 positions—60 percent of its overall budget being given over to salaries—which generated a further \$36 million in downsizing costs. For all French services, the cuts affected over 300 employees, including 64 in the regions. Needless to say, program production, and thus programming, was permanently affected. In making those cuts, the Corporation states having wanted to protect the regions as much as possible by limiting the cuts' effects on regional programs and by mainly targeting the French and English national networks and their supporting components, where 83 percent of the cuts were made.

[13] In Windsor, the 2009 budget cuts diminished CBEF's staff, which shrunk from ten employees (nine of whom were assigned to radio and one, to television) to three (a journalist-videographer, a broadcast journalist and a reporter in charge of producing local vignettes). It should be borne in mind that, in January 2009, three (of about thirty) programs were produced in Windsor:

- “Bonjour le monde”, aired from Monday to Friday from 6 a.m. to 9 a.m., which dedicated about 15 minutes per hour to local content, including news reports;
- “Grand Lacs Café Windsor”, aired on Saturday from 7 a.m. to 9 a.m., which dedicated about 10 minutes per hour to local content;
- “Au détroit de la nuit”, aired on Monday from midnight to 4 a.m., a national program without any regional content, broadcast nationwide.

These three programs were broadcast for the last time on June 19, 20 and 21/22, 2009, respectively. According to the Corporation, the third program was cancelled for programming reasons and not as part of the Recovery Plan. According to the most recent information, CBEF Windsor still broadcasts about five hours a week of locally produced programs.

[14] Unsurprisingly, these changes to CBEF Windsor's radio programming drew the ire of many of the region's Francophone residents. SOS CBEF, a volunteer association, was founded. Applicant Dr. Amellal is the association's vice-president. Apparently not knowing where to turn, members of SOS CBEF made individual complaints to the Corporation, the Minister, the Commissioner and the CRTC.

[15] In fact, some 876 complaints were made to the Commissioner about CBEF Windsor's programming. Incidentally, the Commissioner did not investigate the impact of these cuts on station CBE, which broadcasts Radio One with its local and/or regional English-language programming. On July 9, 2009, the Superior Court of Justice of Ontario refused to issue an interlocutory injunction, citing lack of jurisdiction: *LaRoque v Société Radio-Canada*, [2009] OJ 2925 [*LaRoque*]. The applicants' objective was to maintain the status quo while the Commissioner investigated the complaints made to him.

[16] In *LaRoque*, Justice Templeton of the Superior Court of Justice of Ontario made the following observation at paragraph 41 of his decision:

Having reviewed all of the evidence, it is my impression that there has been a breakdown in communication with the francophone public concerning the rationale and criteria used in the

decision-making process by the SRC. The reduction in local Windsor content will undoubtedly have a deleterious effect on the sense of sharing, support and intimacy from which this isolated francophone community derives its strength and identity. In my view, expert evidence is not required for such an observation. No matter the language, people rely on local media newspapers, television and/or radio to learn of matters concerning the community in which they live. A reduction of the time or space available to broadcast local affairs will have an impact on the community as a whole.

[Emphasis added]

[17] Although the injunction application was dismissed, it was absolutely clear to Justice Templeton that CBEF Windsor “serves as a pillar for the francophone community, enabling them to live in French” (*LaRoque*, above, at paragraph 12). Nonetheless, the judge was of the opinion that, by determination of Parliament, it was necessary to approach the CRTC—the specialized body responsible for monitoring and regulating radio broadcasting—regarding the dispute over the Corporation’s programming, and that this dispute “requires the adjudicator deciding the case to both understand the objectives of the Canadian Broadcasting system and its mandate pursuant to [section 3 of the BA] and assess the impact of financial constraints on those objectives” (*LaRoque*, above, at paragraph 51).

[18] That said, Justice Templeton did not rule out the possibility that the Commissioner could make a concurrent application to the Federal Court if he is of the opinion that the Corporation, as a federal institution, failed to comply with the OLA (*LaRoque*, above, at paragraph 55).

[19] In June 2010, following his investigation, the Commissioner recommended that the Corporation review its decision concerning CBEF Windsor in light of the duty of federal

institutions, under section 41 of the OLA, to take “positive measures”. At the same time, the Commissioner recommended that the Corporation set up actual mechanisms to consult on and assess the impact of its decisions on OLMCs. However, from the outset, the Corporation refused to cooperate and did not follow up on the Commissioner’s recommendations, which resulted in this application for a remedy.

[20] At this stage, presuming that the applicants’ allegations are true, the 2009 budget cuts come on top of other cutbacks made over the course of previous years. If the cumulative effects of these cutbacks are considered from the point of view of local and/or regional programming, their impact on the OLMC of southwestern Ontario is considerable.

[21] However, according to the Commissioner, federal institutions have the duty, under subsection 41(2) of the OLA, to

- a) Take “positive measures”, compatible with the mandate of each institution, to enhance the development of OLMCs. However, every institution has some discretion in selecting those measures; and
- b) Not hinder the development of any OLMC. In 2009, there was no true prior consultation with OLMCs, particularly when the Corporation did not really measure the impact of these cutbacks on the vitality of the OLMC of southwestern Ontario.

[22] Nevertheless, the Corporation is seeking to maintain some dialogue with the OLMCs. In addition, although from a regulatory perspective the minimum thresholds for local or regional content are currently subject not to the conditions of licence, but only to the CRTC’s

expectations, the Corporation voluntarily set up a panel for the regions in 2000. However, this is not a mechanism for engaging in prior consultations or for challenging and reviewing far-reaching corporate decisions made in the Corporation's highest echelons, such as the 2009 budget cuts, affecting staff and programming.

[23] In passing, following the official announcement of the 2009 cutbacks, the Corporation's representatives did try to calm matters down throughout the country by giving ad hoc explanations of its Recovery Plan and the reasons for the cuts in the regions. This did not stop SOS CBEF from continuing to take action against the Corporation; it seems that the few accommodations later made to CBEF's regional programming, which now comes largely from Toronto, failed to satisfy the members of the Francophone community.

[24] In the meantime, the CRTC began the public process of renewing all of the Corporation's licences. Both the Commissioner and Dr. Amellal announced that they wished to intervene in this process. Unfortunately, the public hearings related to the licence renewals were postponed several times because of operational uncertainty related to the financial aspects of the Corporation's budget (Broadcasting Notices of Consultation 2011-379, 2011-379-1 and 2011-379-2).

[25] According to the latest information, the CRTC intends to begin a public hearing, as of November 19, 2012, to examine, in detail, both the Corporation's performance and budget plans and the renewal of its licences. As early as April 2012, the Corporation announced that it wanted the CRTC to amend the licences for Radio Two, Espace Musique and their affiliated stations to

allow national advertising to be broadcast, which would provide it with a means to obtain additional funding. In this regard, the CTRC is of the opinion that approving these amendments could have “perceptible effects on the way CBC radio implements its mandate over the next few years” (letter from John Traversy, Secretary General of the CRTC, to Hubert Lacroix, President and Chief Executive Officer of the Corporation, dated May 18, 2012, and entered in the CTRC’s public record).

[26] Ultimately, the evidence in the record shows that the federal government simply has not budgeted. However, the Standing Senate Committee on Official Languages has already publicly announced that it has undertaken a study of the Corporation’s duties under the BA and the OLA. A central focus of the Senate review is to determine whether the Corporation is still meeting the specific needs of OLMCs, at both the national and regional levels and through every form of media (television, radio and Internet). The Senate Committee also intends to determine whether the Corporation is fulfilling the requirements of Part VII of the OLA by taking positive measures for the vitality of OLMCs and the promotion of linguistic duality. Its report is due out in autumn 2012.

JURISDICTIONAL ISSUE

[27] Under subsection 56(1) of the OLA, it is the duty of the Commissioner to take all actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of the OLA, including in relation to the advancement of English and French (Part VII of the OLA).

[28] To fulfill that purpose, the Commissioner has the duty to investigate either on his own initiative (subsection 56(2) of the OLA) or in response to any complaint made (subsection 58(1) of the OLA). This is not the first time that the Commissioner has examined the Corporation's activities as part of the federal government's commitment to enhance the vitality of OLMCs (subsection 41(1) of the OLA).

[29] This application for a remedy made under Part X of the OLA is important for all of the parties to this case. The CRTC did not ask to intervene but did assist counsel by locating for them and providing them with the relevant documentation required by the Federal Court. This is a test case. Many other OLMCs, including those in Yellowknife in the Northwest Territories, Winnipeg and Thompson in Manitoba, Sudbury in Ontario and Sydney in Nova Scotia disagree with the cutbacks made in 2009 and the decrease in the regional and/or local programming offered.

[30] In this case, rather than taking a head-on approach against the federal government, which seems largely responsible for the Corporation's lack of funding, the Commissioner is claiming to

have general oversight over all of the public broadcaster's decisions that could affect the vitality of French and English and the development of OLMCs. In sum, the Commissioner is asking the Federal Court to examine the legality of the Corporation's actions with respect to the duty to take "positive measures" set out at subsection 41(2) of the OLA, with which the Corporation is quite rightly taking issue.

[31] More specifically, in the course of these legal proceedings, during the examination of its representatives, the Corporation objected to their being examined regarding the internal discussions preceding or surrounding the budget cuts and the choices made by management. Rather than hear the appeals of the interlocutory decisions made by Prothonotary Tabib, the Court, with the parties' consent, held hearings in January and April 2012 to deal with the jurisdictional issue and has already scheduled hearings on the merits to be held in October 2012, if necessary.

[32] Today, the Corporation contends that this application for a remedy must be summarily dismissed on the ground that its programming activities, including the transmission and distribution of all radio broadcast services, are governed exclusively by the broadcasting policy for Canada, the conditions of licence and the expectations set out in the CRTC's decisions made under the BA (sections 3, 18, 19 and 23 to 25 of the BA). Furthermore, section 12 of the BA provides that a complaint may be made with the CRTC where any person has failed to do any act or thing that the person is required to do pursuant to Part II or any applicable regulation, licence, decision or order or is doing any act or thing in contravention thereof, a section which the co-applicant, Dr. Amella, made use of. Unfortunately, to the great frustration of those who made

complaints in 2009 about the decrease in regional or local programming, the CRTC made it known that those complaints were entered in the public record for the Corporation's application to renew its licences.

[33] From the outset, the Corporation has taken up a line already very familiar to its principal protagonist, the Commissioner, since the Corporation used the same type of argument in the 1990s. Following the decrease in public funding, the Corporation had announced, in September 1996, budget cuts then totalling \$414 million (approximately one third of the Corporation's operational budget) spread over three years (1994-95 to 1997-98). In June 1997, the Commissioner had produced his investigation report on the complaints regarding the federal government's responsibility for the Corporation's budget cuts and programming changes.

[34] The fact that the CRTC was designated by Parliament as the body in charge of regulating and monitoring all aspects of the Canadian broadcasting system, including the national broadcaster, is not contested by the applicants, although they do emphasize that the OLA and the BA have separate and complementary purposes, whereas Parts I to V of the OLA prevail over any inconsistencies between the BA and the regulations made under it (subsection 82(1) of the OLA). The discussions between the Commissioner and the Corporation to arrive at a solution that would allow the Corporation to remain independent while acknowledging its duties under the OLA were a failure on account of a disagreement over the definition and scope of the notion of "programming".

[35] In any event, the Corporation states that, since 2005 (that is, since the amendments made to Parts VII and X of the OLA came into force), it has been complying with the duty set out at section 41 of the OLA as regards its “non-programming” activities. It thus submits to the Minister detailed annual action plans and status reports. These set out the positive measures taken to enhance the vitality and development of the OLMCs. It goes without saying that this annual action plan confers no right of consultation over budgetary and programming decisions. However, the question of how Part VII of the OLA applies to the Corporation’s programming activities has never been ruled on by the courts.

[36] However, the Corporation concedes that, in its communications with the public (excluding programming activities), it must comply with all of the applicable provisions of Part IV of the OLA (Communications with and services to the public). The Corporation also acknowledges that it is subject to Part V (Language of work) and Part VI (Participation of English-speaking and French-speaking Canadians). As for the duty set out at section 41, found at Part VII (Advancement of English and French), this can only apply to the Corporation’s “non-programming” activities.

[37] In passing, the Commissioner gave consideration in 2009 to television production for minority communities and concluded, in this regard, that “[t]he Government of Canada may not be able to meet its obligations and commitments under Part VII of the *Official Languages Act* if it allows the Canadian broadcasting system to broadcast programs primarily in a language that does not pass on Canada’s Francophone culture”. As a result, he had proposed ways of improving the production and broadcasting of programs that reflect Francophone culture, a

number of which were directed at the national public broadcaster (Commissioner of Official Languages, *Shadows over the Canadian Television Landscape. The Place of French on the Air and Production in a Minority Context*, Ottawa, January 2009).

[38] In particular, the Commissioner was of the opinion that the Corporation should show greater transparency in order to fully perform its duties under the OLA. The Corporation's status reports on the results of implementing section 41 of the OLA and its reports to the CRTC were thus to provide a breakdown of expenditures for official language programs in a minority context and include the number of programming hours. That being said, the Commissioner did not seem to call into question the Corporation's power to cut staff in the regions or decrease the number of regional and/or local production hours, whether for television or radio.

[39] In 2010, therefore, the Commissioner took an important step when he questioned the legality of the Corporation's decision-making process that resulted in the 2009 cutbacks.

[40] Consequently, in his Amended Notice of Application, the Commissioner asked the Federal Court to make various declarations and grant various remedies under section 77 of the OLA—and section 18 of the *Federal Courts Act*, RSC 1985 c F-7 [FCA], if necessary—to the effect that the Corporation is subject to the OLA, particularly Part VII, and that it failed to comply with section 41 of the OLA when, in June 2009, it made significant budget cuts to CBEF Windsor, without any prior consultation or impact analysis. The Commissioner is therefore seeking an order requiring the Corporation to review its decision concerning CBEF Windsor and

to make the necessary arrangements to compensate for the negative impact of this decision on the OLMC of southwestern Ontario.

[41] The joint applicant, Dr. Amella, supports the Commissioner's request and, as additional relief, is seeking a permanent injunction forcing the Corporation to return to the previous number of local and regional production hours, if it does not return to broadcasting the programs previously aired by CBEF Windsor which were cancelled.

[42] The Federal Court must now rule on the jurisdictional issue raised as a preliminary ground by the Corporation.

EXCLUSIVE JURISDICTION OR CONCURRENT JURISDICTION

[43] Thus far, the provincial courts of original general jurisdiction have refused to issue injunctions or make declarations of right in respect of broadcasting undertakings in cases where the CRTC clearly has jurisdiction to resolve the dispute and where the rights claimed or the violations alleged solely concern the interpretation or application of provisions of the BA or of the regulations made under it (*Trieger v Canadian Broadcasting Corp*, [1988] OJ 1764, at paragraphs 12 to 14; *Mahar v Rogers Cablesystems Ltd*, [1995] OJ 3035, at paragraphs 17, 21 to 22, 25, 33 and 34).

[44] Similarly, in *Canadian Union of Public Employees v Canadian Broadcasting Corp*, [1991] FCJ 241, the Federal Court ruled that it did not have jurisdiction under sections 18 and 23 of the FCA to grant prerogative and injunctive relief directing the Corporation to comply with its

mandate—referring here to its mandate under the *Broadcasting Act*, RSC 1985 c B-9 [the former BA]—and to adhere to and respect the requirements established by the CRTC. First, it was acknowledged that the Corporation is not a “federal board, commission or other tribunal” within the meaning of section 2 of the FCA, meaning that section 18 of the FCA cannot apply. In addition, since this was a matter where jurisdiction had been “otherwise specially assigned” under the BA, section 23 of the FCA also cannot not apply.

[45] The “exclusive jurisdiction” model suggested by the decisions above thus pertains to the exercise of injunctive power in civil matters or the supervisory power of the superior courts, including the Federal Court. However, another model, one of “concurrent jurisdiction”, has evolved in parallel in cases where there has been an assignment of separate jurisdiction by a statute other than the BA to an administrative tribunal, or even to the Federal Court.

[46] Thus, in *Vlug v Canadian Broadcasting Corp*, [2000] CHR 5, the Canadian Human Rights Tribunal [CHRT] ruled that the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA] required that the Corporation make all of its Newsworld television and English-language network programming accessible to the deaf and hard of hearing, as soon as practicable, despite the fact that subtitling is subject to the CRTC’s expectations or conditions of licence (which, instead, set targets to be met).

[47] In *Canadian Broadcasting Corporation v Canada (Information Commissioner)*, 2011 FCA 326, [CBC v ICC], the Court had to interpret the scope of section 68.1 of the *Access to Information Act*, RSC, 1985, c A-1 [AIA]. This provision excludes “any information that is

under the control of the Canadian Broadcasting Corporation that relates to its journalistic, creative or programming activities, other than information that relates to its general administration” (emphasis added). Arguing that the courts have recognized the CBC’s journalistic independence from any government interference and that the words, “journalistic, creative or programming” come from the BA, which enshrines its independence, the Corporation objected to any prior examination by the Information Commissioner.

[48] Although the BA applies to the Corporation’s programming activities, the Federal Court of Appeal did not exclude the possibility that the AIA applies concurrently, while confirming the Information Commissioner’s power of examination:

Although Parliament intended that information related to journalistic, creative or programming activities be excluded from the application of the Act, it also wanted that information related to the CBC’s general administration – as defined in section 3.1 – not be excluded. Subject to what is said in paragraphs 73 and 74, below, it is the Commissioner’s role to initially determine whether the exception applies and to exercise the recommendation power vested in her by the Act.

[49] Last, in *Quigley v Canada (House of Commons)*, [2002] FCJ 858, decided under Part X of the OLA, the applicant was a Rogers Cable subscriber in New Brunswick who had complained to the Commissioner that the Cable Public Affairs Channel (CPAC) broadcast the House of Commons debates in their original version only. As the applicant only spoke English, he was unable to understand those parts that are spoken in French. It should be noted that, under section 25 of the OLA, every federal institution has the duty to ensure that, where services are provided or made available by another person or organization on its behalf, any member of the public in Canada or elsewhere obtain those services from that person or organization in both

languages in any case where the institution would itself be required to provide them in both languages. The Federal Court declared that the method used by the House of Commons and its Board of Internal Economy for providing public television broadcasts of parliamentary proceedings contravened section 25 of the OLA, and ordered that they take the necessary steps to bring their practices into compliance with this provision.

[50] Given the case law discussed above, the Court must refrain from swiftly and mechanically applying the CRTC's exclusive jurisdiction model simply because the Corporation's programming was affected by the 2009 budget cuts. See also: *Norton v Via Rail Canada*, 2009 FC 704, at paragraph 55 [*Norton*]; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (Attorney General)*, [2004] 2 SCR 185, at paragraph 11.

[51] Therefore, having considered all of the parties' submissions in light of the applicable law and the evidence on record, I am of the opinion that there is no conflict between the OLA and the BA and that the court to which Part X applies, that is, the Federal Court (section 76 of the OLA), has *prima facie* jurisdiction to determine the scope of subsection 41(2) of the OLA and to decide whether there was a failure to comply with the duty to take positive measures. Need we be reminded, the OLA reflects a social and political compromise; it gives the Commissioner the powers of a true linguistic ombudsman and creates a judicial process that provides for relief in the cases set out at subsection 77(1) of the OLA: *Canada (Attorney General) v Viola*, [1991] 1 FC 373 at page 386 (FCA); *R v Beaulac*, [1999] 1 SCR 768 at pages 790 to 792; *Forum des maires de la Péninsule acadienne v Canada (Food Inspection Agency)*, [2004] 4 FCR 276, 2004

FCA 263 at paragraphs 16 and 17; and *DesRochers v Canada (Industry)*, [2009] 1 SCR 194 at paragraphs 32 to 35.

[52] That said, although the Federal Court has jurisdiction, strictly speaking, under section 77 of the OLA according to the concurrent jurisdiction model, I am of the opinion that it is preferable for the CRTC to first decide the issue of the decrease in regional or local programming broadcast by CBEF Windsor before I determine whether it is appropriate to either dismiss this application or further examine the issues raised on the merits.

NATURE OF THE DISPUTE AND PARLIAMENT'S INTENT

[53] To decide which of the concurrent legal schemes should govern the dispute, the Court must first analyze the nature of the dispute to determine its essential character, since the key question is whether, in its factual context, the essential character of a dispute arises either expressly or inferentially from a legal scheme. Second, the Court must also determine whether Parliament intended for the dispute to be governed by the BA or by the OLA, depending on what is indicated in the relevant legal provisions: *St Anne Nackawic Pulp and Paper Co v Canadian Paper Workers' Union, Local 219*, [1986] 1 SCR 704; *Weber v Ontario Hydro*, [1995] 2 SCR 929; *Regina Police Assn Inc v Regina (City) Board of Police Commissioners*, [2000] 1 SCR 360; *Bisaillon v Concordia University*, [2006] 1 SCR 666.

[54] Whatever opinion the Commissioner has today, there would not have been 876 complaints from Francophones in southwestern Ontario if the Corporation had not decreased the regional and/or local content in CBEF Windsor's radio programming. In that sense, from the

complainants' perspective, what is at issue is indeed the effect of the cutbacks on the programming broadcast by CBEF Windsor, not the matter of whether the Corporation did or did not hold consultations before making its decision. The complainants are not claiming a right of consultation, although such a right could be granted to them as a remedy in the event of noncompliance with the OLA. What they want, first and foremost, is for CBEF Windsor's programming to strengthen Francophones' ties to the OLMC of southwestern Ontario. This cannot be achieved otherwise than by raising the CRTC's current expectations in terms of local and regional programming.

[55] Whereas the OLA constitutes a comprehensive code on linguistic rights (*Norton*, above, at paragraph 61), the BA also constitutes a comprehensive code—on broadcasting. The BA applies to broadcasting undertakings, which include distribution undertakings and programming undertakings, including networks (subsections 2(1) and 4(3) of the BA). The word “programming” extends to more than the mere words which go out over the air but the total process of gathering, assembling and putting out the programs generally (*R v CKOY Ltd*, [1979] 1 SCR 2 at paragraph 23).

[56] Full effect must be given to Parliament's intent that the specific procedure in accordance with which the national public broadcaster provides its program offering, over the full network and in the regions, be substantively established by the CRTC as part of the public process to issue and renew the Corporation's licences. It goes without saying that the expectations and conditions of licence set by the CRTC must be consistent with all of the applicable provisions of the BA and the OLA, which includes ensuring adherence to the values and spirit of the BA and

the OLA in promoting the equal status of both official languages and supporting the development of OLMCs.

[57] Parliament adopted and, over time, has amended the broadcasting policy for Canada set out at subsection 3(1) of the BA. The elements of this policy have been chosen by Parliament with great care, following profound consideration and extensive consultation and then a public debate, both as regards the former 1968 statute (SC 1967-68, c 25) and the new 1991 statute. Today, the policy contains a set of political, social, economic and cultural objectives that reflect the linguistic duality and the multicultural and multiracial nature of Canadian society.

[58] There is no conflict between the purposes of the OLA and those of the BA. In both statutes, the general will of Parliament is to foster the development and enhance the vitality of OLMCs, while leaving the choice of means in the hands of the federal institutions concerned and the broadcasters, including the national public broadcaster. The same may be said of the legal principles for the application of both statutes. As regards the OLA, the federal government's general commitment to enhancing linguistic duality is met by all of the federal institutions in their respective fields of activity, whereas as regards the BA, the general purposes of the broadcasting policy for Canada are implemented by all broadcasters, taking into account their individual characteristics and the complementarity of the programs offered by the broadcasting system as a whole.

[59] It would also be incorrect to think that the BA does nothing more than express wishful thinking by Parliament. It does, in fact, set out a functional legal groundwork and Parliament's

statement of certain guiding legal principles that may be interpreted or even completed by the CRTC. For example, the equal status of both official languages is not merely “formal”.

Parliament also seeks to counteract all regional inequalities within the system and to do so in accordance with the specific interests of both official language communities. In this respect, it is not a matter of requiring the national public broadcaster to provide a single programming service broadcast simultaneously in both official languages. On the contrary, reference is made to two separate services, “reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French linguistic minorities” (sub-paragraph 3(1)(m)(iv) of the BA, while the Corporation’s programming should also “strive to be of equivalent quality in English and in French” (subparagraph 3(1)(m)(v) of the BA) (emphasis added).

[60] The documentary evidence on record confirms that the statement of the broadcasting policy for Canada is in continuous evolution and does indeed take into account the equal status of the official languages and the importance of fostering the development of OLMCs set out in both the former 1969 *Official Languages Act* (1970, RSC c O-2) and the new 1990 statute. Having read all of the extensive documentation reproduced in the Joint Book of Supplementary Documents, it appears to me that Parliament’s wish, without limiting the Commissioner’s power in relation to carrying out investigations, is for the Commissioner to make public any complaint made by citizens or groups of citizens, including OLMC members, whether the complaint pertains to the Corporation’s relations and communications with the public, at its headquarters and in the regions, or to the very contents of its national and regional programming.

[61] However, the Corporation's mandate and mission in terms of the programming offered and the distribution of its services in Canada are subject to a statutory framework set out, first, by section 3 of the BA, which addresses the broadcasting policy for Canada and the role of the national broadcaster (paragraphs 3(1)(*l*) and (*m*)) and, second, by sections 35 to 71 of the BA, which relate directly to the Corporation's operational methods and accountability. In fact, the national public broadcaster is not an instrument promoting the government and its ministers, but one promoting the broadcasting policy for Canada. That same policy was the will of Parliament, which entrusted the CRTC with supervising the system.

[62] Let me be clear: the government cannot interfere with the Corporation's programming choices (subsections 4(1), 35(2), 46(5) and 52(2) of the BA). However, freedom of expression and journalistic independence do not constitute a general licence allowing the Corporation to avoid implementing the linguistic aspects of the broadcasting policy for Canada, to ignore the regions and the OLMCs and to decrease the contribution of artists and other local talents in its national and regional programming. As well, the Corporation's programming for the people of Canada must include a certain proportion of regionally produced programs, with which listeners and television viewers will be able to identify. This is especially true in the case of OLMCs, which are threatened by assimilation and count on public radio and public television to preserve their language and cultural identity.

[63] Conversely, the national public broadcaster is ultimately responsible before Parliament, through the Minister, for the exercise of its activities (section 40 of the BA). In passing, the Minister is also the one who, in consultation with the other federal ministers, fosters and

encourages coordination of the federal institutions' implementation of the commitment set out at subsection 41(1) of the OLA (section 42 of the OLA). In addition, Canadian Heritage ensures that the Canadian broadcasting and digital communications sectors participate in achieving Canada's social, cultural and economic objectives as set out in the BA and promotes the creation and broadcasting of Canadian content through numerous forms of media.

[64] Since the broadcasting policy for Canada has not been repealed or amended by Parliament, the federal government must comply with it in full, not only in letter but also in spirit. The onus is on the government, the Minister and any other responsible minister to ensure that the Corporation receives adequate public funding on an annual basis and has the financial capacity to provide Canadians with programming that is consistent with the values, objectives and legitimate expectations under the BA, which itself mirrors some key aspects of the OLA.

[65] In particular, the will of Parliament is for a range of broadcasting services in French and English to be extended to all Canadians as resources become available (paragraph 3(1)(k) of the BA). As regards the Corporation's programming, the public broadcaster's mandate expressly includes promoting both official languages, preserving the identity of French-speaking and English-speaking minorities within the Canadian federation and contributing to shared national consciousness and identity (subparagraphs 3(1)(m)(iv), (v) and (vi) of the BA). That is the law, and everyone must obey it, including Her Majesty in Right of Canada or a province (subsection 4(1) of the BA).

[66] On this level, it is interesting to note that the BA is more restrictive than the OLA in terms of the accessibility of program services provided by the national broadcaster. In the OLA, the availability of services in either official language is contingent on the type of office (i.e., head or central office) or the criterion of a “significant demand” outside the National Capital Region, but the BA instead uses the criterion of “resources . . . available” (subparagraph 3(1)(m)(vii) of the BA). As it is, the Corporation must have regard to the principles and purposes of the OLA when planning to extend broadcasting services (subsection 46(4) of the BA). Parliament could not have been clearer.

[67] The duty to take “positive action” set out at subsection 41(2) of the OLA must be interpreted and applied in light of the programming undertakings already assumed by the Corporation under the BA or which the CRTC may require in the form of expectations and conditions of licence. It is difficult to see how the Commissioner or the Federal Court can, for example, require that the Corporation offer radio programming in a given region simply because an OLMC is located there. In fact, to do so, the Corporation must hold a licence from the CRTC, presuming that a frequency is available and it has been allocated to the Corporation. Furthermore, the antenna and facilities of the affiliated station broadcasting the signal must have received Industry Canada’s approval in accordance with the *Radiocommunication Act*, RSC 1985 c R-2, and its regulations.

[68] The CRTC has vast powers under sections 9 to 13 of the BA and, under section 17 of the BA, “has authority to determine questions of fact or law in relation to any matter within its jurisdiction under this Act”. In *Genex Communications Inc v Canada (Attorney General)*, 2005

FCA 283, at paragraphs 72 to 73, the Federal Court of Appeal noted the following about the scope of its powers:

This independent authority, the CRTC, was required by section 15 to regulate and supervise all aspects of the Canadian broadcasting system. Thus, in the performance of its duty of supervision and regulation, it was given exclusive power by Parliament to issue licences, to make regulations respecting standards of programs and advertising, to define the classes of persons who could be allowed to hold broadcasting licences and to prescribe the conditions for the operation of broadcasting stations as part of a network and the conditions for the broadcasting of network programs . . .

The broadcasting policy enunciated by the Act was also addressed to a number of issues of public interest including the language of broadcasting, the need for a national public broadcasting service, diversity and quality of programming, and recognition and supervision of broadcasting undertakings, to mention only a few of these issues.

[69] In the past, the CRTC has shown that it was prepared to make any order necessary to promoting either official language and fostering the development of an OLMC. This is what the CRTC did, for example, when in 1999 it forced broadcasting distribution undertakings [BDUs] to distribute the French-language television service of Groupe TVA Inc. [TVA] across the country, thus responding to “a long-standing desire on the part of French-speaking communities outside Quebec” and being, in addition, persuaded that “national distribution of this television service will contribute to promoting Canada’s linguistic duality and cultural diversity” (Public Notice CRTC 1999-27 – *Order respecting the distribution of the French-language television service of TVA Group Inc.*, February 12, 1999).

[70] Therefore, far from wishing to minimize the Commissioner’s role as ombudsman—since he must continue to receive complaints and conduct any investigations he deems useful under the

OLA—I am nonetheless of the opinion that the general jurisdiction of the court identified under Part X of the OLA, the Federal Court, to grant a “remedy” in the event of noncompliance with the OLA is necessarily only concurrent with the CRTC’s specialized jurisdiction in broadcasting matters under Part II of the BA.

APPROPRIATENESS OF THE CURRENT REGULATORY FRAMEWORK

[71] A great deal of effort has been expended by both parties to satisfy me, as trial judge, to continue the hearing on the merits of this application for a remedy, or to dismiss it summarily, on the ground that the Federal Court could grant an appropriate remedy, or else could not do so, assuming that the facts alleged by the applicants are proven.

[72] At this stage, as made clear in the paragraphs that follow, I am of the opinion that the complaints made to the Commissioner may appropriately be decided on the merits by another authority: in this case, the CRTC. It must be remembered that, according to subsection 77(5) of the OLA, “[n]othing in this section abrogates or derogates from any right of action a person might have other than the right of action set out in this section” (emphasis added). It is clear that the applicants have not waived their right to intervene before the CRTC.

[73] Moreover, in the intervention he filed on July 8, 2011, Dr. Amellal asked the CRTC [TRANSLATION] “to re-establish the programs produced locally at CBEF 540, in accordance with the programming that was current under Decision CRTC 2001-529”, alleging the following in that regard:

[TRANSLATION]

The CBC's decisions and its plan for the future of CBEF are contributing to Francophone assimilation in southwestern Ontario. The CBC has taken no steps to implement its commitment towards the Francophone minority of southwestern Ontario to enhance its vitality and support its development.

The CBC failed to consult the community of southwestern Ontario before making major cuts to the CBEF 540 station and neglected to assess the negative impact that those cuts could have on the community. Those failings were detrimental to the vitality of our minority community.

The CBC is failing to comply with the *Broadcasting Act*, is failing to comply with the current licence issued by the CRTC and has made crushing decisions for the official language minority population.

We believe that, as an institution that regulates and supervises compliance with the *Broadcasting Act* and claims to take the reality of official language minority communities into account, the CRTC must intervene in this situation.

[74] In my opinion, the process of renewing the Corporation's licences is the forum favoured by Parliament for discussions to be held on the decrease in local or regional French-language programming. For the time being, I must assume that the CRTC will give particular attention to the applicants' criticisms of the Corporation. This is part of its mandate as regulator of the broadcasting system.

[75] By nature, radio is more regulated than television and still largely broadcast by radio waves. In fact, these frequencies are a public good whose allocation to a broadcaster presupposes a public review process, upon completion of which the CRTC issues an operating licence to the licence holder that will best be able to serve the people, taking into account the policies in effect, the public interest and government guidelines.

[76] Subject to directions from the Governor in Council—particularly as regards the reservation of channels or frequencies for the use of the Corporation or for any special purpose (subsection 26(1) of the BA)—the allocation of frequencies is a competitive process, such that the Corporation may even propose new networks (*Métromédia CMR Montréal Inc.*, Decision CRTC 99-151, June 21, 1999; *Canadian Broadcasting Corp v Métromédia CMR Montréal Inc.*, [1999] FCJ 1637 (FCA)).

[77] Since 1970, the Corporation has been operating an AM radio programming undertaking in the region of southwestern Ontario on the frequency 540 KHz (AM), known by the name CBEF Windsor. Using its rebroadcaster at Leamington, CBEF-1 FM, the Corporation broadcasts the same programming at 103.1 MHz (FM), which ensures improved broadcasting of La Première Chaîne in this part of the country, which is served almost exclusively by English-language networks on both sides of the border.

[78] However, since CBEF is the only French-language station in the Windsor region, and a great many Francophones in the area understand English, the lack of a French-language FM station encouraged them to tune into English-language stations instead. As a result, in 2008, the CRTC also allowed the Corporation to operate an overlapping rebroadcasting FM transmitter at Windsor, operating at 102.3 MHz and covering about the same area as CBEF Windsor.

[79] Let us leave aside, for the moment, the fact that La Première Chaîne's network programming, produced primarily in Montréal, is broadcast throughout the country. One thing is

clear: all of the stakeholders agree that, in order for the public broadcaster to fulfill its mandate, it is not enough for it to broadcast nationwide in French. First, its programming must be mainly Canadian. Second, that programming must also reflect the regions and the people who live there, if not be produced locally or regionally.

[80] Furthermore, in its application for licence renewal for CBEF Windsor in 1993, the Corporation itself acknowledged that [TRANSLATION] “French radio must remain regional radio”, and that [TRANSLATION] “in many parts of the country, only the CBC is able to make regional programming available in French”. Stating next that [TRANSLATION] “it is therefore through regional programming that French radio will secure the loyalty of listeners, whom it will then be able to provide with a choice of programs that are clearly distinctive in terms of their content and crafting”, the Corporation claimed it was [TRANSLATION] “persuaded that it inhabits a unique niche in the radio landscape of Windsor and the surrounding area”.

[81] In Decision CRTC 2001-529, the CRTC clearly stated that the Corporation has a duty to fulfill its responsibility to broadcast local and regional programming on each of its affiliated stations:

In March 1999, the Commission held a series of public consultations. During these consultations, a number of representatives of Francophones from areas other than Quebec complained about the lack of coverage of their communities in the programs broadcast by the CBC. As the Commission noted when it last renewed the CBC’s network licences in January 2000, “given Canada’s cultural and social diversity and the needs and interests of Anglophone as well as Francophone audiences, the CBC should emphasize programming that reflects all the communities of this country. This obligation is at the very heart of the CBC’s mandate. If Canada’s many voices and faces are to be represented on the public broadcasting service, the CBC must have a stronger

presence in all parts of the country and must be committed to regional talent.” The Commission reaffirms the particular importance it attaches to the CBC’s responsibilities to provide regional programming on its individual stations. Accordingly, the Commission expects the CBC to maintain the levels of regional and subregional programming currently broadcast on each of these stations. The Commission also strongly encourages the licensee to surpass these levels during the new licence term.

[Emphasis added]

[82] From a regulatory standpoint, a distinction should be made between “regional” programs, which may be produced outside an affiliated station (but within the same province) and so-called “local” (sub-regional) programs, produced at the affiliated station itself. Therefore, in 2001, when the Corporation’s licences were most recently renewed, the CRTC stated that it expected the Corporation to maintain the current levels of regional and local (sub-regional) programming at its affiliated stations, while strongly encouraging it to surpass those levels during the new licence term—referring then to the period from September 1, 2001, to August 31, 2007.

[83] However, the cutbacks over the last years have had a substantial impact on the hours of programming produced by CBEF Windsor, to such an extent that one may well ask whether it still fulfills its role as a local French-language information station on the AM band (simultaneously rebroadcast on the FM band) in Windsor’s radio landscape. In June 2010, the Commissioner made the following observation at page 22 of his final investigation report:

[TRANSLATION]

The near-total loss of local radio content spells the effective loss of the radio station that was considered part of the infrastructures providing institutional support to the official language minority community of southwestern Ontario. Its disappearance is detrimental to the minority community’s vitality and development. Owing to the Francophone population’s lack of interest in the new

format and the loss of the only tool in which the community saw itself reflected each day, the Francophone community is now turning to English-language radio, which will most likely be detrimental to its identity.

[84] And yet, in brighter days—meaning the state of affairs before 1996—CBEF Windsor had some 25 regular employees, 15 of whom were assigned to programming and 7 of whom worked on news and information. That said, following the 2009 budget cuts, it seems that the affiliated station in Toronto, CJBC, benefited from an increase in local and/or regional production, to the detriment of CBEF Windsor. In fact, in 2001, CJBC broadcast approximately 27.5 hours a week of programs produced in Toronto, whereas, during the 2010-2011 period, programs produced in Toronto reached 32 hours a week.

[85] Ten years have passed since the Corporation's licences were last renewed. It is therefore high time that the Corporation provide Canadians with an explanation of its programming choices and of its vision for the future in a setting where the interested parties will have the opportunity to be heard. In this case, I believe that the best forum is indeed the CRTC, which acts as regulator and lawmaker (by delegation) in the area of broadcasting. In all likelihood, the stakeholders and other interested parties will make submissions to the CRTC insisting that the Corporation now be required, by conditions of licence, to meet a minimum threshold for local and/or regional programs that are regionally broadcast and produced. Presumably, if the Corporation fails to compromise, it is to be expected that the battle before the CRTC for a return to the previous level of local programming in Windsor will be very bitter. One might even have to call it a "fight to the finish" between the Corporation, the Commissioner and the Francophone

population of southwestern Ontario, which is not desirable in a context where the “public interest” must come first.

[86] To go by the documentation currently in the public record, the Corporation’s plan for the next licence term is for 20 hours and up of the weekly broadcast to be locally produced at “main” stations and, by contrast, for 5 to 20 hours of the weekly broadcast to be locally produced at “remote” stations. The Corporation now wants the CTRC to set out expectations backing the organizational and operational changes that have been made in terms of content produced locally and/or regionally. According to the plans announced by the Corporation in 2011, in Ontario, the affiliated stations in Ottawa, Toronto and Sudbury, which broadcast La Première Chaîne, would all become “main” stations, whereas the Windsor station, which also broadcasts La Première Chaîne, would become a “remote” station. In the case of CBEF Windsor, this means only five hours of local production a week, unless, of course, the Corporation revises its plans or is forced to do so.

[87] The 2009 cutbacks were made over three years ago, so I have trouble seeing how, today, the Federal Court can legally force the resumed broadcasting of cancelled programs or set a minimum threshold for local or regional production. This power belongs instead to the Canadian broadcasting system regulator, the CRTC, which has an overall picture of the Corporation’s broadcasting activities and its future plans for programming produced in the major centres and in the regions. In this case, nothing has shown me that it will not be possible for the complaints made to the Commissioner in 2009 to be decided appropriately on the merits. In my opinion, the fact that the CRTC considers other factors in addition to the language issue is not, in itself,

sufficient for me to agree to entertain this application for a remedy at this stage. Concern for judicial economy strongly favours letting matters play out.

[88] In this regard, the CRTC's practice is to integrate the purposes of section 41 of the OLA into the activities it carries out. It takes into account its duties under that provision by making certain to consider the needs of OLMCs in respect of the hearings held, policies developed and decisions made, in addition to other factors that it has to take into account. As well, in July 2009, the CRTC accepted the Commissioner's proposal to conduct an analysis of the impact of its decisions on the OLMCs as part of its decision-making process. As a result, the CRTC announced that it intended to engage in this process systematically to show that it is fulfilling its duties and to demonstrate in its decisions that consideration was given to all of the factors. Similarly, given the importance of the Corporation's radio programming in the communities and within the broadcasting system, the CRTC intends to review the Corporation's contributions to the reflection of those communities when its licences are renewed (*Report to the Governor in Council on English- and French-language broadcasting services in English and French linguistic minority communities in Canada*).

[89] It is true that subsection 77(4) of the OLA allows the designated court (the Federal Court) to "grant such remedy as it considers appropriate and just in the circumstances"; nonetheless, the exercise of that power cannot directly conflict with the powers of the CRTC. Indeed, Parliament has stated in the BA that the objectives of the broadcasting policy for Canada can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority, namely, the CRTC (subsection 3(2) of the BA).

[90] Consequently, although in the narrow sense the Federal Court does have jurisdiction to entertain this application under sections 76 to 81 of the OLA, I am of the opinion that the CRTC is in a better position than the Federal Court to assess the impact of the budget cuts on the Corporation's programming, including as broadcast by CBEF Windsor. After consulting with the Corporation, the CRTC will, if necessary, be able to strengthen the current expectations, if not propose new conditions of licence, in order to enhance the vitality and support the development of OLMCs. This will not affect the Corporation's right to later submit any condition of licence to the Minister for consideration, if the Corporation is of the opinion that the condition would unreasonably impede it in providing its programming (section 23 of the BA).

CONCLUSIONS AND STAY ORDER

[91] If it is correct on the jurisdictional issue, the Corporation asks that I, as trial judge, decline to hear the case on the merits, make certain declarations of right, summarily dismiss this application and make any other order that the Court may deem appropriate and fair.

[92] In this case, since I am rejecting the exclusive jurisdiction model proposed by the Corporation and applying the concurrent jurisdiction model accepted by the Court, it seems to me that, at this stage, the CRTC is in a better position than the Federal Court to determine the dispute on its merits and to grant the applicants appropriate relief, if applicable.

[93] However, I note that the CRTC has thus far not wished to inquire into the merits of the numerous complaints that have been brought to its attention since the 2009 budget cuts and filed

in the public record of the Corporation's licence renewal application. Furthermore, I understand that the CRTC wants to have an overall picture before it makes a decision on the specific recriminations of the OLMCs regarding regional and/or local programming, including the programming broadcast by CBEF Windsor.

[94] I also note that, in July 2009, the CRTC accepted the Commissioner's proposal that it perform an analysis on the impact of its decisions on the OLMCs as part of its decision-making process. As a result, the CRTC announced that it intended to implement this practice systematically in order to show that it is fulfilling its duties and to demonstrate in its decisions that consideration was given to all of the factors.

[95] In my opinion, the applicants therefore have a legitimate expectation to be heard and to express their point of view within the process that has been initiated to have the Corporation's licences renewed. The applicants also have a legitimate expectation that the CRTC will conduct an analysis of the impact on the OLMC of southwestern Ontario of its potential decision to renew the licence of the radio programming undertaking operated by the affiliated CBEF Windsor station. At that stage, it can be assumed that the CRTC will pay particular attention to the Commissioner's findings in his final investigation report from June 2010 concerning the negative impact of the 2009 budget cuts on the development of the OLMC of southwestern Ontario.

[96] Some aspects of the Corporation's application to renew its licences are completely unprecedented, such as its new applications to have the licences for Radio Two, Espace Musique

and their affiliated stations amended to allow national advertising to be broadcast. On May 18, 2012, the CRTC asked the Corporation to submit an update of all of its applications by no later than July 16, 2012, after which the Notice of Consultation formally announcing the hearing and inviting the public to intervene would be released (letter from John Traversy, Secretary General of the CRTC, to Hubert Lacroix, President and Chief Executive Officer of the Corporation, dated May 18, 2012, and entered in the CRTC's public record).

[97] However, aside from the hearing to be held in Gatineau, Quebec, starting on November 19, 2012, to hear the application to renew the Corporation's licences, the CRTC still, to this day, has not announced whether a public hearing will subsequently be held in Windsor, nor has it made known other special conditions for hearing the stakeholders, including the Commissioner, Dr. Amellal and the members of the OLMC of southwestern Ontario.

[98] At this stage, it is not possible to predict the final outcome or the Corporation's arguments in response to the interventions of the applicants and the other interested parties; moreover, the Corporation has until July 16, 2012, to bring its applications up to date. It is still unknown whether, over a reduced licence term (five years rather than seven), the Corporation will have the financial capacity to fulfill all of its promises to meet its commitments, particularly to the regions and the OLMCs, if it does not obtain all of the public funding expected or if it is not authorized to engage in national advertising in certain cases (Radio Two, Espace Musique).

[99] Given the current climate of uncertainty and the Court's wish to spare the parties additional or unnecessary costs by forcing them to engage in long and costly legal proceedings

having outcomes that are necessarily unknown, and rather than summarily dismissing this application today, I am exercising my judicial discretion. It seems to me that the fairest and most equitable course is to order a stay of proceedings in this file while safeguarding the rights of the parties.

[100] As Madam Justice Abella of the Supreme Court of Canada (writing on behalf of Justices LeBel, Deschamps, Charron and Rothstein) emphasized in *British Columbia (Workers' Compensation Board) v Figliola*, [2011] 3 SCR 422, at paragraph 1 [*Figliola*],

[I]tigators hope to have their legal issues resolved as equitably and expeditiously as possible by an authoritative adjudicator. Subject only to rights of review or appeal, they expect, in the interests of fairness, to be able to rely on the outcome as final and binding. What they do not expect is to have those same issues relitigated by a different adjudicator in a different forum at the request of a losing party seeking a different result. On the other hand, it may sometimes be the case that justice demands fresh litigation.

[Emphasis added]

[101] Let us simply recall that the final decisions and orders of the CRTC are subject to appeal, on an issue of law or a question of jurisdiction, to the Federal Court of Appeal—that is, on leave (subsection 31(2) of the BA)—such that the “fairness” of the CRTC’s eventual decision on the merits “is not meant to be bait for another tribunal with a concurrent mandate” (*Figliola*, above, at paragraph 38).

[102] Although the Federal Court is not a “tribunal”, it is nonetheless the “Court” designated by Parliament to hear a complaint made under Part X of the OLA. However, the CRTC has made no decision as yet. To be prudent, jurisdiction should therefore be reserved in the interim.

[103] Consequently, the interests of justice here require that the Court order a stay of proceedings under subsection 50(1) of the FCA during the time for the CRTC to make a decision, as part of the process to renew the Corporation's licences, on any complaint or intervention made in respect of the decrease in the number of hours of local and/or regional programming broadcast by CBEF Windsor.

[104] The continuation of all examinations already scheduled and the hearing on the merits set to begin on October 15, 2012, will therefore be adjourned *sine die*. Once the CRTC has made its decision, it will be open to any of the parties to ask the Court to extend or put an end to the stay of proceedings, resume examining the record or dismiss this application, having consideration for the applicable laws and all of the legal principles applicable in this case.

[105] If appropriate, this Court could then determine whether the issue decided by the CRTC is essentially the same as the one raised in this application and whether the process followed by the CRTC (regardless of how closely it mirrors the procedure of the designated Court under section 76 of the OLA) gave the applicants the opportunity to present their case and make their arguments (*Figliola*, above, at paragraph 37).

[106] In the interim, as judge in this case, I reserve jurisdiction to issue any other direction or make any other order, on my own initiative or upon the application of a party, in the event of any new developments.

[107] Last, no award of costs should be made to either party.

ORDER

THE COURT ORDERS that

1. The proceedings in this case are stayed to allow the CRTC to make its decision on the applications for renewal of the Corporation's licences and on any complaint or intervention by the applicants in respect of the decrease in local and/or regional programming hours broadcast by CBEF Windsor;
2. The continuation of any examinations already scheduled and the hearing on the merits set to begin on October 15, 2012, are adjourned *sine die*;
3. Once the CRTC has made its decision regarding the applications for renewal of the Corporation's licences, it will be open to any of the parties, upon application, to ask the Court to extend or put an end to the stay of proceedings, to resume examining the record or to dismiss this application, having consideration for the applicable laws and all of the legal principles applicable in this case;
4. In the interim, the judge in this case reserves jurisdiction to issue any other direction or make any other order, on his own initiative or upon the application of a party, in the event of any new developments; and
5. Without costs.

“Luc Martineau”

Judge

Certified true translation
Sarah Burns

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1288-10

STYLE OF CAUSE: THE COMMISSIONER OF OFFICIAL
LANGUAGES OF CANADA AND DR KARIM
AMELLAL v CBC/RADIO-CANADA

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: January 9, 2012;
April 11 and 12, 2012

REASONS FOR JUDGMENT: MARTINEAU J.A.

DATED: May 29, 2012

APPEARANCES:

Amélie Lavictoire
Pascale Giguère

FOR THE APPLICANTS

Guy Pratte
Nadia Effendi

FOR THE RESPONDENT
CBC/RADIO-CANADA

SOLICITORS OF RECORD:

Office of the Commissioner of
Official Languages of Canada
Legal Affairs Branch
Ottawa, Ontario

FOR THE APPLICANTS

Borden Ladner Gervais LLP
Ottawa, Ontario

FOR THE RESPONDENT
CBC/RADIO-CANADA