Cour fédérale Federal Court

Date: 20140908

Docket: T-1288-10

Citation: 2014 FC 849

Ottawa, Ontario, September 8, 2014

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

THE COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA AND DR KARIM AMELLAL

Applicants

and

CBC/RADIO-CANADA

Respondent

JUDGMENT AND REASONS

[1] This judgment follows a stay of proceedings by interim order of the Court dated May 29, 2012: *Canada (Commissioner of Official Languages) v CBC/Radio-Canada*, 2012 FC 650, [2014] 1 FCR 142 [interlocutory decision].

[2] The Court, in the exercise of its discretion, is faced with two issues to determine today:

1. Should the Court issue a final judgment on enforcement and jurisdictional issues addressed in the interlocutory decision?
2. Would it be appropriate to lift the stay and resume proceedings in light of recent developments since the interlocutory decision?

[3] For the reasons that follow, the Court has decided to render final judgment on issues of enforcement and jurisdiction dealt with in the interlocutory decision. However, being of the view that it would not be appropriate, in light of recent developments since the interlocutory decision, to lift the stay and resume proceedings, the Court declares a permanent stay of proceedings.

Background

[4] The facts underlying this proceeding, commenced in 2010 by the Commissioner of Official Languages of Canada [Commissioner] under Part X of the *Official Languages Act*, RSC 1985, c 31 (4th Supp) [OLA], have already been thoroughly reviewed in the interlocutory decision. For the purposes herein, I will only review certain general elements.

[5] In 2009, the Canadian Broadcasting Corporation/Société Radio-Canada [Corporation] made substantial nationwide budget cuts. In the case at bar, Francophones in the southwestern region of Ontario, including Dr. Karim Amellal, complained to both the Commissioner and the Canadian Radio-Television and Telecommunications Commission [CRTC], about the negative impact of the reduction in local or regional content in programming at radio station CBEF 540 in Windsor [CBEF Windsor], the only French-language radio station in southwestern Ontario. But the issue does not end with CBEF Windsor. Thousands of the national public broadcaster's radio

listeners and television viewers throughout the country are asking themselves the same question: where is the Corporation headed? In particular, Official Language Minority Communities [OLMCs] feel threatened. Each new wave of cuts at the Corporation – the ones in 2009 were not the first, nor are they the last – leaves a bitter taste. To many, it is an unacceptable withdrawal on the part of a federal institution that has over the years acquired an iconic status in terms of the promotion of linguistic duality and the development of official language groups.

[6] In order to stay afloat, the Corporation needed to reduce its operating expenses following a shortfall of $171 million for the 2009-2010 fiscal year alone. The Corporation adopted a Recovery Plan which would eventually eliminate some 800 positions, including 336 employees in the French Services. Among other things, CBEF Windsor would lose seven of its ten employees and three programs that were still produced locally. The net result in southwestern Ontario: a reduction of local or regional content in programming, from approximately 36.5 hours (before the cuts) to about 5 hours per week in July 2009. This is far too little, too little for the thousands of loyal listeners who mobilized to save the local station and created the Comité SOS CBEF.

[7] When the CRTC was slow to act and the Ontario Superior Court held that it did not have jurisdiction in the matter, the Commissioner began an investigation pursuant to section 56 of the OLA. But the Commissioner came up against a wall. The Corporation refused all cooperation with him in this regard: it was of the view that is was not accountable to the Commissioner, nor did it have any language obligations under the OLA with respect to its programming activities,

which were already regulated by the CRTC. Nevertheless, in his final report, the Commissioner noted that the Corporation had not held prior consultations or conducted an impact analysis of its decision. The negative impacts of the cuts on the development of Windsor's tiny Francophone community were vigorously denounced by the Commissioner. In that case the Commissioner found that there had been a failure to comply with subsection 41(2) of the OLA, which requires that federal institutions take "positive measures" to enhance the vitality of Canada's English and French linguistic minority communities and assist their development. The Commissioner urged the Corporation to act and review its decision. The Corporation ignored his recommendations. In 2010, the Commissioner commenced this proceeding.

[8] In short, in his amended notice of application, the Commissioner asked the Court to make various declarations under section 77 of the OLA – and section 18 of the *Federal Courts Act*, SCR 1985 c F-7 [FCA], if necessary – to the effect that: the respondent is subject to the OLA, particularly Part VII; the Commissioner had jurisdiction to investigate the complaints regarding the budget cuts; the respondent failed to comply with section 41 of the OLA; it must review its decision concerning CBEF Windsor and make the necessary arrangements to compensate for the negative impact of its budget cuts on the OLMC of southwestern Ontario. For his part, Doctor Amellal, as additional relief, sought a permanent injunction forcing the respondent to return to the previous number of local and regional production hours, if it did not return to broadcasting the programs previously aired by CBEF Windsor that were cancelled following the budget cuts.

[9] In the winter of 2012, the Court agreed to hear the motion for summary dismissal of the present proceeding made by the respondent. On either side, the parties disputed the exclusivity of

jurisdiction attributed to the Commissioner and the Federal Court on one hand, and to the CRTC, on the other. Although the respondent acknowledges that its "non-programming" activities are subject to the OLA , it argues that its programming services – radio and television – are subject to the *Broadcasting Act*, SC 1991, c 11 [BA], and that under sections 3, 12, 18, 19, 23 to 25 of the BA, the CRTC has exclusive jurisdiction in those matters. For their part, the applicants object to the motion to dismiss and in turn argue that there is no conflict between the BA and the OLA, that the Commissioner has exclusive jurisdiction under section 56 of the OLA to investigate any violation of the OLA, while the Federal Court has exclusive jurisdiction under section 77 of the OLA to grant such remedy as it considers appropriate and just in the event of noncompliance with the duty set out at subsection 41(2) of the OLA.

[10] On May 29, 2012, being of the opinion that the Corporation was subject to the OLA in all of its activities and having opted for the concurrent jurisdiction model, the Court ordered an interim stay of proceedings in this case. The reasons for which the Court decided to exercise its judicial discretion in this way stem primarily from the Court's view, at that stage, that the CRTC was an appropriate forum, and that it was "in a better position than the Federal Court to determine the dispute on the merits and to grant the applicants appropriate relief, if applicable" (interlocutory decision, para 92).

[11] At paragraphs 99 to 103 of its interlocutory decision, the Court notes:

> 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 SCC 52, [2011] 3 S.C.R. 422 (*Figliola*), at paragraph 1:

> [l]itigants 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 expert 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. <u>On the other hand, it may sometimes be the case that justice demands fresh litigation.</u> [Emphasis added.]

101 Let us simply recall that 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" [page183] 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) [mod. par L.C. 2002, ch. 8, art. 46] 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.

[12] By its order dated May 29, 2012, the Court also suspended the continuation of examinations of the respondent's representatives and adjourned *sine die* the hearing on the merits of this case – which was set to begin on October 15, 2012. The Court ordered that once the CRTC made its decision regarding the applications for renewal of the Corporation's licences, it would be open to any of the parties to ask the Court to extend or put an end to the stay of proceedings, to resume examining the record or to dismiss the application, having consideration for the applicable laws and all of the legal principles applicable in this case.

[13] In the meantime, public hearings regarding the renewal of the Corporation's licences began in November 2012. Among those who actively participated were: the Commissioner, Doctor Amellal, members of the OLMC of southwestern Ontario, Francophone advocacy associations and the SOS CBEF Windsor committee. On May 28, 2013, the CRTC issued its final decision renewing the Corporation's broadcasting licences for programming services for a period of five years, from September 1, 2013, until August 31, 2018, including CBEF Windsor and its transmitters: Broadcasting Decision CRTC 2013-263 and Broadcasting Orders CRTC 2013-264 and 2013-265 [2013 CRTC decision]. There is no application for judicial review or appeal before the Federal Court of Appeal against the 2013 CRTC decision.

Respective applications for summary dismissal and for recommencement of proceedings

[14] The probationary period provided to the parties to resolve their dispute and voluntarily put an end to these proceedings has expired. In August 2013, following a case management conference, the Court invited the parties to make written submissions regarding the continuance or dismissal of proceedings, including any request for final judgment (directions,

August 12, 2013). Relevant excerpts from the CRTC file were filed with the parties' consent in September 2013 (Volumes 1 to 24). The Commissioner and the Corporation filed their respective written submissions in October, then in November 2013 (in response). A public hearing was held on June 19 and 20, 2014. On that occasion, the parties agreed to have the Report of the Standing Senate Committee on Official Languages, *CBC/Radio-Canada's Language Obligations*, tabled in April 2014 [Senate report], filed in the Court record.

[15] The Corporation is reiterating its previous objections and is asking that I, as trial judge, declare that the CRTC has exclusive jurisdiction over such matters, summarily dismiss this legal proceeding and issue any further order that the Court deems just and appropriate. This, in addition to stating that, alternatively, there is no need to hear the matter on the merits, given that the CRTC has already considered the language obligations of the national public broadcaster and prescribed the appropriate remedies in terms of both the hours of local programming on CBEF Windsor, and consultation with OLMC representatives (in the form of conditions of licence, expectations or wishes).

[16] The applicants, being rather of the opposite view that the response and prescribed remedies in the CRTC's 2013 decision do not resolve the matter or go far enough, object to the summary dismissal of the case and to a ruling by the Court declaring that the CRTC has exclusive jurisdiction. They are instead asking that the Court lift the order to stay the proceedings, allow them to resume examination of the respondent's representatives, establish a timetable for continuing the examinations and the filing of memoranda, and hold a hearing on the

merits as soon as possible on the outstanding issues, namely, those involving the breach of the OLA and appropriate remedy in the circumstances.

Should the Court issue a final judgment on enforcement and jurisdictional issues addressed in the interlocutory decision?

[17] The parties agree that issues of enforcement of the Acts (OLA and BA) and jurisdiction essentially constitute questions of law and that these have already been dealt with by the Court in the interlocutory decision. However, spurred on by the fact that the decision handed down by the Court in May 2012 was only "interlocutory", the respondent today is asking that I render final judgment concluding that the BA applies to the Corporation's broadcasting activities and that the CRTC has exclusive jurisdiction to rule on any complaint by the Commissioner or by members of an OLMC that the Corporation is not in compliance with its language obligations. The respondent is inviting me to revise my earlier reasoning in light of an argument that is concisely centered on the overall intent of Parliament and on the completeness of the 2013 CRTC decision.

[18] First, the respondent, relying on *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (Attorney General)*, [2004] 2 SCR 185, 2004 SCC 39 [*Morin*], reiterates that Parliament wanted issues regarding the regulation and oversight of the public broadcaster's program offering, to be subject to the exclusive jurisdiction of the CRTC, which would include compliance with the language obligations set out in the BA and in the OLA, in an implicit manner. In particular, paragraphs 3(1)(i) and (m), subsections 3(2) and 5(1) of the BA are cited. As for whether subparagraph 3(1)(m)(iv) of the BA incorporates the obligations found in section 41 of the OLA with regard to programming, the respondent's learned counsel suggested at the hearing that this provision showed Parliament's "concern" about OLMCs.

However, the needs of OLMCs constitute criteria that are enshrined in the BA, whereas CRTC practice is to integrate the objectives of the OLA in the implementation of its programming activities. This can be seen in the way quasi-constitutional values of the protection of minorities are reflected in the BA and the 2013 CRTC decision.

[19] Second, the respondent argues that the quasi-constitutional status of an act such as the OLA is not a factor that ought to be used to determine the choice of jurisdiction model between two different tribunals that could potentially be seized with the same matter (*Charrette v R*, [1980] 1 SCR 785). Moreover, subsection 41(2) of the OLA is not referred to at section 82, which grants precedence to certain parts of the statute. It is clear that Parliament did not wish for the Commissioner or the Federal Court to interfere, under Parts VII and X of the OLA, in areas that were already regulated by other federal authorities. Lastly, the respondent is of the view that adopting the concurrent jurisdiction model would lead to uncertainty as to the determination of the appropriate forum and risks of contradictory decisions.

[20] For his part, the Commissioner is categorical: the Court has already ruled in its interlocutory decision on enforcement and jurisdictional issues. It would therefore be contrary to the interests of justice to revisit the reasons underlying the concurrent jurisdiction model accepted by the Court in May 2012. On the contrary, the resumption of proceedings must rather serve to definitively resolve the two outstanding issues: (i) the violation of Part VII of the OLA; (ii) the remedy the Court may grant pursuant to section 77 of the OLA. In the final judgment, which will dispose of the issues related to the merits, the Court will have an opportunity to insert declarations on enforcement and jurisdictional issues.

[21] It is in the best interests of justice and of the parties to render a final judgment today on the enforcement and jurisdictional issues. The bond of trust between the Commissioner and the Corporation – federal institutions of paramount importance which are both renowned for their integrity and respected by the Canadian people as a whole – has been broken. This is regrettable. However, there is no avoiding the brutal choices that have been put to the Court by parties who have hitherto refused to budge from their positions.

[22] In its April 2014 report, the Senate Committee noted that the Court was to determine the issue in the near future (page 100) and

> [r]ight now, stakeholders do not agree on the scope of CBC/Radio-Canada's obligations under Part VII of the *Official Languages Act*. Does the Corporation's programming fall within the scope of these obligations? So far, this issue has been left to the Federal Court, which is re-examining the issue. A ruling may be handed down in the coming months. (Page 89)

[23] I am also taking into consideration the guidance provided by Justice Gauthier of the Federal Court of Appeal to the effect that the decision dated May 29, 2012, was "interlocutory" and that [TRANSLATION] "these jurisdictional issues will be subject to a final judgment when the proceeding resumes" (Federal Court of Appeal Order, 12-A-33, July 31, 2012, page 2). By the same logic, I must do so having regard to all of the representations that have been made to me until this point, which of course includes the written submissions made by the parties in the fall of 2013 and the oral submissions by counsel in June of 2014.

[24] In proceeding with this review, I took a fresh look at the record in its entirety and the case law. I will not engage in any sophistry by noting that the essential questions were posed in May

2012 in the Court's interlocutory decision. Nor do I believe that the respondent's new submissions – so many variations on an already familiar theme – seriously challenge the inherent logic of the overall reasoning found in the Court's interlocutory decision. By ordering an interim stay of proceedings, while at the same time opting for a concurrent jurisdiction model, the Court had already addressed the issues of enforcement, jurisdiction and appropriate forum. For the sake of brevity, I would suggest referring to the relevant paragraphs of the interlocutory decision. Furthermore, rather than repeat myself, it would be useful to make certain general or additional observations that would clarify the Court's earlier reasoning or that are directly related to assertions and arguments reprised by both parties in their new submissions.

CBC/Radio-Canada and official language minorities

[25] I will begin by making a rather general observation: the State is at the service of the populace and its institutions are nothing if they cannot connect with the various communities that make up the nation's social fabric. The Corporation is not an ordinary federal institution: the national public broadcaster has an obligation to broadcast radio and television programming across the country and in both official languages. This amazing potential for discourse makes it a formidable national vehicle for communication and information.

[26] Having said that, the Corporation is not an organization that exists to serve government; it exists exclusively to serve Canadians. Its unique place is due to the fact that under Canada's broadcasting policy, the Corporation's role is to inform and entertain, often in areas where private broadcasters would not dare to venture. In that regard, public policy dictates that that the regulation of the Corporation's broadcasting activities, under the BA, falls within the CRTC's

jurisdiction. But is that sufficient to exempt from the enforcement of the OLA a federal institution whose continued existence in the radio and television landscape is largely dependent on its ability to respond to the specific needs of the two principal linguistic communities it serves in each region of the country?

[27] How do we reassure Canadians, not only by the Canadian government's discourse and the assurances of the Corporation's management, but in actual fact, on the ground, far from the major production centres, that the public broadcaster offers – and above all will have the financial means to continue to offer – radio and television programming that reflects its language obligations, while responding to the vital needs of OLMCs, who should be able to recognize themselves in the programs broadcast across the country? How do we reconcile the Corporation's statutory language obligations as a federal institution and national public broadcaster, with its mandate and the financial and operational choices it is called upon to make, when year after year – since at least 1973, while costs have increased everywhere – it sees its budget continue to melt away?

[28] If we set aside the revenue the Corporation can take in from television advertising, the quality of its radio and television programming depends largely on the yearly appropriations of funds by Parliament. This is because in practice, under the financial provisions of the BA, the Corporation has to submit its corporate plan, including capital and operating budgets, to the Minister of Canadian Heritage and Official Languages. In principle, this form of government paternalism should not diminish the autonomy enjoyed by the Corporation with regard to its programming. However, from a practical perspective, this fails to take into account the

extraordinary power and influence conferred upon the government by its control over the Corporation's finances. After all, it falls upon the Minister of Finance and even the President of the Treasury Board and Minister of Canadian Heritage and Official Languages, to justify before Parliament, any increase or reduction in appropriations to the Corporation. One may even wonder as to whether the proceeding commenced by the Commissioner has been directed at the party that is truly responsible for the loss of quality programming as a result of budget cuts that has been decried by several stakeholders during the CRTC hearings.

[29] As we are all aware, the logic of accounting is implacable. If cuts to programming budgets are required, it is those devoted to internal productions, where labour costs are high, that will be first to be cut, especially if cheaper alternatives can be found. In television, one can broadcast purchased programming, and on radio, one can always just broadcast the same network programs produced in the major production centres on all regional stations. Yet it has always been a point of pride for the Corporation that it was able to produce its own programs not only in the major production centres, but also in the regions where OLMCs live.

[30] Since it was created in 1936, modelled on the BBC [British Broadcasting Corporation], the Corporation has become a national symbol and standard bearer for Canada's linguistic duality and equality of status of both languages throughout the country. In May 2013, the CRTC, when renewing the Corporation's licences, used the opportunity to note that the national public broadcaster: "… plays an important role in the lives of Canadians [and] [a]s a national public broadcaster, the CBC should be a pan-Canadian service that reflects and serves the needs of all Canadians in both official languages regardless of where they live" (para 15). In its April 2014

report, the Senate Committee emphasized that "[w]itnesses were unanimous in recognizing that CBC/Radio-Canada plays a key role in enhancing the vitality of (OLMCs)" (page 19). In addition, in its 2009 Report to the Governor in Council on English- and French-language broadcasting services in English and French linguistic minority communities in Canada, the CRTC concluded that "it is important that the CBC have the means to continue serving these communities" and encouraged the Canadian government "to consider solutions that would enable it to provide the best possible service to official-language minority communities".

[31] In the Office of the Commissioner of Official Languages 2010-2011Report on Plans and Priorities, Commissioner Graham Fraser stated that "[a]s an officer of Parliament, I provide parliamentarians with unbiased advice based on objective and factual information to help them fulfill one of their important roles—that of holding the federal government accountable for its stewardship of the equal status of English and French in Canada", while reaffirming that "the Office of the Commissioner of Official Languages must maintain its independence to be able to provide unbiased advice and information to Parliament". The composite aspect of broadcasting activities should not cause us to lose sight of the national public broadcaster's raison d'être and its indissociable linguistic component. The national public broadcaster's language obligations, in particular with respect to OLMCs, constitute a fundamental issue for Canada and for the survival of the federation. The Commissioner may rightly pose the question: Do the lack of appropriations from Parliament and budget cuts prevent the Corporation from fully carrying out its original mandate and fulfilling its statutory language obligations?

[32] In keeping with the line of reasoning used in my interlocutory decision, I reject any assertion by the respondent to the effect that the regulator of broadcasting undertakings exercises exclusive control over the content of programming produced or broadcast by the national public broadcaster. That is to confuse the medium with the message. What we have, organically speaking, is the same fractal object whose essence remains unalterable. Because, whether it is radio or television programming, we are still referring to a service that is linguistic in nature. The listener or viewer can only decipher what he or she hears on the radio, or hears and sees on television, if the broadcasting service (the medium) is provided to them in a language they themselves can speak or understand. But there is more. Language has a strong identity aspect to it, which is intimately connected to the place in which it is spoken – country, province, region, city or village – as much as vocabulary, the way we express ourselves, our various accents are infinitely variable from one place to another, a language may find itself in competition with another language. Such is the case with Canada's two official languages: French competes with English (in Quebec) and English competes with French (in the other provinces). The Corporation maintains that it complies with the LLO in its off-air communications with the public, but it claims to be exempt from the obligations of the OLA, in particular those under Part VII, in its broadcasting services. I firmly believe that this obstinate quest to create, at all costs, a scission between "broadcaster" and "institution" is misguided and wrong from the point of view of enforcing a constitutional, quasi-constitutional or statutory linguistic obligation. This is especially true when the language programming service is broadcast nationally and regionally by a public institution which is funded in large part by all Canadian taxpayers and which is regarded as a paragon of political rectitude.

Obligation to take positive measures to support Anglophone and Francophone minorities

[33] In the final judgment that follows, the Court declares that the Corporation is subject to the OLA, in particular Part VII (sections 41 to 45). It has an obligation to take positive measures to enhance the vitality and support and assist the development of OLMCs under Part VII of the OLA, specifically 41, which imposes an obligation to act in a manner that does not hinder the development and vitality of Canada's Anglophone and Francophone minorities.

[34] Respect for minorities is an unwritten constitutional principle: *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 79-82; *Vriend v Alberta*, [1998] 1 SCR 493 at para 176; *Lalonde v Ontario (Commission de restructuration des services de santé)*, 56 OR (3d) 505 at paras 111-125 [*Lalonde*]. This explicit legal recognition by the Supreme Court of Canada goes far beyond any sort of apophatic discourse offering only a faint and glimmering hope to the country's Anglophone and Francophone minorities. We are speaking here of an indispensable constitutional principle, itself the creator of positive obligations. And, as independent branches of government tasked with upholding the Constitution, the courts are in the best position to ensure that language obligations are respected. Moreover, so is the Federal Court, when a proceeding is commenced under Part X of the OLA.

[35] As the Supreme Court clearly stated in *Reference re Secession of Quebec*:

> 80 … We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order. This principle is clearly reflected in the *Charter* provisions for the protection of minority rights. See, e.g., le *Reference re Public Schools Act (Man.), art. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, and *Mahe v. Alberta*, [1990] 1 S.C.R. 342.
>
> 81 The concern of our courts and governments to protect minorities has been prominent in recent years, particularly

> following the enactment of the *Charter*. Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation: *Senate Reference*, *supra*, at p. 71. Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without success. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.

[36] In *R v Beaulac*, [1999] 1 RCS 768 at para 25 [*Beaulac*], the Supreme Court further states that "[l]anguage rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada". More recently, the Supreme Court reaffirmed, in *Reference re Senate Reform*, 2014 SCC 32 at para 25, that "… constitutional interpretation must be informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism and the rule of law". [Emphasis added.]

[37] In this regard, the Supreme Court highlighted the importance in our legal system of the OLA, which "is not an ordinary statute" (*Beaulac* at para 21). Part VII is entitled "Advancement of English and French". The provisions in Part VII are therefore geared towards long-term objectives whose achievement is dependent on political will. It cannot be otherwise and, as long as these provisions are not repealed by Parliament, the government must respect the commitment set out at section 41 of the OLA. Because, in a singular manner, Part VII of the OLA expresses the will of Parliament to place the federal apparatus at the service of a larger societal project that

will encompass and surpass it, namely, the advent of a Canada that fully recognizes the equality of English and French, and in which official language minorities flourish. Bringing such an ambitious project to fruition will require a comprehensive, coordinated and a necessarily polycentric approach, as explained below.

[38] Under subsection 41(1) of the OLA, "[t]he government of Canada is committed to enhancing the vitality of the English and French linguistic minorities in Canada and supporting and assisting their development; and fostering the full recognition and use of both English and French in Canadian society" (government's commitment). In the French version, Parliament uses the verb "*s'engage*". It is therefore through the government's commitment that one must understand the correlative obligation placed on federal institutions subject to the OLA. This of course includes the Corporation, which is not above the law, and which has not convinced me in this case that there exists any conflict between the BA and the OLA.

[39] In its interlocutory decision, the Court emphasized that "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 1968 statute (SC 1967-68, c 25) and the new 1991statute" (para 57). For this reason, "[t]oday, 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" (para 57). Thus, the Court observed that "[t]here 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" (para 58).

[40] In any event, with regard to the Corporation's specific linguistic obligations, the OLA takes precedence over the BA and any decision or order of the CRTC. To be even clearer, the obligation to take positive measures and not to hinder the development of linguistic minorities is not rescinded by the BA. According to the new subsection 41(2) of the OLA, added in 2005, "[e]very federal institution has the duty to ensure that positive measures are taken for the implementation of the commitments [duty of federal institutions]…while respecting the jurisdiction and powers of the provinces". In the French iteration, the term "*il incombe aux*" is used to convey the same idea. This wording is more restrictive than that employed at subsection 41(1). According to the Federal Court of Appeal's reasoning in *Forum des maires de la Péninsule acadienne v Canada (Canadian Food Inspection Agency)***,** 2004 FCA 263, [2004] 4 FCR 276 [*Forum des maires*], subsection 41(2) imposes a "legal obligation" on federal institutions, which is enforceable by the courts. This is also a positive legal duty of the Corporation as a "federal institution".

[41] That said, the expression "positive measures" is not defined in the OLA. The choice of which positive measures would be best to carry out the government's commitment is, in principle, left up to each institution, subject, of course, to applicable regulations and to any powers of supervision or coordination that the Minister of Canadian Heritage and Official Languages and the President of the Treasury Board may have over the matter. The cutbacks decreed by the Corporation in 2009 gave rise to a fierce debate among Canadians and

Parliamentarians. And that was just the beginning; other, more significant cuts were announced by the Corporation when this proceeding was commenced in 2010. The debate about reductions to the Corporation's budget and cuts to regional service extended beyond the hearing rooms. One would be quite correct to characterize the whole affair as "political". Is it any surprise that, at about the same time, the Standing Senate Committee on Official Languages was studying the national public broadcaster's linguistic obligations?

[42] Maintaining the equality of English and French, as well as the development of linguistic communities, are products of the will of a courageous Parliament which had the wherewithal, when it enacted the OLA and the amendments in 2005, to rise above partisan strategies or electoral consideration. There were howls of protest from the Commissioner when he saw the Corporation being stretched further by cuts to radio in the regions this federal institution was originally designed to serve. No one is above the law; it goes without saying that this includes any agent of the Crown. Moreover, the Senate Committee stated that it "wishes to remind the Corporation that it has obligations under Part VII of the *Official Languages Act* to enhance the vitality of official-language minority communities" (page 88). This is a categorical, non-negotiable imperative, and as such would thwart any initiative that was not reasonably justifiable and that would adversely affect an obligation or right under the OLA.

[43] At the risk of repeating myself, it is clear that the Corporation has positive obligations under Part VII of the OLA with regard to broadcasting and programming activities that arise, in particular, from the principle of respect for and protection of minority language rights. Although the respondent argues that the quasi-constitutional character of the OLA does not apply to Part

VII, the protection of minorities is, in and of itself, and unwritten or quasi-constitutional principle that does not arise solely from the OLA. As the Supreme Court noted in *Lavigne v Canada (Office of the Commissioner of Official Languages)*, [2002] 2 SCR 773 [*Lavigne*], the OLA and the *Privacy Act*, RSC 1985, c P-21, "are closely linked to the values and rights set out in the Constitution, and this explains their quasi-constitutional status that this Court has recognized them as having" (para 25).

[44] According to the respondent, these obligations are embedded in the BA itself, and because Parliament conferred upon the CRTC the regulatory authority to monitor all aspects of the broadcasting systems, the CRTC must be recognized as having exclusive jurisdiction. Such reasoning is sophistry: the fact that the BA is compatible with the Constitution, the OLA and the constitutional principle of protecting minorities does not confer upon the CRTC exclusive jurisdiction with respect to the regulation of the Corporation's linguistic obligations under the Act. As a result of the potential for jurisdictional overlapping arising from the OLA and the BA, the best way to reconcile linguistic issues with the Corporation's broadcasting activities would be to adopt the concurrent jurisdiction model proposed in this Court's interlocutory decision. Therefore, issues with respect to the protection of OLMCs must be able to be examined and determined independently of any regulatory mandate Parliament may have conferred upon a specialized body such as the CRTC.

Concurrent jurisdiction model

[45] In the final judgment that follows, the Court declares that the Commissioner has jurisdiction to investigate complaints filed against the Corporation under the OLA, specifically

Part VII, and in particular with regard to the adverse impacts on the OLMC of Southwestern Ontario that potentially resulted from the Corporation's decision in 2009 to proceed with substantial budget cuts aimed specifically at CBEF Windsor.

[46] The respondent is asking the Court to re-examine the issue of jurisdiction in light of the *Morin* case. It is apparent from the evidence that the Court already took that decision into account in its interlocutory decision. Specifically, it considered the nature of the dispute and the intent of Parliament, bearing in mind the following principle: "[d]epending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction or themselves be endowed with exclusive jurisdiction" (quoting *Morin* at para 11). With respect to the first step in *Morin*, I concur with the respondent that subsections 5(1) and 3(2) of the BA emphasize that the broadcasting system is "unique" and that Parliament conferred upon the CRTC the power to regulate and monitor all aspects of that system. But unlike the Quebec Charter, which was analyzed by the Supreme Court of Canada in *Morin*, the BA does not expressly exclude the jurisdiction of the Commissioner or the Federal Court under the OLA, nor that of other federal agencies whose jurisdiction may overlap with that of the CRTC.

[47] To wit, there are other instances in which the CRTC shares jurisdiction with that of another federal body. Thus, in cases where there has been a merger or change in control of a telecommunications and broadcasting undertaking, two bodies have jurisdiction under their respective statutes: the CRTC and the Competition Bureau [Bureau]. How to resolve potential conflicts? Well, in a 2001 Bulletin, "CRTC/Competition Bureau Interface", this is explained as follows:

> Under the *Telecommunications Act*, prior approval of telecommunications mergers is not required. However, the CRTC has a specific responsibility under the *Telecommunications Act* for ensuring compliance with foreign ownership and control rules and has broad regulatory authority over the Canadian telecommunications system, Under the *Competition Act*, all mergers are subject to review and those which exceed prescribed economic thresholds must be formally prenotified to the Bureau.
>
> Under the *Broadcasting Act*, prior approval of the Commission is required for changes of control or ownership of licensed undertakings. Whereas the Bureau's examination of mergers relates exclusively to competitive effects, the Commission's consideration involves a broader set of objectives under the *Act*. This may encompass consideration of competition issues in order to further the objectives of the *Act*. The Bureau's concern in radio and television broadcast markets relates primarily to the impact on advertising markets and, with respect to broadcast distribution undertakings, to the choices and prices available to consumers. The Commission's concerns include those of the Bureau except that its considerations of advertising markets relates to the broadcasters' ability to fulfill the objectives of the *Act*.

[48] Thus, the Bureau described the two organizations as having "complementary roles": there is parallel jurisdiction and any transaction must comply with the legislation administered by both organizations. Furthermore, the Court's interlocutory decision also identified a number of other instances where the Federal Court and other federal tribunals dealt with issues and ordered remedies with respect to broadcasting. For example, the Court referred to *Vlug v Canadian Broadcasting Corp.*, in which the Canadian Human Rights Tribunal stated that the CBC infringed the rights of a man who is deaf in the application of the *Canadian Human Rights Act* and ordered the CBC's English language network and Newsworld to caption all of their television programming (2000 CanLII 5591 (CHRT) at para 152, 38 CHRR 404, discussed by the Court in its interlocutory decision, para 46).

[49] The Court also mentioned *Quigley v Canada (House of Commons)*, [2003] 1 FC 132, 2002 FCT 645, decided under Part X of the OLA, where the applicant was a subscriber to Rogers Cable in New Brunswick and filed a complaint with the Commissioner that the Cable Public Affairs Channel was broadcasting the House of Commons debates in their original version only. The applicant spoke only English, so he could not understand the parts spoken in French. In that case, the Attorney General of Canada contended that the implementation of any order should be left to the CRTC which is a specialized and independent agency and is best positioned to consider complex technological, economic and cultural policy issues. However, the Federal Court stated that the method used by the House of Commons and its Board of Internal Economy for providing television broadcasts of parliamentary proceedings contravened section 25 of the OLA and ordered them to take the necessary steps to comply with that provision.

[50] Regarding the second step in *Morin*, the nature of the dispute in this case – considered in its factual context and viewed in its essential character and not formalistically – indicates that the CRTC does not have exclusive jurisdiction (*Morin* at para 20). The main area of contention in the dispute is the fact that the Corporation changed the programming affecting OLMCs and the decision-making process used by the CBC in response to the budget cuts. In *Quebec (Attorney General) v Quebec (Human Rights Tribunal)*, [2004] 2 SCR 223, 2004 SCC 40, Chief Justice McLachlin, dissenting in the result, stated that "[w]here legislation confers exclusive jurisdiction, one must go on to determine its scope. 'Exclusive over what?' remains the question" (para 11). In this case, the subject of the CRTC's exclusivity does not involve the protection of linguistic rights. That expertise and the role of guardian is vested in the Commissioner. Even though the respondent identified the means by which the CRTC takes official language obligations into

account, the primary function of the CRTC is not to interpret quasi-constitutional rights, including the protection of minorities.

[51] Instead, Parliament created another authority with jurisdiction to investigate complaints made with respect to the actions of federal institutions that fail to comply with their obligations pursuant to the OLA. The Supreme Court noted the following in *Lavigne* at para 35:

> . . . the Commissioner of Official Languages plays an important role. It is his job to take the measures that are necessary in respect of the recognition of each of the two official languages, and to secure compliance with the spirit of the *Official Languages Act*, in particular in the administration of the affairs of federal institutions. It is therefore the Commissioner who has been given the mandate to ensure that the objectives of that Act are implemented. To allow him to fulfil a social mission of such broad scope, he has been vested with broad powers by the Parliament of Canada. For instance, he may conduct investigations into complaints that in any particular case the status of an official language was not recognized, or any provision of an Act of Parliament or regulation relating to the status or use of the two official languages, or the spirit or intent of the *Official Languages Act*, was not complied with . . .

[52] The Commissioner's power is mainly political. For example, the Federal Court of Appeal stated the following in *Forum des maires* at para 16:

> The Commissioner, it is important to keep in mind, is not a tribunal. She does not, strictly speaking, render a decision; she receives complaints, she conducts an inquiry, and she makes a report that she may accompany with recommendations (subsections 63(1), (3)). If the federal institution in question does not implement the report or the recommendations, the Commissioner may lodge a complaint with the Governor in Council (subsection 65(1)) and, if the latter does not take action either, the Commissioner may lodge a complaint with Parliament (subsection 65(3)). The remedy, at that level, is political.

[53] In respect of language matters, the Commissioner is a necessary interlocutor, and it is on the basis of his investigations and robust interventions, when the obligations or principles of the OLA are disregarded by the government or a federal institution, that there is meaningful "dialogue". The pre-eminence of the executive branch, including any Department or Crown Corporation, does not prevent the Commissioner, as an officer of Parliament, from asking any relevant questions. That is what Parliament and, consequently, Canadians, for whom the Commissioner speaks, want. The Commissioner's roles as an ombudsman, auditor, watchdog and reporter enable him to provide Parliament with the necessary information to promote maintaining and enhancing OLMCs in Canada. For the benefit of Canadians, the Commissioner acts as a guide for Parliament and the executive branch, ensuring that they keep their promises and political commitments regarding the two official languages and the protection of the rights of linguistic minorities.

[54] Under sections 61 and 62 of the OLA, the Commissioner has been given wide-ranging investigative powers. It appears that the respondent refused to cooperate with the investigation validly conducted under the provisions of the OLA following the 2009 budget cuts and refused to respond to the Commissioner's legitimate questions regarding the decision-making process and the impact of the decision on OLMCs. I stated the following earlier: the Constitution, the OLA and the constitutional principle of the protection of minorities do not tolerate an officer of Her Majesty claiming any immunity. The Commissioner's independence from the executive branch is necessary to ensure that federal institutions respect their obligations vis-à-vis minorities.

[55] The CRTC has not taken over for the Commissioner in terms of overseeing the language obligations of the national public broadcaster. The CRTC's authority over it relates exclusively to its broadcasting activities. And there is a certain logic in that vision of complementary mandates. Given that the Commissioner is an officer of Parliament, who reports his activities directly to Parliament, he is independent from the government. As noted by the Supreme Court in *Lavigne*, and as also cited by the Federal Court of Appeal in *Forum des maires*, "[i]n many significant respects, the mandates of the Commissioner . . . are in the same nature of an ombudsman's role", including the fact that the Commissioner is independent of government's administrative institutions, that he examines complaints made by individuals against the government's administrative institutions and conducts impartial investigations and attempts to improve the level of compliance by government institutions with the laws (*Lavigne* at para 37 and *Forum des maires* at para 21). The CRTC does not enjoy the same independence as the Commissioner. For example, the Governor in Council may, by order, issue to the CRTC directions of general application (sections 7 and 8 of the BA). Where the CRTC makes a decision to issue, amend or renew a licence, the Governor in Council may, even on the Governor in Council's own motion, set aside the decision or refer the decision for reconsideration if the Governor in Council is satisfied that the decision derogates from the attainment of the objectives of the broadcasting policy set out in subsection 3(1) (section 28 of the BA).

[56] Simply put, in reiterating the principles stated by the Supreme Court in the present case, the existence of a specific regulatory framework under the BA is not sufficient to prevent the enforcement of the OLA, or the general control exercised by the Commissioner and the Federal Court over compliance with language obligations under the OLA or the Constitution. This raises

the following question: what is the Federal Court doing and what can it do in this political discourse?

Justiciability of the political issues and particularities of the proceedings before the Federal Court

[57] As a general rule, an issue is non-justiciable if it involves "moral and political considerations which it is not within the province of the courts to assess" (*Operation Dismantle Inc v The Queen*, [1985] 1 SCR 441 at page 465 [*Operation Dismantle*]). In short, the issue is whether the question before a tribunal "is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch" (*Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at para 26; *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49).

[58] The doctrine of justiciability was extended in administrative law to quasi-statutory acts emanating from the executive branch itself, be it regulations or even government policies or programs. Because those actions result mainly from delegated powers, the intervention of the courts is warranted when the government oversteps its delegated authority: "[i]f that body has failed to observe a condition precedent to the exercise of that power, the court can declare that such purported exercise is a nullity" (*Attorney General of Canada v Inuit Tapirisat of Canada*, [1980] 2 SCR 735 at page 748). However, the courts are not required to comment on the lawfulness of a purely political decision or a quasi-statutory act. This is especially true in the case of a Crown Corporation's decision to make budget cuts. At least in principle. Are there any exceptions?

[59] The first exception that comes to mind is when the Charter is invoked. The following was reiterated by Madam Justice Deschamps in *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791 at para 89 [Chaoulli]: "The courts have a duty to rise above political debate. They leave it to the legislatures to develop social policy. But when such social policies infringe rights that are protected by the charters, the courts cannot shy away from considering them. The judicial branch plays a role that is not played by the legislative branch." Furthermore, Chief Justice McLachlin and Justice Major noted the following in the same decision at paragraph 107: "The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for Charter compliance when citizens challenge it."

[60] Waiting in the wings, the courts are always there to intervene when political decisions lead to the denial of constitutional or quasi-constitutional rights. The decision in *Lalonde* is highly relevant. In that decision, the Court of Appeal for Ontario unanimously upheld the trial judge's decision to set aside the directions by the Health Services Restructuring Commission ordering the Montfort Hospital in Ottawa, the only hospital in Ontario in which the working language is French and where services in French are available at all times, to reduce its health care services.

[61] In *Lalonde*, the Court noted that the appeal " . . . calls for careful consideration of the appropriate weight, value and effect to be accorded to the respect for and protection of minorities as one of the fundamental principles of our Constitution." (para 115). It stated the following, in particular:

> 112 The protection of linguistic minorities is essential to our country. Dickson J. captured the spirit of the place of language rights in the Constitution in *Société des Acadiens, supra,* at p. 564 S.C.R.: "Linguistics duality has been a longstanding concern in our nation. Canada is a country with both French and English solidly embedded in its history." As stated by La Forest J. in *R. v. Mercure*, [1988] 1 S.C.R. 234 at 269, "rights regarding the English and French languages…are basic to the continued viability of the nation."
>
> 113 As we have already mentioned, the *Charter* enhanced language rights. The entrenched guarantee of equality in s. 15 and the provisions requiring the respect and protection of aboriginal rights enhanced the protection of the rights of other minorities and the right to be free from discrimination. As the Supreme Court of Canada explained in the *Secession Reference* at p. 269, "There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights."
>
> 114 The principle of respect for and protection of minorities is a fundamental structural feature of the Canadian Constitution that both explains and transcends the minority rights that are specifically guaranteed in the constitutional text. This is an area where, as the Supreme Court of Canada explained in the *Secession Reference* at p. 292, "[a] superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading." This structural feature of the Constitution is reflected not only in the specific guarantees in favour of minorities. It infuses the entire text and, as we have explained, plays a vital role in shaping the content and contours of the Constitution's other structural features: federalism, constitutionalism and the rule of law, and democracy.

[62] The Montfort Hospital judgment, while reaffirming the supervisory power of the superior courts with respect to the lawfulness of decisions made by public bodies, makes the positive obligation to reconcile any specialized statutory mandate with the protection of minority language rights essential. Clearly, "[t]he unwritten principles of the Constitution do have normative force" and " . . . the principle of respect for and protection of minority language rights is a useful tool not only in interpreting the [French Languages Services Act] but in assessing the

validity of the Commission's directions in light of that legislation. Government action as well as government legislation is to be considered in light of constitutional principles, including the unwritten constitutional principles." (Paras 116 and 130) Therefore, in *Lalonde*, the principle of respect for and protection of minority language rights was translated into a positive obligation to reconcile the Health Services Restructuring Commission's mandate with the obligations imposed by the French Languages Services Act, including to demonstrate that the removal of medical services that are provided in French is "reasonable and necessary".

[63] Another exception to the non-justiciability of political issues is when Parliament itself demonstrated intent for certain actions by the government or a federal institution to be examined by an independent third party. Consider the administrative review of a political decision giving the green light to an environmental project. Moreover, the courts were able to add constraints, with respect to consultation, that do not exist in the legislation. That is the case with certain projects affecting the First Nations. The same is true for an evaluation by an independent body – the Commissioner – of positive measures by a federal institution in a language matter; it is an independent evaluation specifically intended by Parliament, which adopted the OLA. We would like to make it clear here: the Corporation's decisions are not reviewable under section 18 of the FCA. However, with respect to a right or obligation set out in the OLA (including Part VII), nothing prevents its lawfulness (or legitimacy) from otherwise being examined by the Commissioner under section 56 of the OLA, and, if need be, by the Federal Court under section 77 of the OLA.

[64] That said, the nature of the proceeding set out in Part X of the OLA is unique. As reiterated by Justice Décary of the Federal Court of Appeal in *Forum des maires*, to ensure that the OLA "has some teeth, that the rights or obligations it recognizes or imposes do not remain dead letters, and that the members of the official language minorities are not condemned to unceasing battles with no guarantees at the political level alone", Parliament has created a "remedy" in the Federal Court (the Court) that the Commissioner himself (section 78) or the complainant (section 77) may use. That is the legislative foundation that legitimizes the intervention of the Federal Court in an area where administrative discretion and political action prevail.

[65] Nonetheless, the language in subsection 77(1) is clear and explicit: only those complaints in respect of "a right or duty under" the sections or parts of the OLA that are specifically stated in that provision could be the subject matter of the remedy before the court. In *Forum des maires* at para 25, it is noted that the list in subsection 77(1) is "completely compatible with Parliament's intention, clearly expressed elsewhere in the Act, to ensure that not every section or every part of the Act should enjoy the same status or the same protection in the courts." Moreover, Justice Décary reiterated the following in *Forum des maires* at paragraph 27: "This asymmetry of the Act is easily explained when we note that it deals not only with policies and commitments but also with rights and duties." He also specified the following later on in that same paragraph: "So Parliament has spoken with great care, so as to ensure that only those disputes in respect of particular rights or duties may be taken before the Court. This prudence is especially warranted in that the remedial authority conferred by subsection 77(4) is exceptional in scope and it is readily understandable that Parliament did not intend to give the courts the

power to interfere in the area of policies and commitments that is not usually within their jurisdiction."

[66] The justiciability of certain political issues is therefore an evil integrated into the defence of democracy, and even the protection of the rights of linguistic minorities. The Federal Court exercises statutory jurisdiction in this area. However, it does not necessarily do so on the front lines because the Commissioner is the one who receives and investigates complaints made pursuant to the OLA. While the CRTC is the preferred forum for broadcasting issues under the BA, the Commissioner is the preferred forum for all issues relating to the application of the OLA.

[67] All automatism must also be rejected in the exercise of the Federal Court's jurisdiction. A remedy under Part X is not an ordinary action. Public interest is at issue. The Commissioner has already investigated. Also, it should not be thought that the remedy set out in Part X of the OLA, which was expanded in 2005 to include Part VII, allows the court dealing with a complaint made validly under section 77 or section 78 to once again enter into the political arena in any way and to assume political power by dictating to the government and federal institutions which programs to establish under section 41 of the OLA. It is the sole responsibility of the judicial branch to circumscribe its jurisdiction in a manner that is compatible with the spirit and purpose of the law. Does that leave room for some judicial discretion to stay its proceedings or to refuse to exercise its jurisdiction when it believes that another organization is better placed to resolve the issue?

[68] I believe so. A court of justice always has discretion to control its proceedings. It all depends on the particular facts of each case. A fair distance seems appropriate here for the following reasons.

Application of the doctrine of* forum conveniens *and stay of proceedings

[69] In the interlocutory decision of May 2012, the Court favoured the "concurrent jurisdiction model". In such situations, by analogy, the doctrine of *forum (non) conveniens* may be useful for preventing the risk of conflicting decisions. Excessive court proceedings regarding the remedy set out in Part X of the OLA can only reinforce the impression of degeneration that may be left from non compliance with the division of powers principle. That explains the extreme prudence of the Court, in May 2012, in deciding to stay the proceedings so that the process to renew the Corporation's broadcasting licences could be fully exercised.

[70] While the OLA constitutes a law of general application, the BA specifically targets the broadcasting industry because of its cultural, social and economic importance. More specifically, section 3 of the BA, which is entitled "Broadcasting Policy for Canada", lists the general principles and the cultural, social and economic objectives in respect of broadcasting. It is not necessary, for the moment, to discuss this further. Note only that Parliament sees in the Canadian broadcasting system, comprising public, private and community elements, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty (paragraph 3(1)(b) and subparagraph 3(1)(d)(i) BA). Also, Parliament considers that "the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent

public authority" (subsection 3(2) BA), in this case, the CRTC. In that respect, the CRTC "shall regulate and supervise all aspects of the Canadian broadcasting system", "[s]ubject to [the BA] and the *Radiocommunication Act* and to any directions to the Commission issued by the Governor in Council" (subsection 5(1) BA).

[71] The issuance of a broadcasting licence has always been considered the exercise of a quasi-statutory, if not executive, power of the government, a power delegated here to a regulatory agency. The CRTC's primary function is eminently "political" and it is certainly in a better position than the Federal Court to assess the quality of the means by which the national public broadcaster carries out its mandate. Incidentally, the CRTC may be called upon to decide questions of law, and even though the BA is a complete code, the CRTC has the duty to consider the application of the Constitution, the OLA and the constitutional principle of the protection of linguistic minorities. In the 2013 CRTC decision, there is no direct reference to the Charter, the OLA or the principle of the protection of linguistic minorities. That suggests to the Commissioner that the Federal Court should lift the provisional stay ordered in May 2012. The issue will be discussed further later.

[72] As previously noted, I see no existing conflict between the BA and the OLA. It does not preclude, from a legal and political point of view, the CRTC from considering, in practice, the objectives of section 41 of the OLA when it renders a decision that could impact an OLMC. In particular, on March 30, 2009, the CRTC published the *Report to the Governor in Council on English- and French-language broadcasting services in English and French linguistic minority communities in Canada*, and stated the following:

> . . . several parties emphasized the need to apply the *Official Languages Act* when considering applications to operate radio stations. For example, the Commissioner of Official Languages recommended that the Commission assess the impact of its decisions on official-language minority communities prior to making a decision. In this respect, it is Commission practice to integrate the objectives of section 41 of the *Official Languages Act* in the carrying out of its activities. It takes into account its obligations under this section by ensuring that it considers the needs of official-language minority communities when holding hearings, developing policies and making decisions, as well as the other factors it must consider. [Emphasis added]

[73] Namely, the report in question states the following:

> The Commission agrees with the proposal by the Commissioner of Official Languages that it adopt an analysis of the impact of its decision on [OLMCs] as part of its decision making process. The Commission intends to systematize its practice to demonstrate that it is fulfilling its obligations and that it has considered all factors in its decisions.

[74] The intention expressed by the CRTC to integrate the objectives of section 41 of the OLA in the carrying out the activities of the public broadcaster is extremely laudable. Certainly, the CRTC is the forum favoured by Parliament to resolve broadcasting issues, but making the CRTC the exclusive arbitrator on the issue of respect for the rights of OLMCs is a step that I am not ready to take today, and neither is the Commissioner, who is well aware of the complexity of the language issues and who intends to ensure that the Corporation will cooperate in his investigations in the future. And, one must be careful not to trivialize the importance of the Corporation's language obligations and the debate on that issue, which shifted to the CRTC since the Court's interlocutory decision.

[75] The expertise enjoyed by the Commissioner in this regard is very important. Furthermore, in parallel to the proceeding before the Federal Court, nothing prevented the Commissioner, as an agency that specializes in language issues, from denouncing the 2009 cuts and informing the CRTC of his opposition to the Corporation's renewal applications if he believed that the language obligations, the spirit and objectives of the OLA, the protection of minorities principle, the government's commitment and the correlative obligation of section 41 of the OLA, and the legitimate expectations of the OLMCs were not sufficiently taken into account.

[76] In the final judgment that follows, the Court declares that even if it has jurisdiction in the strict sense under section 77 of the OLA, according to the concurrent jurisdiction model, to hear and rule on this proceeding brought in 2010, the CRTC is, pursuant to the BA, the preferred forum for discussing the impact of the budget cuts on programming, ruling on the issue of the decrease in regional or local programming broadcast by CBEF Windsor, forcing the resumed broadcasting of the programs cancelled by the Corporation, prescribing a minimum threshold for local or regional production hours and prescribing any other appropriate remedy in the circumstances, including imposing any consultation and reporting requirements with respect to decisions and measures that could affect OLMCs.

Is it appropriate to lift the stay and resume the proceedings in light of the recent developments since the interlocutory decision?

[77] Alternatively, the respondent is asking me to not allow the applicants to pursue the proceedings brought in 2010, given that the 2013 CRTC decision is determinative and determined the dispute, which is obviously contested by the applicants, who would like the stay ordered by the Court in May 2012 to be lifted.

[78] In its interlocutory decision, the Court temporarily stayed the proceedings in order to allow the CRTC to decide the issue of the decrease in regional or local programming broadcast by CBEF Windsor before determining whether it was appropriate to either dismiss the application or further examine the issues raised on the merits (para 52). Once the CRTC rendered its decision, the 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)" (para 105).

[79] Therefore, according to the interlocutory decision, "[f]ull 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" (para 56). 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 (para 74). Furthermore, the Court noted that both parties may have a legitimate expectation to be heard and a legitimate expectation that the CRTC will conduct an analysis of the impact of those decisions on the OLMC of southwestern Ontario during the licence renewal process (para 95). However, the Court stated that "[i]t 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." (para 56).

[80] Today, the applicants are seeking to have the Court exercise its discretion in a way that orders the recommencement of the proceedings that were stayed pending the outcome of the CRTC decision. In summary, they are claiming the following: (i) the CRTC did not appropriately dispose of the merits of the dispute; (ii) this proceeding is not moot following the CRTC's decision; and (iii) the summary dismissal of an application under section 77 of the OLA is an exceptional and extraordinary measure. In this respect, the Commissioner argues that this proceeding does not constitute an institutional detour "to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route": *British Columbia (Workers' Compensation Board) v Figliola*, [2011] 3 SCR 422 at para 28, 2011 SCC 52 [*Figliola*].

[81] Regarding the purpose of the proceeding, the Commissioner is of the opinion that the CRTC considered the issue of CBEF Windsor's local programming only in the context of the Corporation's obligations under the BA. Similarly, the interests of the parties also differ. Before the CRTC, the complainants sought mainly that Windsor's locally produced programs be reinstated, whereas the Commissioner is seeking here to have the Court clarify and enforce the respondent's language obligations under Part VII of the OLA. Even though the 2013 CRTC decision resolved the issue of the number of local programming hours at CBEF Windsor, the CRTC's decision did not resolve the issue of the application of Part VII of the OLA and its alleged breach in the case of the budget cut measures announced in 2009. In any event, the

consultation and reporting requirements now imposed by the CRTC through the condition of licence are largely inadequate for the Corporation to fulfill its obligations under Part VII of the OLA. For example, subsection 41(1) of the OLA does not impose any obligation to consult OLMCs, but instead the duty to take positive measures to enhance the vitality of Canada's English and French linguistic minority communities and assist their development. With respect to the issues, the CRTC ruled on the issues that arise under the BA, whereas the Court is called upon to review the issues under the OLA. Moreover, the Commissioner adopts the exclusive jurisdiction model in favour of the Commissioner, a model that was not upheld by the Court's interlocutory decision. In short, the CRTC does not have jurisdiction to determine whether the Corporation complied with the OLA because that role lies exclusively with the Commissioner and, under section 77 of the OLA, with the Federal Court.

[82] Similarly, the applicants also argue that the proceeding is not moot. According to *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*], the Court must first determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. According to the applicants, the dispute between the parties persists despite the interlocutory decision by the Federal Court and the 2013 CRTC decision. However, even if the Court finds that the dispute is now moot, the Court should exercise its discretion to hear the case. According to the applicants, the three factors stated in *Borowski* are present: (i) an adversarial context, namely the scope of the CBC's duties pursuant to Part VII of the OLA; (ii) the concern for judicial economy, given the resources already invested in the case; and (iii) the role of the Court in law making, specifically the Commissioner's jurisdiction to investigate complaints in respect of the CBC.

[83] Finally, by analogy, the applicants maintain that under the *Federal Courts Rules*, SOR/98-106 [Rules], the summary dismissal of an action is an extraordinary measure and that it must be clear that it has no chance of success. Furthermore, the Federal Court of Appeal noted the following in *Norton c Via Rail Canada Inc*: "An application under section 77 of the OLA should not be struck unless there is no possibility that the Judge hearing the application will grant a remedy." (2005 FCA 205 at para 15, [2005] FCJ No 978 [*Norton*]). Therefore, the applicants argue that only in cases where the Court decides that the CRTC's jurisdiction is exclusive, which is not the case here, can the summary dismissal of an action be authorized.

[84] Alternatively, the respondent argues that if the Court finds that the Commissioner and the CRTC have concurrent jurisdiction, the Court should not resume the hearing because the preconditions to the operation of issue estoppel are met here. Looking at the first step in *Danyluk v Ainsworth Technologies Inc*, [2001] 2 SCR 460, 2001 SCC 44 [*Danyluk*], the respondent submits that: (i) the CRTC considered all of the issues raised by the Commissioner in his application; (ii) the CRTC rendered a final decision; and (iii) the same parties were before the CRTC concerning the issues in this case. Regarding the second step in applying the criterion stated in *Danyluk*, the respondent maintains that the Court should not exercise its discretion to refuse the application of estoppel, because there is no problem of unfairness under the circumstances. In fact, the hearing before the CRTC was fair, the parties had a reasonable opportunity to state their position and the issues were decided. According the respondent, the CRTC paid particular attention to the interests and specific situation of OLMCs. Indeed, in the 2013 decision, the CRTC imposed concrete measures that require consultations with OLMCs to determine the impact of the Corporation's decisions on OLMCs and measures to mitigate the

negative impact of the unfavourable decisions on OLMCs. Furthermore, the 2013 CRTC decision is final and was not challenged by the parties before the Federal Court of Appeal. Ordering the recommencement of the proceedings would be perverse and contrary to justice in the circumstances.

[85] In the final judgment that follows, the Court declares that, by reason of the 2013 CRTC decision, this proceeding is now largely moot. In light of the recent developments since the Court's interlocutory decision, it is not in the interests of justice to lift the stay of proceedings that was provisionally ordered on May 29, 2012; the stay of proceedings will become permanent as of the date of this final judgment. As explained below, the applicants' claims seem to me to be unfounded in this case.

[86] In *Danyluk*, the Supreme Court established a two-step analysis. First, the Court must determine whether the three requirements for estoppel stated by Justice Dickson in *Angle v Minister of National Revenue*, [1975] 2 SCR 248 are met: (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final; and (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel was raised, or their privies. (*Angle* at 254, cited in *Danyluk* at para 25). If the answer to the first question is "yes", the second step is that the Court must determine whether it should still exercise its discretion to hear the case.

[87] In *Danyluk*, the Supreme Court explained the following:

> Dickson J. (later C.J.), speaking for the majority in *Angle*, *supra*, p. 255, subscribed to the more stringent definition for the purpose

> of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings. (Para 24) [Emphasis added]

[88] Later, the Supreme Court noted the following:

> Issue estoppel simply means that once a material fact . . . is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding. (Para 54)

[89] In 2013, in *Penner v Niagara (Regional Police Services Board)*, [2013] 2 SCR 125, 2013 SCC 19 [*Penner*], Justice Cromwell and Justice Karakatstanis, writing for the majority, stated that "[t]he legal framework governing the exercise of this discretion is set out in Danyluk" and that "this framework has not been overtaken by this Court's subsequent jurisprudence" (para 31). In *Danyluk* and *Penner*, the Supreme Court reiterated seven factors "that are relevant to the discretionary analysis in the context of a prior administrative tribunal proceeding." (*Penner* at para 37). Those factors are as follows: the wording of the statute from which the power to issue the administrative order derives; the purpose of the legislation; the availability of an appeal; the safeguards available to the parties in the administrative procedure; the expertise of the administrative decision maker; the circumstances giving rise to the prior administrative proceedings; and the potential injustice. However, the list is not exhaustive (*Penner* at para 38).

[90] In passing, in *Penner*, the Supreme Court specified that unfairness may arise in two different ways:

> First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim. (Para 39)

In the second situation, the Supreme Court suggested that " . . . where there is a significant difference between the purposes, processes or stakes involved in the two proceedings", injustice may arise from using the results to preclude the subsequent proceedings (*Penner* at para 42).

[91] First, I believe that the preconditions for the application of the doctrine of issue estoppel are met in this case. Second, after considering the factors stated in *Danulyk* and *Penner,* it is not appropriate for the Court to still exercise its discretion to hear the case.

[92] In the 2013 decision, the CRTC took the risk of never explicitly referring to the language obligations set out in the OLA, while ensuring in practice that the objectives under section 41 of the OLA had been considered in the process to renew the licences of the national public broadcaster. For example, at paragraph 25 of its decision, the Commission noted that it had imposed a number of different conditions to ensure that the Corporation "strengthens its leadership as a pan-Canadian service that reflects and serves the needs of all Canadians in both official languages regardless of where they live". The CRTC stated in its summary that it is "implementing the following measures to ensure that Canadians living in official language minority communities are well served." (Summary of CRTC decision) Specifically, the Commission examined the level of local programming that the Corporation proposed for stations

that operate as part of the Première Chaîne network and noted that "no station operating in an OLMC other than CBEF Windsor provides less than 15 hours of local programming each broadcast week." (para 266). By acknowledging that "ten hours of local programming is not sufficient to properly serve the OLMC community in Southwestern Ontario", the Commission required CBEF Windsor to provide a minimum of 15 hours of local programming each week for the French-language OLMCs in that area (decision, para 266 and Appendix 4, para 15; see also the summary of the decision).

[93] It is evident here that the CRTC considered the concerns of the Francophones served by CBEF Windsor and those of OLMCs in general in renewing the Corporation's licences. Furthermore, it expressly reiterated what was stated by the SOS CBEF Windsor Committee and various interveners in that respect:

> Complainants and interveners underlined the unique situation of Windsor, noting that CBEF is the only French-language station serving the city. At the hearing, SOS CBEF noted that CBEF had been in operation for 42 years and was important to the Windsor community. It was concerned that all of the cuts made by the CBC in Ontario were at the expense of CBEF. SOS CBEF also noted Windsor's proximity to the U.S. and stated, [TRANSLATION] "We are bombarded by American media. Therefore, just keeping a Canadian culture is difficult, and keeping a Francophone culture in our region is even more difficult." (Para 262)

[94] Moreover, by imposing conditions of licence, the CRTC stated that it considered the Corporation's obligations in respect of official languages and OLMCs and took positive measures in that respect. For example, the CRTC found that the BA:

> . . . enjoins the CBC to provide programming to Canadians that is of equivalent quality in English and in French, while reflecting the different needs and circumstances of each official language community. Thus, throughout this decision, the specificity of each

> official language community has resulted in the Commission taking an approach and imposing conditions of licence that respects this specificity. (Para 26 of the decision)

[95] Furthermore, the CRTC

> . . . placed special emphasis on service to those living in different regions of the country, including OLMCs. Under the [BA], the CBC must reflect and serve Canada's regions, as well as French and English OLMCs across the country. In its approach, the Commission has attempted to recognize the different needs and challenges of the English and French OLMCs. The Commission has set out specific measures related to OLMCs throughout this decision. (Para 27)

[96] The Commission also imposed two other relevant conditions of licence: first, the CRTC required, for the first time, the CBC to "hold a formal consultation at least once every two years with [OLMCs] located in each of the regions of Atlantic Canada, Ontario, Western Canada, the North and Quebec to discuss issues that affect their development and vitality." (Appendix 2, para 1). Furthermore, it required that the CBC "report annually on consultations that took place that year and demonstrate how feedback from the consultations was taken into consideration in the Corporation's decision making process." (Appendix 2, para 1). The Commission noted that it is " . . . essential for the CBC to consult representatives of OLMCs so that the programming of all of its services responds to the particular needs and circumstances of OLMCs, as set out in section 3(1)(m)(iv) of the Act." (para 354). It noted that while the Corporation " . . . made commitments in this regard for its French-language television, the Commission considers that consultations should be required by condition of licence for all CBC services." (para 354).

[97] The Commission also made it a requirement that the Corporation provide an annual report " . . . containing results of a French-language [OLMCs] audience perception survey on how well the Corporation's French-language radio and television services are reflecting the OLMCs." (Appendix 4, para 9). It also created an equivalent obligation with respect to English-language OLMCs (Appendix 4, para 10).

[98] Even if the CRTC did not formally determine, in its 2013 decision, whether the Corporation failed to, during the last licence period, respect any positive requirement in relation to carrying out consultations or analyzing the impact of its decision, it is clear that, in a prospective manner, by imposing, for the first time, on the Corporation a general requirement to hold consultations and report periodically to the OLMCs, and by prescribing a minimum number of local programming hours in French radio stations outside Quebec, the CRTC repudiated the budget cuts in the regions that were denounced by the interveners.

[99] In addition, the specific situation of the OLMC in southwestern Ontario was not ignored. The CRTC pointed out the following:

> . . . the Commissioner of Official Languages, Graham Fraser, noted that according to an inquiry launched by his office, the CBC's decision to reduce local programming in Windsor had a negative impact on the region's already fragile Francophone community since the local programming offered by the station no longer met the needs of that community. Mr. Fraser also argued that the manner in which the CBC had reduced local programming in Windsor was contrary to the principles set out in the Act, which provide that CBC programming must be in English and in French, reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French linguistic minorities. (Para 264)

[100] During public hearings before the CRTC, the Corporation wanted to make amends to the OLMCs when it returned in reply and improved its licence renewal proposal. At that time, the Corporation proposed to the CRTC that it increase CBEF Windsor's local production to 10 hours per week and hold public meetings every two years in regions where there are minority groups during which it would present its initiatives and report the results obtained to OLMCs. This is a good example of a quasi-statutory process allowing any interested parties to argue their point of view in an evolving framework where positions are not fixed like they are before the courts. The CRTC's solution to the dispute seems to me to be fair and consistent with the objectives of the OLA. In this case, this is a consideration that has a lot of weight in the decision that the Court is making today to not lift the stay to allow the applicants to continue with this proceeding under Part X of the OLA against the Corporation.

[101] Needless to say, the approach taken by the Court in its interlocutory decision in May 2012 is purely pragmatic. The power of the Court, in section 77 of the OLA, is essentially "remedial". The Court is not here to be the primary investigator of any alleged failure of a federal institution to uphold its duty to take positive measures. Accusations with respect to the injurious effects of the Corporation's 2009 budget cuts on OLMCs were already made in a timely manner by the Commissioner after an in-depth investigation. Today, the Commissioner would like the Federal Court to take this opportunity to examine, in an overall context, the scope of the Corporations' language obligations towards OLMCs.

[102] In my humble opinion, this would be repeating what was already done before the CRTC. All of the parties had a reasonable opportunity to state their position. The CRTC made its

decision at the end of a proceeding consisting of a public hearing held from November 19 to 30, 2012, and an online consultation in June and July 2011. The CRTC received more than 8,000 interventions during the public hearing, including the Commissioner as well as 13 groups and organizations that discussed the importance of the Corporation for OLMCs including the SOS CBEF Committee, a coalition of people from the Windsor area established to contest reductions in the CBEF's local programming. See, for example, the interventions of the Committee: (July 8, 2011), CRTC's Record, Volume 8, Tab F-43, pp 2502-507), (October 4 and 5, 2012), Volume 13, Tab F-153, pp 4282-293; Committee's presentation: (November 27, 2012), Volume 19, Tab H-19 and the final written submissions: (December 11, 2012), Volume 23, Tab K-10. For the Commissioner's presentation, see: (November 27, 2013), Volume 18, Tab H-11. The online consultation also yielded thousands of comments.

[103] The CRTC noted in the 2013 decision that it had received "interventions commenting on the CBC's licence renewal applications and on specific CBC proposals. These interventions addressed a variety of subjects, including: . . . the need for CBC programming . . . to reflect all of Canada's regions, as well as official language minority communities" (para 6). In its written submissions before the Court, the respondent identified 184 interventions addressing [TRANSLATION] "the issue of linguistic duality, Francophone culture, OLMCs, the importance of the services of CBC/Radio-Canada for Anglophone and Francophone minority communities, equality between the services provided to Anglophones and Francophones or the visibility that CBC/Radio-Canada provides to OLMCs and their activities." For example, Dr. Amellal and Nicole Larocque intervened in July 2011 and October 2012 on behalf of the SOS CBEF Committee and asked that the CRTC require the Corporation to reinstate the programs produced

locally at CBEF, that is, 36.5 hours of locally produced programming per week, which existed in the framework of Decision CRTC 2001-529 (Intervention of the SOS CBEF Committee, Volume 8, Tab F-43 and Volume 13, Tab F-153). The issue of reinstating the local programming hours is definitely resolved today.

[104] The applicants agree that the other general remedies that they are still seeking from the Court are essentially systemic in nature. It is true that the Commissioner still would like to have an order issued that requires the Corporation to review its decision concerning CBEF Windsor in light of its obligations under section 41 of the OLA, but it is clear that the Corporation already agreed to increase the level of local programming at the CBEF Windsor station before the 2013 CRTC decision, and that since that decision, the Corporation has been required, by condition of licence, to produce at least fifteen hours of local programming. Regarding taking the necessary steps to address the negative impact of the 2009 cuts on OLMCs, the Commissioner would like the Court to order, in the future, the Corporation to put in place mechanisms that allow it to consult OLMCs that could be affected by a decision at the initial stage of the decision-making process. The consultation issue is at the heart of the decision of the CRTC, which, however, chose to not formally impose a prior consultation right. Still, the CRTC has already imposed a duty to consult and a periodic reporting requirement.

[105] Finally, the amended notice of application leaves it up to the Court to grant [TRANSLATION] "any other remedy that the Court considers appropriate and just under the circumstances". At the hearing in June 2014, counsel for Dr. Karim Amellal suggested that this could allow the Court to grant damages to all of the members in the OLMC of southwestern

Ontario. Both the Court and the other counsel in this case were shocked by that very late suggestion. The current allegations in the proceedings before the Court certainly do not allow the applicant, Dr. Amellal, to claim damages. I agree with counsel for the respondent that the Court must exercise discretion to prevent an abuse of process. Be it compensatory or punitive damages, the Court never awards damages automatically. There must be serious grounds and evidence for doing so. Specific allegations on the violation of a particular obligation, the existence of a causal link and the nature and extent of the damages allegedly suffered by any applicant must be reflected in the proceedings. At this very advanced stage of the proceedings, the Court is not prepared to transform this proceeding into a class action and authorize Dr. Amellal to act as a representative for a group of persons that has not yet been defined.

[106] Counsel for the Commissioner asserts that he has a legitimate expectation to complete the examinations of the Corporation's representatives. It is necessary to distinguish between what is essential and false pretence or triviality. Proceeding with the examinations of the Corporation's representatives is not an end in itself. Regardless of the interlocutory decisions rendered by Prothonotary Tabib in 2001, the preferred route that must be followed by the Court in 2014 does not depend only on the relevance of the questions that the Commissioner would like to ask the Corporation's representatives, but also on whether the ends of justice will be better served by ordering that the stay be lifted and allowing this proceeding to continue. Counsel for the Commissioner provided very few answers to the Court's legitimate questions, other than to point out that memory has a way of fading and that the examinations of the Corporation's representatives must take place as soon as possible because the relevant facts date back to 2009. It is apparent in the evidence that without a specific plan, or a legitimate objective, the proposed

exercise does not serve any purpose today and must be stopped so as to not result in testimonial ramblings that will be of no genuine use today.

[107] I agree with the respondent that the 2013 CRTC decision is now definitive and determinative in this case; it was not the subject of an appeal or judicial review in the Federal Court of Appeal. Furthermore, the parties before this Court are the same as those in the hearings before the CRTC. It must be concluded that this proceeding is largely moot. Most of the issues were resolved by the CRTC, namely, the minimum number of local programming hours that CBEF Windsor must provide and the Corporation's duty to consult and obligation to determine the impact of its decisions on OLMCs. By renewing the Corporation's licences, the CRTC did not address the issues of jurisdiction and the subjection of the Corporation to the OLA, which were addressed in the Court's interlocutory decision and which will now be the subject of a final judgment by this Court. Moreover, the CRTC took the trouble to note that "the Federal Court issued an interim decision denying the model of exclusive jurisdiction proposed by the CBC and ruled in favour of the concurrent jurisdiction of both the Federal Court and the Commission." (Decision, at paras 259-260).

[108] In conclusion, the 2013 CRTC decision explicitly acknowledged that "Windsor had one of the highest assimilation rates of Francophones among French OLMCs in Canada." (Para 263), It is therefore not surprising that the Senate Committee Report notes that "[t]he attention paid to official-language minority communities in this decision is important. It seems that most of what these communities said at the CRTC's public hearings was heard." (Page 16) The remaining

issue is whether, in the future, the Corporation will comply with the letter and spirit of the commitments that it now says it made with respect to OLMCs.

Conclusion

[109] In the following judgment, the Court determines, with finality, the issues of jurisdiction and the application of the OLA and of the BA, while in the exercise of its discretion, the Court refuses to lift the stay of proceedings, which will become permanent on this date. Counsel agree that, regardless of the result, it is not appropriate to assign costs to either party.

JUDGMENT

THE COURT ORDERS AND ADJUDGES THE FOLLOWING:

1. The Canadian Broadcasting Corporation/Société Radio-Canada [Corporation] is subject to the Official Languages Act, RSC 1985, c 31 (4th Supp) [OLA], namely Part VII (sections 41 to 45). It has the obligation to take positive measures to enhance the vitality and assist the development of official language minority communities [OLMCs] under Part VII of the OLA, in particular section 41, which also imposes the obligation to not hinder the development and vitality of English and French minorities in Canada;

2. The Commissioner of Official Languages [Commissioner] has the jurisdiction to investigate complaints made against the Corporation under the OLA, namely Part VII and in particular, regarding the negative impacts on the OLMC of southwestern Ontario of the Corporation's decision to make significant budget cuts in 2009, which affected, in particular, the CBEF 540 Windsor radio station [CBEF Windsor];

3. Even if the Federal Court has jurisdiction in the strict sense under section 77 of the OLA, according to the concurrent jurisdiction model, to hear and rule on the proceeding brought in 2010, the Canadian Radio-television and Telecommunications Commission [CRTC] is, pursuant to the Broadcasting Act, SC 1991, c 11 [BA], the preferred forum for discussing the impact of the budget cuts on programming, ruling on the issue of the decrease in regional or local programming broadcast by CBEF Windsor, forcing the resumed broadcasting of the programs cancelled by the Corporation, prescribing a minimum threshold for local or regional production hours, and prescribing any other appropriate remedy in the circumstances, including imposing any consultation and reporting requirements with respect to decisions and measures that could affect OLMCs;

4. Because of the decision dated May 28, 2013, renewing the Corporation's licences to broadcast programming services for a five-year period, from September 1, 2013, to August 31, 2018, including CBEF Windsor and its transmitters: Broadcasting Decision CRTC 2013-263 and Broadcasting Orders CRTC 2013-264 and 2013-265 [2013 CRTC decision], this proceeding is now largely moot. In light of the recent developments since the Court's interlocutory decision, it is not in the interests of justice to lift the stay of proceedings that was provisionally ordered on May 29, 2012; the stay of proceedings will become permanent on this date;

5. The Court otherwise dismisses the motion for summary dismissal of this proceeding brought by the respondent and the motion for the recommencement of the proceedings brought by the applicants;

6. Without costs.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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