

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20151112**

**Docket: A-421-14**

**Citation: 2015 FCA 251**

**CORAM: NADON J.A.  
SCOTT J.A.  
BOIVIN J.A.**

**BETWEEN:**

**CBC/RADIO-CANADA**

**Appellant**

**and**

**THE COMMISSIONER OF OFFICIAL  
LANGUAGES OF CANADA and  
DR. KARIM AMELLAL**

**Respondents**

Heard at Ottawa, Ontario, on April 14 and 15, 2015.

Judgment delivered at Ottawa, Ontario, on November 12, 2015.

**REASONS FOR JUDGMENT BY:**

**NADON J.A.**

**CONCURRED IN BY:**

**SCOTT J.A.  
BOIVIN J.A.**

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**REASONS FOR JUDGMENT**

**NADON J.A.**

I. Overview

[1] This is an appeal brought by the Canadian Broadcasting Corporation (“CBC”) from a decision of Martineau J. (the “Judge”) of the Federal Court dated September 8, 2014 (2014 FC 849)(sometimes referred to as the second decision). In this decision, the Judge confirmed his findings from an earlier decision dated May 29, 2012 (2012 FC 650) (sometimes referred to as

the first decision) in which he found that the Commissioner of Official Languages (the “Commissioner”) and the Canadian Radio-television and Telecommunications Commission (the “CRTC”) had concurrent jurisdiction to investigate complaints related to the *Official Languages Act* (R.S.C., 1985, c. 31 (4th Supp.)) (the “OLA”) against CBC.

[2] More particularly, in his decision of May 29, 2012 the Judge expressed the view that the CRTC and the Commissioner shared jurisdiction to investigate complaints pertaining to the negative impacts on the Francophone official language minority community (“OLMC”) located at Windsor, Ontario arising from cuts made by CBC to the amount of local and regional programming content provided by the local Francophone radio station in Windsor, CBEF Windsor (“CBEF Windsor”). However, the Judge took note that proceedings were underway before the CRTC pertaining to the renewal of CBC’s radio licences and decided that the CRTC was “in a better position than the Federal Court to determine the dispute on its merits and to grant the [respondents] appropriate relief, if applicable” (paragraph 92 of the first decision). He therefore stayed the Federal Court proceedings brought by the Commissioner and Dr. Amellal pending the resolution of the CRTC proceedings.

[3] In his decision of September 8, 2014, the Judge confirmed his findings with respect to the concurrent jurisdiction issue as it pertained to the investigation of OLA-related complaints against CBC. He also declared that CBC was subject to the OLA, specifically Part VII (sections 41 to 45) and that it had the obligation thereunder to enhance the vitality of the OLMCs and to support and assist in their development. The Judge further held that the CRTC was the better forum to hear those complaints. To this end, he considered the decision rendered by the CRTC

on May 28, 2013 (the “CRTC’s decision”) which, *inter alia*, ordered CBC to increase the amount of local programming provided by CBEF Windsor and declared that he was satisfied that the CRTC had reached a fair result consistent with the purpose of the *OLA* and that it had, in effect, addressed most of the issues raised in the proceedings before him. Finally, the Judge found that the doctrine of issue estoppel applied in the circumstances to bar the Federal Court proceedings from continuing and he thus ordered a permanent stay of these proceedings.

## II. Facts and Decisions Below

[4] In 2009, CBC was forced to make substantial nationwide budget cuts. In response, it adopted a recovery plan which, *inter alia*, involved financial cuts to the amount of local and regional content developed by CBEF Windsor, the only French-language radio station in southwestern Ontario. The cuts reduced CBEF Windsor's employees from ten to three, eliminated three programs produced locally and reduced the local and regional content in programming from 36.5 hours to 5 hours per week.

[5] The French-speaking OLMC in southwestern Ontario (of which Dr. Amellal, one of the Respondents, is a member) objected to these cuts. They formed a volunteer association, the Comité SOS CBEF (the “Comité”), and lodged complaints with both the Commissioner and the CRTC regarding the negative impact these cuts would have upon the French-speaking minority in this region. When the CRTC failed to act quickly enough, the Commissioner began an investigation pursuant to section 56 of the *OLA*.

[6] CBC refused to cooperate with the Commissioner's investigation. In its view, the Commissioner did not have jurisdiction to review its programming activities and those activities were not subject to *OLA*-related obligations. Instead, it argued that those matters were properly within the CRTC's jurisdiction.

[7] Nevertheless, the Commissioner wrote a report on this matter. He stated that CBC had failed to hold consultations with the OLMC in southwestern Ontario before the 2009 budget cuts and similarly that it had not conducted an impact analysis of these cuts. He denounced the negative impact of these cuts and found that CBC had not complied with its obligation to take "positive measures" to enhance the vitality of Canada's English and French linguistic minority communities and to assist in their development (*OLA*, section 41(2)). The Commissioner urged CBC to review its decision. When CBC refused to do so, the Commissioner began proceedings in the Federal Court.

[8] In his Notice of Application brought pursuant to section 77 of the *OLA*, the Commissioner sought various declarations from the Federal Court: that CBC was subject to the *OLA*, particularly sections 41-45; that he had jurisdiction to investigate the complaints regarding the 2009 budget cuts; that CBC had failed to comply with section 41 of the *OLA*; and that CBC should review its decision to cut the level of local and regional content at CBEF Windsor and make necessary arrangements to compensate the OLMC for the negative impact of its 2009 decision. Dr. Amellal, for his part, sought a permanent injunction forcing CBC to reinstate the previous level of local and regional content provided by CBEF Windsor.

A. *Federal Court Decision dated May 29, 2012*

[9] The May 29, 2012 decision stems from a motion for summary dismissal brought by CBC. Although CBC accepted that its non-programming activities were subject to the *OLA*, it argued that its programming services, including the transmission and distribution of all radio broadcast services, were governed exclusively by the broadcasting policy of Canada and the conditions of licence and expectations set by the CRTC pursuant to the *Broadcasting Act*, S.C. 1991, c. 11 ("*BA*"). In turn, the Commissioner (supported by Dr. Amellal) argued that he had jurisdiction to oversee CBC's decisions which could affect the vitality of French and English minorities and the development of OLMCs.

[10] In his reasons, the Judge opined, after consideration of a number of judicial decisions pertaining to the CRTC's jurisdiction, that these decisions suggested that he should refrain from swiftly and mechanically following the CRTC's exclusive jurisdiction model simply because CBC's programming was affected by the 2009 budget cuts (paragraph 50). After considering the case law, he found that there was no conflict between the *OLA* and the *BA* and that the Federal Court had *prima facie* jurisdiction to determine the scope of subsection 41(2) of the *OLA* and whether CBC had breached its obligations thereunder. The Judge noted that the *OLA* reflected a social and political compromise which gave the Commissioner the powers of a true linguistic ombudsman and created a judicial avenue for relief in the situations set out in subsection 77(1) of the *OLA* (paragraph 51).

[11] Nonetheless, although of the view that the Federal Court had jurisdiction under section 77 of the *OLA* according to the concurrent jurisdiction model, the Judge held that it would be

preferable for the CRTC to first review CBC's decision to decrease the level of regional and local programming content broadcast by CBEF Windsor. He noted that the CRTC's practice was to integrate the purpose of section 41 of the *OLA* into the activities that it carried out. It did so by considering the needs of OLMCs in its decisions (paragraph 88). Therefore, though the Federal Court had jurisdiction "in the narrow sense" to entertain this application under sections 76-81 of the *OLA*, the Judge was of the view that the CRTC was in a better position to assess the impact of the budget cuts on CBC's programming, including those broadcast from CBEF Windsor. He therefore ordered an interim stay of proceedings pending the CRTC's decision and held that it would be open to any of the parties to ask the Federal Court to re-open or permanently stay the proceedings after the CRTC had rendered its decision.

B. *CRTC's decision dated May 28, 2013*

[12] Both the Commissioner and the Comité intervened before the CRTC. In its decision, the CRTC first summarized the facts and the decision rendered by the Judge on May 29, 2012. It noted that CBC had offered to increase the amount of local programming offered at CBEF Windsor from five to ten hours per week (CRTC's decision, paragraphs 257-261).

[13] The CRTC took note of the Comité's concerns, namely that CBEF Windsor was the only French-language radio station for the City of Windsor and that it served a vital role in the maintenance of the French-speaking minority. It also noted that, according to the Comité, Windsor had one of the highest assimilation rates among Francophone OLMCs in Canada and further noted that the Comité had requested the CRTC to reinstate the pre-2009 amount of local programming. The CRTC also took note of the Commissioner's submissions to the effect that

CBC's actions constituted a breach of its obligations under the *OLA* as its actions had a negative impact upon the region's already fragile Francophone community. Further, the Commissioner argued before the CRTC that the manner in which CBC had reduced the local programming was contrary to the principles of the *OLA*, which provide that CBC's programming must be in English and French, and that it should reflect the different needs and circumstances of each official language community, including the needs of OLMCs (CRTC's decision, paragraphs 262-264).

[14] In its conclusion, the CRTC noted that subparagraph 3(1)(m)(iv) of the *BA* provides that CBC's programming shall "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". The CRTC also noted that no other radio station in CBC's network serving an OLMC provided less than 15 hours of local programming per week. Therefore, it ordered CBC to increase the amount of local programming to 15 hours per week at CBEF Windsor (CRTC's decision, paragraphs 265-267).

[15] In addition, the CRTC required CBC to consult with OLMCs at least once every two years to discuss issues which affect their development and vitality. It also required CBC to report annually on these consultations and to demonstrate how the consultations affected CBC's decision-making process (CRTC's decision, Appendix 2, paragraph 1). The CRTC noted that these consultations were essential in order for CBC to meet the requirement imposed by subparagraph 3(1)(m)(iv) of the *BA* (CRTC's decision, paragraph 354).

[16] None of the parties involved in this appeal challenged the CRTC's decision.

C. *The Federal Court Decision of September 8, 2014*

[17] Following the release of the CRTC's decision, the parties returned to the Federal Court. CBC reiterated its previous argument and sought a declaration from the Judge that the CRTC has exclusive jurisdiction over programming concerns (such as this complaint) and sought the summary dismissal of the proceedings. It also argued that there was no need for the Federal Court to re-open the proceedings considering that the CRTC's decision had considered CBC's official language obligations and that it had prescribed the appropriate remedy (paragraph 15).

[18] With respect to the merits of the application, the Commissioner and Dr. Amellal argued that the Federal Court proceedings should be re-opened as the CRTC's decision did not resolve the matter or go far enough. They asked that the stay be lifted, that examination of CBC's representative recommence and that a hearing on the merits be scheduled as soon as possible to determine the alleged breach of the *OLA* and to provide any appropriate remedy in the circumstances (paragraph 16). With regard to the jurisdiction issue, the Commissioner argued that as that issue had been determined by the Judge in his first decision it was no longer open for debate.

[19] In his decision of September 8, 2014, the Judge indicated that he had to determine two issues: (1) whether a final judgment should issue concerning the enforcement and jurisdictional issues addressed in his first decision and (2) whether the interim stay of proceedings should be lifted and the Federal Court proceedings resumed. For the reasons summarized below, the Judge

confirmed the findings he made in the first decision regarding the concurrent jurisdiction issue and ordered a permanent stay of the Federal Court proceedings.

(1) The Judge's analysis on the jurisdictional issue

[20] The Judge noted that public policy concerns pointed toward the CRTC having jurisdiction over CBC's broadcasting activities under the *BA* (paragraph 26). However, he rejected CBC's arguments that it was subject to the CRTC's exclusive jurisdiction for programs produced or broadcast. He held that all of CBC's programs involved language and therefore involved *OLA* obligations. He also rejected CBC's argument that it was not subject to sections 41-45 of the *OLA* with regard to its broadcasting services (paragraph 32).

[21] On this point, the Judge declared that CBC was subject to sections 41-45 of the *OLA* and, pursuant to those provisions, it had an obligation to take positive measures to enhance the vitality of OLMCs and to support and to assist in their development and further to act in a manner that did not hinder the development and vitality of Canada's official language minorities (paragraph 33). He noted that this legal obligation derived in part from the unwritten constitutional principle of respect for minorities (paragraphs 34-36, 43) and from the quasi-constitutional status of the *OLA*. Therefore, section 41 created a legally enforceable obligation on all federal institutions, defined by the *OLA* to include CBC, to take "positive measures" (paragraph 40). Such an obligation extended to CBC's broadcasting and programming activities. The Judge also found that this was a quasi-constitutional obligation, no matter the fact that, according to subsection 82(1) of the *OLA*, Part VII (sections 41-45) did not prevail over other statutes in the event of an inconsistency (paragraph 43).

[22] The Judge specifically rejected the idea that CBC's *OLA* obligations were embedded in the *BA* itself and therefore subject to the CRTC's exclusive jurisdiction. The Judge said that although the *BA* aligned with constitutional principles such as respect for minorities and the *OLA*, it did not grant the CRTC exclusive jurisdiction. Rather, the best way to reconcile linguistic issues arising from CBC's broadcasting activities was to adopt the concurrent jurisdictional model. Issues concerning the respect for and protection of OLMCs were to be examined independently of any regulatory mandate conferred by Parliament on the CRTC (paragraph 44).

[23] Therefore, the Judge held that the Commissioner had the jurisdiction to investigate complaints filed against CBC under the *OLA*, specifically Part VII, with regard to the negative impacts upon the OLMC in southwestern Ontario due to the 2009 budget cuts.

[24] The Judge also considered Parliament's intent and the nature of the dispute in question to determine the appropriate jurisdictional model in line with Quebec (*Commission des droits de la personne et des droits de la jeunesse*) v. *Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 SCR 185 ("*Morin*") (paragraph 46). With respect to Parliament's intent, he agreed that Canada's broadcasting system was unique and that the CRTC had the power to regulate and monitor all aspects of that system. However, he noted that the *BA* did not expressly exclude the Commissioner's or the Federal Court's jurisdiction (paragraph 46) and that the CRTC shared jurisdiction with other federal bodies, such as the Competition Bureau, in certain circumstances. The mere existence of the *BA* and of a specific regulatory framework thereunder was insufficient

to oust the enforcement of the *OLA* and the general control exercised by the Commissioner and the Federal Court to ensure compliance with the *OLA* and the constitution (paragraph 56).

[25] With respect to the nature of the dispute, the Judge noted that the complaints in this case related to programming changes and the decision-making process adopted in response to the 2009 budget cuts (paragraph 50). He held that the subject matter of the CRTC's exclusive jurisdiction did not extend to the protection of linguistic minorities or quasi-constitutional rights, no matter the fact that its practice was to take those considerations into account in its decisions. Rather, the expertise and role of guardian of linguistic concerns was housed with the Commissioner. Part of the Commissioner's powers was the investigation of complaints against federal institutions which failed to comply with their *OLA* obligations (paragraphs 50 and 72).

- (2) The Judge's analysis on re-opening the Federal Court proceedings or instituting a permanent stay

[26] The Commissioner and Dr. Amellal argued that the CRTC's decision did not appropriately dispose of the merits of the parties' dispute and that the matter was not moot. Therefore, they requested that the interim stay be lifted and that the Federal Court proceedings be resumed. The Commissioner argued that the CRTC's decision had only considered CBC's *BA*-related obligations and that the parties had sought different remedies before the CRTC and the Federal Court. In the former forum, the complainants sought the reinstatement of the pre-budget cuts to local programming content whereas in the latter forum, the Commissioner and complainant sought clarification of CBC's language obligations and a declaration that CBC breached its *OLA* obligations (paragraphs 80-81).

[27] CBC argued that the stay of the Federal Court proceedings should not be lifted by virtue of issue estoppel (paragraph 84). In short, the CRTC had considered all the issues, it had rendered a final decision and the same parties had spoken to the same issues before the CRTC. Further, there was no problem of unfairness which could prevent the application of issue estoppel.

[28] The Judge held that the Federal Court proceedings were largely moot as a result of the CRTC's decision (paragraph 85). He found that it was not in the interest of justice to lift the stay of proceedings and converted the interim stay into a permanent one. He found that the doctrine of issue estoppel applied and that it was not appropriate to exercise his discretion to hear the case on its merits (paragraph 91).

[29] The Judge noted that the CRTC's decision did not explicitly refer to the *OLA*. However, he found that it ensured, in practice, that the underlying objectives of section 41 of the *OLA* were protected. He also considered the consultation and annual report requirements that the CRTC's decision imposed upon CBC (paragraphs 92-96). He held that the CRTC's decision had effectively denounced the negative impact of the budget cuts on the complainants by imposing prospective consultation requirements upon CBC (paragraph 98). He therefore concluded that the CRTC's decision was a fair result and consistent with the objectives of the *OLA* (paragraph 100).

III. Legislative Provisions

[30] The provisions of the *BA* and of the *OLA* relevant to this appeal are set out in Appendix A and Appendix B to these reasons.

[31] I now turn to the issues raised by this appeal.

IV. Issues

[32] The parties submit that three issues must be determined by this appeal:

1. What is the applicable standard of review?
2. Does the CRTC have exclusive jurisdiction over *OLA*-related complaints which relate to CBC's programming activities?
3. Is the Judge's declaratory order that CBC should abide by Part VII of the *OLA* too vague?

V. Analysis

[33] For the reasons that follow, I am of the opinion that we need not address these issues. More particularly, I believe we ought to allow the appeal and set aside the Judge's decision.

[34] I begin by examining the Judge's two decisions in order to determine what he actually decided. In his first decision, the Judge clearly found, in his reasons, that the CRTC did not have exclusive jurisdiction over the issues raised by the Commissioner and Dr. Amellal, but he made no order to that effect. Rather, his order dealt only with the stay of proceedings, the adjournment

of the examinations on discovery and the hearing on the merits which had previously been set down. His order reads as follows:

THE COURT ORDERS that

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

[35] Believing that the Judge had actually made a determination on the jurisdiction issue in his first decision, CBC filed a motion for an extension of the delay to file a Notice of Appeal of the Judge's Order of May 29, 2012. CBC's motion was dismissed by my colleague Madame Justice Gauthier on the grounds that the order made by the Judge did not address nor deal with any of the conclusions or declarations sought in the Notice of Application filed on August 10, 2010, including the question of whether the Commissioner had jurisdiction to address and deal with the complaints filed against CBC pursuant to the *OLA*.

[36] In concluding her reasons, Madame Justice Gauthier indicated that the question of jurisdiction as between the Commissioner and the CRTC would be the subject of a final decision

by the Judge following the decision that the CRTC was expected to render. It is clear from Madame Justice Gauthier's reasons that she considered that, in all of the circumstances, the Judge had simply made non-binding preliminary comments on the question of jurisdiction prior to the rendering of a final decision in the future.

[37] Following the CRTC's decision, the parties returned before the Judge for arguments on whether, *inter alia*, the Judge ought to lift the stay which he had ordered in his first decision. At the commencement of his second decision (paragraph 2), the Judge indicated that he had to address two issues, namely whether he should issue a final judgment on enforcement and jurisdictional issues addressed "in the interlocutory decision" and whether it was appropriate to lift the stay which he had ordered on May 29, 2012 and to resume proceedings in light of recent developments "since the interlocutory decision". I have a number of comments to make with regard to the Judge's decisions.

[38] With respect to the first decision, there can be no doubt that although he purported to determine the jurisdictional issue, the Judge failed to make any order in that regard. In my view, what the parties ought to have done, following receipt of the Judge's first decision, was to bring a motion pursuant to Rule 397(1)(a) of the *Federal Court Rules* (SOR 98/106) which provides that the parties may request the Court to reconsider the terms of an order which does not accord with the reasons given. In other words, the Judge ought to have been asked to amend his order so as to include the findings which he had made on the jurisdiction issue. However, that did not happen and, as a result, Madame Justice Gauthier dismissed CBC's motion for an extension of the delay to file a Notice of Appeal.

[39] I now turn to the Judge's second decision. Having stayed the proceedings before him in his order of May 29, 2012, the Judge could not entertain further proceedings unless he was prepared to lift the stay which he had ordered. In the event, he refused to lift the stay of proceedings but nonetheless proceeded to write extensive reasons in which he reiterated the view on the jurisdiction issue which he had expressed in his first decision. In my respectful opinion, the Judge was *functus* to opine and determine any of the issues which were before him unless he lifted the stay.

[40] The outcome of the decisions rendered by the Judge is, in my respectful opinion, unsatisfactory as he failed to properly address the issues before him. On the one hand, the first decision does not determine the jurisdiction issue because the order made by the Judge is silent on that count. On the other hand, the second decision does not, in law, make any determination on the issue of jurisdiction because the Judge refused to lift the stay of proceedings which he had imposed in his first decision.

[41] When the panel brought up these difficulties with the parties at the time of the hearing, they impressed upon us that they wanted the Court to address, if possible, the substantive issues raised in the proceedings. After careful consideration of the issues raised by the proceedings and of the submissions made by the parties, I am of the opinion that there are a number of reasons which militate against addressing the substantive issues raised in this appeal. However, in concluding that we should not address the substantive issues raised by the parties, I have taken the Judge's second decision as having validly decided the issues which he purported to decide. In other words, I have not considered that he was *functus* to make the determinations that he made.

[42] I will now set out my reasons for concluding that we should not deal with the substantive issues and that we should allow the appeal. I begin by reproducing section 77 of the *OLA* which provides as follows:

**77.** (1) Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV, V or VII, or in respect of section 91, may apply to the Court for a remedy under this Part.

Limitation period

(2) An application may be made under subsection (1) within sixty days after

(a) the results of an investigation of the complaint by the Commissioner are reported to the complainant under subsection 64(1),

(b) the complainant is informed of the recommendations of the Commissioner under subsection 64(2),  
or

(c) the complainant is informed of the Commissioner's decision to refuse or cease to investigate the complaint under subsection 58(5),

or within such further time as the Court may, either before or after the expiration of those sixty days, fix or allow.

**77.** (1) Quiconque a saisi le commissaire d'une plainte visant une obligation ou un droit prévus aux articles 4 à 7 et 10 à 13 ou aux parties IV, V, ou VII, ou fondée sur l'article 91, peut former un recours devant le tribunal sous le régime de la présente partie.

Délai

(2) Sauf délai supérieur accordé par le tribunal sur demande présentée ou non avant l'expiration du délai normal, le recours est formé dans les soixante jours qui suivent la communication au plaignant des conclusions de l'enquête, des recommandations visées au paragraphe 64(2) ou de l'avis de refus d'ouverture ou de poursuite d'une enquête donné au titre du paragraphe 58(5).

Application six months after complaint

(3) Where a complaint is made to the Commissioner under this Act but the complainant is not informed of the results of the investigation of the complaint under subsection 64(1), of the recommendations of the Commissioner under subsection 64(2) or of a decision under subsection 58(5) within six months after the complaint is made, the complainant may make an application under subsection (1) at any time thereafter

Order of Court

(4) Where, in proceedings under subsection (1), the Court concludes that a federal institution has failed to comply with this Act, the Court may grant such remedy as it considers appropriate and just in the circumstances.

Other rights of action

(5) Nothing in this section abrogates or derogates from any right of action a person might have other than the right of action set out in this section.

Commissioner may apply or appear

[emphasis added]

Autre délai

(3) Si, dans les six mois suivant le dépôt d'une plainte, il n'est pas avisé des conclusions de l'enquête, des recommandations visées au paragraphe 64(2) ou du refus opposé au titre du paragraphe 58(5), le plaignant peut former le recours à l'expiration de ces six mois.

Ordonnance

(4) Le tribunal peut, s'il estime qu'une institution fédérale ne s'est pas conformée à la présente loi, accorder la réparation qu'il estime convenable et juste eu égard aux circonstances.

Précision

(5) Le présent article ne porte atteinte à aucun autre droit d'action.

Exercice de recours par le commissaire

[43] As appears from subsection 77(4) above, the subsection clearly requires the Federal Court to determine that a federal institution has failed to comply with the provisions of the *OLA* before it may grant a remedy (see *Lavigne v. Canada (Human Resources Development)*, [2002] 2 FCR 165, 228 F.T.R. 185 where Lemieux J. of the Federal Court held, at paragraph 63 of his

reasons, that no remedy could be granted pursuant to subsection 77(4) of the *OLA* unless the Court concluded that a federal institution had failed to comply with its obligations under that Act).

[44] It is clear, in my respectful opinion, that in the present matter the Judge did not make any finding or reach any conclusion to the effect that CBC had failed to comply with any of its obligations under the *OLA* since he refused, for the reasons he gave, to deal with the merits of the case brought by the Commissioner and Dr. Amellal. More particularly, he so refused because he was satisfied that the CRTC had properly dealt with the issues before it and that it had resolved these issues in a manner that was “fair and consistent with the objectives of the *OLA*” (paragraph 100 of the second decision).

[45] However, in fairness to the Judge, he appears to suggest in his reasons of the second decision that the CRTC had found, in effect, that CBC had not complied with its *OLA* obligations. This view is perhaps why he felt he could provide a remedy to the respondents under section 77 of the *OLA*. At paragraph 98 of his second decision, the Judge made the following remarks:

[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.

[46] As the Judge recognizes at paragraph 98 above, the CRTC did not actually make any finding that CBC had failed to comply with its *OLA* obligations. In my view, it is beyond doubt that the CRTC made no such finding nor could it. I am satisfied that the determination made by the CRTC with respect to the renewal of CBC's licences and, in particular, its decision to impose upon CBC a number of conditions of licence that meet the expectations of the respondents (and seemingly those of the Judge) do not constitute a finding that CBC failed to comply with its obligations under the *OLA*.

[47] In any event, subsection 77(4) of the *OLA* is clear. It requires the Federal Court to make a determination that a federal institution has failed to comply with the *OLA* before it can grant a remedy to a complainant. That did not happen in the present matter.

[48] Consequently, I have difficulty with the remarks which the Judge made at paragraph 101 of his reasons of the second decision, that the Court's power under section 77 "is essentially 'remedial'" and that the Court is not there to investigate the "alleged failure of a federal institution to uphold its duty to take positive measures". In my respectful view, it is the Federal Court's duty under section 77 of the *OLA* to determine whether there has been a failure to comply with the *OLA* and, if so, to grant the appropriate remedy in the circumstances of the case. This means that it is up to the Federal Court to make the relevant findings with respect to the federal institution's conduct, based on the evidence before it, in order to determine whether there has been a breach of the *OLA*.

[49] What is also clear is that the CRTC does not have the power under the *BA* to determine whether there has been a breach of the provisions of the *OLA*. The CRTC's mandate under the *BA* is otherwise. Although it is empowered, pursuant to subsection 46(4) of the *BA*, to "have regard to the principles and purposes of the *OLA*" in determining whether broadcasting services should be renewed and/or extended, the CRTC cannot reach any conclusion regarding breaches of the *OLA*. That, in my respectful view, is an entirely different matter.

[50] In my view, the fact that the CRTC (in the Judge's opinion) had, in effect, put an end to CBC's violation of the *OLA* and that the CRTC (in the Judge's opinion) had provided a complete remedy for the future is an irrelevant consideration. The simple fact is that what was before the Judge was whether CBC had breached its obligations under the *OLA* when it decided, in 2009, to make the budget cuts which affected CBEF Windsor. More particularly, did CBC's decision and the consequences which resulted therefrom constitute a failure on the part of CBC to comply with its *OLA* obligations.

[51] That question, in my respectful view, has yet to receive an answer. The fact that the CRTC has imposed conditions of licence on CBC which meet some of the respondents' demands is not an answer to the question that was before the Judge. The CRTC's decision, rendered some four years after the budget cuts made by CBC in 2009, did not address the period elapsed between 2009 and 2013. In other words, by imposing conditions of licence on CBC, the CRTC gave CBC its marching orders for the next licence period. However, in so doing, the CRTC made no pronouncement, nor did it purport to make any, regarding the period of 2009 to 2013. Thus the question that was before the Judge was not addressed nor dealt with.

[52] Because he refused to lift the stay of proceedings which he had imposed in his first decision, the Judge was not called upon to make any determination as to whether the budget cuts of 2009 constituted a failure by CBC to comply with the *OLA*. More particularly, he did not hear the parties' arguments with regard to the questions raised by the respondents in their application, other than on the question of jurisdiction.

[53] I therefore conclude that having made no determination as to CBC's failure to comply with the *OLA*, the Judge could not grant the respondents any of the remedies which they sought. This, in my view, is sufficient to dispose of the appeal. In other words, because the Judge could not grant any remedy to the respondents, CBC's appeal must be allowed.

[54] There are, however, other reasons why, in the circumstances, we should not deal with the jurisdiction issue. Before setting out those reasons, I must point out that neither the Commissioner nor Dr. Amellal appealed the Judge's second decision. Consequently, we are not called upon in this appeal to decide whether the Judge was correct when he refused to lift the stay which he had imposed in the first decision. I would say, however, that I have difficulty with the Judge's approach that, on the one hand, the Commissioner had jurisdiction to investigate the complaint made herein by Dr. Amellal and the Comité, and hence to institute proceedings under section 77 of the *OLA*, but that the Court should refuse to hear and determine the complaint because the CRTC is the better forum to resolve the matter. It appears to me, with respect, that if the Judge was right in his determination of the jurisdiction issue, then the Commissioner and Dr. Amellal should have been allowed to pursue the matter so as to obtain a determination on the merits of the complaint.

[55] I am not, however, to be taken as saying that the Judge was correct to find that there was concurrent jurisdiction between the CRTC and the Commissioner in regard to the complaint made by Dr. Amellal and the Comité. Whether there is concurrent jurisdiction over all or certain aspects of the complaint is a question which, unfortunately, will have to be resolved another day.

[56] The issue with regard to the question of jurisdiction is whether CBC's programming activities are subject to the exclusive jurisdiction of the CRTC or whether there is a shared jurisdiction over these matters between the Commissioner and the CRTC. Before setting out my further reasons for not dealing with the jurisdiction issue, I will briefly summarize those submissions and concessions on the issue made by the parties which are particularly relevant.

[57] For the CBC, the matter is quite straightforward. All of its programming activities are to be decided exclusively by the CRTC. It says that pursuant to section 51 of the *BA*, the CRTC is empowered to determine all of CBC's programming activities, adding that the regulation, supervision and implementation of all aspects of the Canadian broadcasting system and the Canadian broadcasting policy were clearly entrusted to the CRTC.

[58] CBC further says that in carrying out its aforesaid mandate, the CRTC, by reason of subsection 46(4) of the *BA*, is required to consider the principles and purposes of the *OLA*. Thus, in enacting the *BA*, Parliament intended to withdraw CBC from the Commissioner's jurisdiction under the *OLA* insofar as its programming activities were concerned.

[59] More particularly, CBC says that the broad powers given to the CRTC under the *BA* allow it, in granting licences to CBC, to oblige CBC to create programs that satisfy the linguistic expectations of OLMCs.

[60] In making these submissions CBC says that the *OLA* is silent with regard to broadcasting and programming. In other words, no powers are given to the Commissioner over these matters.

[61] On my understanding of its position, CBC does not deny that it is subject to section 41 of the *OLA*, but says that whatever obligations it may have under that provision, its obligations may only be determined by the CRTC which must consider CBC's language obligations when it regulates and supervises its programming activities.

[62] CBC also says that it is clear that the Commissioner has no expertise insofar as programming is concerned, adding that the language issues arising in this appeal are part and parcel of its programming activities.

[63] CBC says that subjecting it to two jurisdictions with respect to its programming activities would cause havoc to its operations in that greater time would be required to deal with complaints and, it goes without saying, further expenses would have to be incurred.

[64] Finally, CBC says that its independence in regard to its programming activities would be placed at risk if the Commissioner were allowed to investigate and intrude into its activities.

[65] I now turn to the Commissioner's and Dr. Amellal's submissions. It goes without saying that they both disagree totally with CBC's position.

[66] The Commissioner says that the principal issue to be addressed in the appeal is the question of programming. More particularly, the Commissioner says that programming cannot be as broad and all-encompassing as CBC suggests. The Commissioner says that if CBC's arguments are accepted, all of CBC's activities will be exempt from the *OLA*, hence he will have no jurisdiction whatsoever over CBC in respect of language obligations arising from the *OLA*.

[67] The Commissioner further says that there are no provisions, either in the *BA* or in the *OLA*, which exempt CBC from the *OLA* and from his jurisdiction thereunder. To the contrary, the Commissioner says that the *OLA* has entrusted to him the power to investigate all federal institutions including CBC, adding that as the Federal Court's jurisdiction is tied to his jurisdiction it must determine the matters brought before it under section 77 of the *OLA*.

[68] The Commissioner further says that the fact that the CRTC has jurisdiction to regulate and supervise the Canadian broadcasting system is not a bar to the exercise of his powers under the *OLA*.

[69] The Commissioner concedes that the CRTC was given the jurisdiction under the *BA* to supervise and regulate all of CBC's activities directly related to programming. However, in his view, this does not prevent him from investigating activities which have or might have an indirect effect on CBC's programming.

[70] This leads the Commissioner to make a distinction between programming and programming related activities. In other words, the fact that an activity might have an impact on CBC's programming activities does not lead to the conclusion that such activity is removed from his jurisdiction. Consequently, the Commissioner submits that many of CBC's activities cannot be characterized as programming activities and thus he has the power to investigate them.

[71] Turning to the particular facts of the case, the Commissioner says that the dispute herein between the parties is whether CBC considered its obligations under section 41 of the *OLA* when it decided to make the cuts which impacted on CBEF Windsor. More particularly, the Commissioner says that the CRTC's jurisdiction is one that pertains to the content of the programs produced and diffused by CBC, but not to the decision making process that took place at CBC in deciding that cuts had to be made.

[72] Lastly, the Commissioner says that CBC's submission that complaints which pertain to future programming should be dealt with exclusively by the CRTC does not address the question of whether he can investigate allegations that *OLA* obligations have been breached. In other words, the Commissioner does not dispute the fact that the CRTC properly exercised its jurisdiction when it imposed conditions on CBC's licence for the period of the new licences including those conditions pertaining to language obligations and their impact on OLMCs.

[73] As to Dr. Amellal, he adopts all of the Commissioner's arguments, adding that the dispute between the parties pertains to the manner in which CBC made the impugned decision following the 2009 budget cuts and how that decision affected CBEF Windsor.

[74] From the above, there can be no doubt that the true issue in these proceedings is whether the Commissioner has jurisdiction under the *OLA* to inquire into what CBC says are its programming activities. In that respect, CBC argues, as I have already indicated, that section 41 of the *OLA* is relevant to its programming activities insofar as the CRTC takes these considerations into account in exercising its jurisdiction under the *BA*. Thus, in that light, it cannot be said that CBC objects to the application of section 41 to its programming activities, but that it objects to the Commissioner asserting jurisdiction to investigate programming-related complaints which pertain to *OLA* subject matter, i.e. official languages. In CBC's view, that sort of complaint is assigned exclusively to the CRTC by virtue of the *BA*.

[75] It is trite to say that it cannot be disputed that the CRTC's jurisdiction includes the regulation of CBC's programming activities. However, as appears from the parties' submissions, there is a difference of opinion between the Commissioner and CBC as to what constitutes programming. For CBC, programming is all encompassing and that is why it argues in this case that its decision to make cuts which, *inter alia*, affected CBEF Windsor constitutes programming. From the Commissioner's point of view, that is an overly broad view of what programming is and thus cannot be right.

[76] If I understand the Commissioner's submissions correctly, he says that CBC's broad definition of programming is an attempt to include in its programming activities the decision making processes undertaken in the lead up to programming activities. At the same time, the Commissioner concedes that he does not have jurisdiction to investigate the actual programs produced and disseminated from CBEF Windsor. However, the Commissioner submits that he

had jurisdiction to investigate the context in which CBC's decision to reduce the local and regional content of CBEF Windsor was made. He also says that the question of whether CBC took into account its obligations under section 41 of the *OLA* in making that decision is within his jurisdiction.

[77] Thus, the nature of the dispute before us pertains not only to the end result of CBC's decision making, i.e. the cutting of the local content at CBEF Windsor, but also to the lack of consultation with regard to the making of the initial decision to cut and the question of whether the concerns of the local OLMC were adequately addressed. Thus, the dispute was multifaceted. There was a programming aspect, i.e. the decision to cut the local content and the manner in which that was to be undertaken and an aspect that was, in a certain way, more peripheral to the issue of programming, i.e. that of the consultation involved and the considerations taken by CBC in making its decision. Those were the issues that were before the Judge which, in the event, he did not address.

[78] In other words, the Judge took, in my respectful view, an absolute position. He determined, on a preliminary motion to dismiss brought by CBC and without the benefit of any arguments on the merits of the issues before him, that every facet of the decision making process and the effect of that decision on CBC's programming activities, including the consequences which resulted in the cuts which affected CBEF Windsor, were all subject to a shared jurisdiction between the CRTC and the Commissioner. The Judge made no findings of fact with regard to these questions. He did not address the various components of the activities at issue, i.e. the decision to make cuts, the cuts themselves, and the consequences which these cuts had on CBEF

Windsor. He simply took the view that there was concurrent jurisdiction over all aspects of the decision making process and he made no attempt to examine the activities at issue so as to determine which were programming activities and which, if any, were not. Had he done so, he would have had to define what programming was and from there determine which of the activities under scrutiny were truly programming activities. Consequently, we do not have the benefit of his findings nor do we have the benefit of his views on these matters. There was evidence before the Judge but, as it turned out, he never dealt with that evidence.

[79] As I indicated earlier, the Judge's view was that the whole of the complaint made by Dr. Amellal and the Comité fell within the jurisdiction of both the Commissioner and the CRTC. In my view, that cannot be. I believe that I am on safe grounds in so saying because the Commissioner himself recognizes that he does not have jurisdiction over what are truly programming activities. The question therefore is whether all of CBC's activities at issue in this case are programming activities and, if so, do they necessarily fall within the CRTC's exclusive jurisdiction. If any of these activities were not programming activities, did they then fall within the Commissioner's realm?

[80] Consequently, were we to accept to determine the question of jurisdiction at issue in this appeal, it would be left to us to review the evidence and make the factual findings which must be made in order to determine the legal issues. This would have to be done without the benefit of the Judge's view on the questions which I have raised. In the circumstances of this case, I am of the opinion that it would be very unwise for us to proceed in such a way.

VI. Conclusion

[81] For these reasons, I would allow CBC's appeal, I would set aside the Federal Court's decision of September 8, 2014 and rendering the judgment which ought to have been rendered, I would dismiss the application brought by the Commissioner and Dr. Amellal pursuant to section 77 of the *OLA*. In the circumstances, I would make no order as to costs.

"M Nadon"

---

J.A.

"I agree.  
A.F. Scott"

"I agree.  
Richard Boivin"

## APPENDIX A

*Broadcasting Act, S.C. 1991, c. 11*

**PART I**  
**GENERAL**  
**INTERPRETATION**

**PARTIE I**  
**DISPOSITIONS GÉNÉRALES**  
**DÉFINITIONS**

Definitions

2. (1) In this Act,

(...)

“Commission”

« *Conseil* »

“Commission” means the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*;

“Corporation”

« *Société* »

“Corporation” means the Canadian Broadcasting Corporation continued by section 36;

(...)

“program”

« *émission* »

Définitions

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

[...]

« Conseil »

“*Commission*”

« Conseil » Le Conseil institué par la *Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes*.

« Société »

“*Corporation*”

« Société » La Société Radio-Canada, visée à l'article 36.

[...]

« émission »

“*program*”

“program” means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text;

(...)

### **Broadcasting Policy for Canada**

#### Declaration

3. (1) It is hereby declared as the broadcasting policy for Canada that

(...)

(c) English and French language broadcasting, while sharing common aspects, operate under different conditions and may have different requirements;

(d) the Canadian broadcasting system should

(i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,

« émission » Les sons ou les images — ou leur combinaison — destinés à informer ou divertir, à l’exception des images, muettes ou non, consistant essentiellement en des lettres ou des chiffres.

[...]

### **Politique canadienne de radiodiffusion**

#### Politique canadienne de radiodiffusion

3. (1) Il est déclaré que, dans le cadre de la politique canadienne de radiodiffusion :

[...]

c) les radiodiffusions de langues française et anglaise, malgré certains points communs, diffèrent quant à leurs conditions d’exploitation et, éventuellement, quant à leurs besoins;

d) le système canadien de radiodiffusion devrait :

(i) servir à sauvegarder, enrichir et renforcer la structure culturelle, politique, sociale et économique du Canada,

(ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,

(iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and

(iv) be readily adaptable to scientific and technological change;

(...)

(m) the programming provided by the Corporation should

(i) be predominantly and distinctively Canadian,

(ii) favoriser l'épanouissement de l'expression canadienne en proposant une très large programmation qui traduise des attitudes, des opinions, des idées, des valeurs et une créativité artistique canadiennes, qui mette en valeur des divertissements faisant appel à des artistes canadiens et qui fournisse de l'information et de l'analyse concernant le Canada et l'étranger considérés d'un point de vue canadien,

(iii) par sa programmation et par les chances que son fonctionnement offre en matière d'emploi, répondre aux besoins et aux intérêts, et refléter la condition et les aspirations, des hommes, des femmes et des enfants canadiens, notamment l'égalité sur le plan des droits, la dualité linguistique et le caractère multiculturel et multiracial de la société canadienne ainsi que la place particulière qu'y occupent les peuples autochtones,

(iv) demeurer aisément adaptable aux progrès scientifiques et techniques;

[...]

m) la programmation de la Société devrait à la fois :

(i) être principalement et typiquement canadienne,

(ii) reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions,

(iii) actively contribute to the flow and exchange of cultural expression,

(iv) 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,

(v) strive to be of equivalent quality in English and in French,

(vi) contribute to shared national consciousness and identity,

(vii) be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose, and

(viii) reflect the multicultural and multiracial nature of Canada;

(...)

#### Further declaration

(2) It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the

(ii) refléter la globalité canadienne et rendre compte de la diversité régionale du pays, tant au plan national qu'au niveau régional, tout en répondant aux besoins particuliers des régions,

(iii) contribuer activement à l'expression culturelle et à l'échange des diverses formes qu'elle peut prendre,

(iv) être offerte en français et en anglais, de manière à refléter la situation et les besoins particuliers des deux collectivités de langue officielle, y compris ceux des minorités de l'une ou l'autre langue,

(v) chercher à être de qualité équivalente en français et en anglais,

(vi) contribuer au partage d'une conscience et d'une identité nationales,

(vii) être offerte partout au Canada de la manière la plus adéquate et efficace, au fur et à mesure de la disponibilité des moyens,

(viii) refléter le caractère multiculturel et multiracial du Canada;

[...]

#### Déclaration

(2) Il est déclaré en outre que le système canadien de radiodiffusion constitue un système unique et que la meilleure façon d'atteindre les objectifs de la politique canadienne de radiodiffusion consiste à confier la

regulation and supervision of the Canadian broadcasting system by a single independent public authority.

réglementation et la surveillance du système canadien de radiodiffusion à un seul organisme public autonome.

(...)

[...]

## PART II

## PARTIE II

### OBJECTS AND POWERS OF THE COMMISSION IN RELATED TO BROADCASTING

### MISSION ET POUVOIRS DU CONSEIL EN MATIÈRE DE RADIODIFFUSION

#### OBJECTS

#### MISSION

##### Objects

##### Mission

5. (1) Subject to this Act and the *Radiocommunication Act* and to any directions to the Commission issued by the Governor in Council under this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2).

5. (1) Sous réserve des autres dispositions de la présente loi, ainsi que de la *Loi sur la radiocommunication* et des instructions qui lui sont données par le gouverneur en conseil sous le régime de la présente loi, le Conseil réglemente et surveille tous les aspects du système canadien de radiodiffusion en vue de mettre en oeuvre la politique canadienne de radiodiffusion.

##### Regulatory policy

##### Réglementation et surveillance

(2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that

(2) La réglementation et la surveillance du système devraient être souples et à la fois :

(a) is readily adaptable to the different characteristics of English and French language broadcasting and to the different conditions under which broadcasting undertakings that provide English or French language programming operate;

a) tenir compte des caractéristiques de la radiodiffusion dans les langues française et anglaise et des conditions différentes d'exploitation auxquelles sont soumises les entreprises de radiodiffusion qui diffusent la programmation dans l'une ou l'autre langue;

(...)

[...]

**PART III**

**CANADIAN BROADCASTING  
CORPORATION**

(...)

**OBJECTS AND POWERS**

Objects and Powers

**46.** (1) The Corporation is established for the purpose of providing the programming contemplated by paragraphs 3(1)(*l*) and (*m*), in accordance with the conditions of any licence or licences issued to it by the Commission and subject to any applicable regulations of the Commission, and for that purpose the Corporation may

(...)

Extension of services

(4) In planning extensions of broadcasting services, the Corporation shall have regard to the principles and purposes of the Official Languages Act.

**PARTIE III**

**SOCIÉTÉ RADIO-CANADA**

[...]

**MISSION ET POUVOIRS**

Mission et pouvoirs

**46.** (1) La Société a pour mission de fournir la programmation prévue aux alinéas 3(1) *l*) et *m*), en se conformant aux conditions des licences qui lui sont attribuées par le Conseil, sous réserve des règlements de celui-ci. À cette fin, elle peut :

[...]

Extension des services

(4) La Société tient compte, dans ses projets d'extension de services de radiodiffusion, des principes et des objectifs de la Loi sur les langues officielles.

## APPENDIX B

*Official Languages Act* (R.S.C., 1985, c. 31 (4th Supp.))

### PURPOSE OF ACT

Purpose

2. The purpose of this Act is to

(a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions;

(b) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society; and

(c) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada.

### INTERPRETATION

Definitions

3. (1) In this Act,

(...)

### OBJET

Objet

2. La présente loi a pour objet :

a) d'assurer le respect du français et de l'anglais à titre de langues officielles du Canada, leur égalité de statut et l'égalité de droits et privilèges quant à leur usage dans les institutions fédérales, notamment en ce qui touche les débats et travaux du Parlement, les actes législatifs et autres, l'administration de la justice, les communications avec le public et la prestation des services, ainsi que la mise en oeuvre des objectifs de ces institutions;

b) d'appuyer le développement des minorités francophones et anglophones et, d'une façon générale, de favoriser, au sein de la société canadienne, la progression vers l'égalité de statut et d'usage du français et de l'anglais;

c) de préciser les pouvoirs et les obligations des institutions fédérales en matière de langues officielles.

### DÉFINITIONS

Définitions

3. (1) Les définitions qui suivent s'appliquent à la présente loi.

[...]

“federal institution”  
« *institutions fédérales* »

“federal institution” includes any of the following institutions of the Parliament or government of Canada:

- (a) the Senate,
- (b) the House of Commons,
- (c) the Library of Parliament,
- (c.1) the office of the Senate Ethics Officer and the office of the Conflict of Interest and Ethics Commissioner,
- (...)
- (d) any federal court,
- (e) any board, commission or council, or other body or office, established to perform a governmental function by or pursuant to an Act of Parliament or by or under the authority of the Governor in Council,

« institutions fédérales »  
“*federal institution*”

« institutions fédérales » Les institutions du Parlement et du gouvernement du Canada, dont le Sénat, la Chambre des communes, la bibliothèque du Parlement, le bureau du conseiller sénatorial en éthique et le bureau du commissaire aux conflits d'intérêts et à l'éthique, le Service de protection parlementaire, les tribunaux fédéraux, tout organisme — bureau, commission, conseil, office ou autre — chargé de fonctions administratives sous le régime d'une loi fédérale ou en vertu des attributions du gouverneur en conseil, les ministères fédéraux, les sociétés d'État créées sous le régime d'une loi fédérale et tout autre organisme désigné par la loi à titre de mandataire de Sa Majesté du chef du Canada ou placé sous la tutelle du gouverneur en conseil ou d'un ministre fédéral.

(f) a department of the Government of Canada,

(g) a Crown corporation established by or pursuant to an Act of Parliament, and

(h) any other body that is specified by an Act of Parliament to be an agent of Her Majesty in right of Canada or to be subject to the direction of the Governor in Council or a minister of the Crown

(...)

[...]

## **PART VII**

### **ADVANCEMENT OF ENGLISH AND FRENCH**

Government policy

**41.** (1) The Government of Canada is committed to

(a) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and

(b) fostering the full recognition and use of both English and French in Canadian society.

Duty of federal institutions

(2) Every federal institution has the duty to ensure that positive measures are taken for the implementation of

## **PARTIE VII**

### **PROMOTION DU FRANÇAIS ET DE L'ANGLAIS**

Engagement

**41.** (1) Le gouvernement fédéral s'engage à favoriser l'épanouissement des minorités francophones et anglophones du Canada et à appuyer leur développement, ainsi qu'à promouvoir la pleine reconnaissance et l'usage du français et de l'anglais dans la société canadienne.

Obligations des institutions fédérales

(2) Il incombe aux institutions fédérales de veiller à ce que soient prises des mesures positives pour

the commitments under subsection (1). For greater certainty, this implementation shall be carried out while respecting the jurisdiction and powers of the provinces.

(...)

## **PART IX**

### **COMMISSIONER OF OFFICIAL LANGUAGES**

(...)

#### **DUTIES AND FUNCTIONS OF COMMISSIONER**

(...)

Duty of Commissioner under Act

**56.** (1) It is the duty of the Commissioner to take all actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society.

Idem

(2) It is the duty of the Commissioner, for the purpose set out in subsection (1), to conduct and carry out investigations either on his own initiative or pursuant to any complaint made to the Commissioner and to report and make recommendations with respect thereto as provided in this Act.

mettre en oeuvre cet engagement. Il demeure entendu que cette mise en oeuvre se fait dans le respect des champs de compétence et des pouvoirs des provinces.

[...]

## **PARTIE IX**

### **COMMISSAIRE AUX LANGUES OFFICIELLES**

[...]

#### **MANDAT DU COMMISSAIRE**

[...]

Mission

**56.** (1) Il incombe au commissaire de prendre, dans le cadre de sa compétence, toutes les mesures visant à assurer la reconnaissance du statut de chacune des langues officielles et à faire respecter l'esprit de la présente loi et l'intention du législateur en ce qui touche l'administration des affaires des institutions fédérales, et notamment la promotion du français et de l'anglais dans la société canadienne.

Enquêtes

(2) Pour s'acquitter de cette mission, le commissaire procède à des enquêtes, soit de sa propre initiative, soit à la suite des plaintes qu'il reçoit, et présente ses rapports et recommandations conformément à la présente loi.

(...)

## INVESTIGATIONS

Investigation of complaints

**58.** (1) Subject to this Act, the Commissioner shall investigate any complaint made to the Commissioner arising from any act or omission to the effect that, in any particular instance or case,

(a) the status of an official language was not or is not being recognized,

(b) any provision of any Act of Parliament or regulation relating to the status or use of the official languages was not or is not being complied with, or

(c) the spirit and intent of this Act was not or is not being complied with in the administration of the affairs of any federal institution.

(...)

Discontinuance of investigation

(3) If in the course of investigating any complaint it appears to the Commissioner that, having regard to all the circumstances of the case, any further investigation is unnecessary, the Commissioner may refuse to investigate the matter further.

[...]

## PLAINTES ET ENQUÊTES

Plaintes

**58.** (1) Sous réserve des autres dispositions de la présente loi, le commissaire instruit toute plainte reçue — sur un acte ou une omission — et faisant état, dans l'administration d'une institution fédérale, d'un cas précis de non-reconnaissance du statut d'une langue officielle, de manquement à une loi ou un règlement fédéraux sur le statut ou l'usage des deux langues officielles ou encore à l'esprit de la présente loi et à l'intention du législateur.

[...]

Interruption de l'instruction

(3) Le commissaire peut, à son appréciation, interrompre toute enquête qu'il estime, compte tenu des circonstances, inutile de poursuivre

Right of Commissioner to refuse or cease investigation

Refus d'instruire

(4) The Commissioner may refuse to investigate or cease to investigate any complaint if in the opinion of the Commissioner

(4) Le commissaire peut, à son appréciation, refuser ou cesser d'instruire une plainte dans l'un ou l'autre des cas suivants :

(a) the subject-matter of the complaint is trivial;

a) elle est sans importance;

(b) the complaint is frivolous or vexatious or is not made in good faith; or

b) elle est futile ou vexatoire ou n'est pas faite de bonne foi;

(c) the subject-matter of the complaint does not involve a contravention or failure to comply with the spirit and intent of this Act, or does not for any other reason come within the authority of the Commissioner under this Act.

c) son objet ne constitue pas une contravention à la présente loi ou une violation de son esprit et de l'intention du législateur ou, pour toute autre raison, ne relève pas de la compétence du commissaire.

(...)

[...]

Conclusion of investigation

Clôture de l'enquête

**63.** (1) If, after carrying out an investigation under this Act, the Commissioner is of the opinion that

**63.** (1) Au terme de l'enquête, le commissaire transmet un rapport motivé au président du Conseil du Trésor ainsi qu'à l'administrateur général ou à tout autre responsable administratif de l'institution fédérale concernée, s'il est d'avis :

(a) the act or omission that was the subject of the investigation should be referred to any federal institution concerned for consideration and action if necessary,

a) soit que le cas en question doit être renvoyé à celle-ci pour examen et suite à donner si nécessaire;

(b) any Act or regulations thereunder, or any directive of the Governor in Council or the Treasury Board, should be reconsidered or any practice that leads or is likely to lead to a contravention of this Act should be altered or discontinued, or

*b)* soit que des lois ou règlements ou des instructions du gouverneur en conseil ou du Conseil du Trésor devraient être reconsidérés, ou encore qu'un usage aboutissant à la violation de la présente loi ou risquant d'y aboutir devrait être modifié ou abandonné;

(c) any other action should be taken,

*c)* soit que d'autres mesures devraient être prises.

the Commissioner shall report that opinion and the reasons therefor to the President of the Treasury Board and the deputy head or other administrative head of any institution concerned.

Other policies to be taken into account

Facteurs additionnels

(2) In making a report under subsection (1) that relates to any federal institution, the Commissioner shall have regard to any policies that apply to that institution that are set out in any Act of Parliament or regulation thereunder or in any directive of the Governor in Council or the Treasury Board.

(2) En établissant son rapport, le commissaire tient compte des principes applicables à l'institution fédérale concernée aux termes d'une loi ou d'un règlement fédéraux ou d'instructions émanant du gouverneur en conseil ou du Conseil du Trésor.

(...)

[...]

## **PART X**

## **PARTIE X**

### **COURT REMEDY**

### **RECOURS JUDICIAIRE**

Definition of "Court"

Définition de « tribunal »

**76.** In this Part, "Court" means the Federal Court.

**76.** Le tribunal visé à la présente partie est la Cour fédérale.

Application for remedy

Recours

**77.** (1) Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, sections 10 to 13 or

**77.** (1) Quiconque a saisi le commissaire d'une plainte visant une obligation ou un droit prévus aux articles 4 à 7 et 10 à 13 ou aux parties

Part IV, V or VII, or in respect of section 91, may apply to the Court for a remedy under this Part.

IV, V, ou VII, ou fondée sur l'article 91, peut former un recours devant le tribunal sous le régime de la présente partie.

#### Limitation period

#### Délai

(2) An application may be made under subsection (1) within sixty days after

(2) Sauf délai supérieur accordé par le tribunal sur demande présentée ou non avant l'expiration du délai normal, le recours est formé dans les soixante jours qui suivent la communication au plaignant des conclusions de l'enquête, des recommandations visées au paragraphe 64(2) ou de l'avis de refus d'ouverture ou de poursuite d'une enquête donné au titre du paragraphe 58(5).

(a) the results of an investigation of the complaint by the Commissioner are reported to the complainant under subsection 64(1),

(b) the complainant is informed of the recommendations of the Commissioner under subsection 64(2), or

(c) the complainant is informed of the Commissioner's decision to refuse or cease to investigate the complaint under subsection 58(5),

or within such further time as the Court may, either before or after the expiration of those sixty days, fix or allow.

#### Application six months after complaint

#### Autre délai

(3) Where a complaint is made to the Commissioner under this Act but the complainant is not informed of the results of the investigation of the complaint under subsection 64(1), of the recommendations of the

(3) Si, dans les six mois suivant le dépôt d'une plainte, il n'est pas avisé des conclusions de l'enquête, des recommandations visées au paragraphe 64(2) ou du refus opposé au titre du paragraphe 58(5), le

Commissioner under subsection 64(2) or of a decision under subsection 58(5) within six months after the complaint is made, the complainant may make an application under subsection (1) at any time thereafter

plaignant peut former le recours à l'expiration de ces six mois.

#### Order of Court

#### Ordonnance

(4) Where, in proceedings under subsection (1), the Court concludes that a federal institution has failed to comply with this Act, the Court may grant such remedy as it considers appropriate and just in the circumstances.

(4) Le tribunal peut, s'il estime qu'une institution fédérale ne s'est pas conformée à la présente loi, accorder la réparation qu'il estime convenable et juste eu égard aux circonstances.

#### Other rights of action

#### Précision

(5) Nothing in this section abrogates or derogates from any right of action a person might have other than the right of action set out in this section.

(5) Le présent article ne porte atteinte à aucun autre droit d'action.

#### Commissioner may apply or appear

#### Exercice de recours par le commissaire

**78.** (1) The Commissioner may

**78.** (1) Le commissaire peut selon le cas :

(a) within the time limits prescribed by paragraph 77(2)(a) or (b), apply to the Court for a remedy under this Part in relation to a complaint investigated by the Commissioner if the Commissioner has the consent of the complainant;

a) exercer lui-même le recours, dans les soixante jours qui suivent la communication au plaignant des conclusions de l'enquête ou des recommandations visées au paragraphe 64(2) ou dans le délai supérieur accordé au titre du paragraphe 77(2), si le plaignant y consent;

(b) appear before the Court on behalf of any person who has applied under section 77 for a remedy under this Part; or

b) comparaître devant le tribunal pour le compte de l'auteur d'un recours;

(c) with leave of the Court, appear as a party to any proceedings under this Part.

c) comparaître, avec l'autorisation du tribunal, comme partie à une instance engagée sur le fondement de la présente partie.

(...)

[...]

## **PART XI**

## **PARTIE XI**

### **GENERAL**

### **DISPOSITIONS GÉNÉRALES**

Primacy of Parts I to V

Primauté sur les autres lois

**82.** (1) In the event of any inconsistency between the following Parts and any other Act of Parliament or regulation thereunder, the following Parts prevail to the extent of the inconsistency:

**82.** (1) Les dispositions des parties qui suivent l'emportent sur les dispositions incompatibles de toute autre loi ou de tout règlement fédéraux:

(a) Part I (Proceedings of Parliament);

a) partie I (Débats et travaux parlementaires);

(b) Part II (Legislative and other Instruments);

b) partie II (Actes législatifs et autres);

(c) Part III (Administration of Justice);

c) partie III (Administration de la justice);

(d) Part IV (Communications with and Services to the Public); and

d) partie IV (Communications avec le public et prestation des services);

(e) Part V (Language of Work).

e) partie V (Langue de travail).

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-421-14

**(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE  
MARTINEAU DATED SEPTEMBER 8, 2014, DOCKET NUMBER T-1288-10)**

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

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** APRIL 14 AND 15, 2015

**REASONS FOR JUDGMENT BY:** NADON J.A.

**CONCURRED IN BY:** SCOTT J.A.  
BOIVIN J.A.

**DATED:** NOVEMBER 12, 2015

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