

Date: 20080725

Docket: 08-A-32

Citation: 2008 FCA 247

**CORAM: EVANS J.A.
RYER J.A.
TRUDEL J.A.**

BETWEEN:

**COMMUNICATIONS, ENERGY AND
PAPERWORKERS UNION OF CANADA**

Appellant

and

CANWEST MEDIAWORKS INC.

Respondent

**THE CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION**

Intervener

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 25, 2008.

REASONS FOR ORDER BY:

EVANS J.A.

CONCURRING IN BY:

**RYER J.A.
TRUDEL J.A.**

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REASONS FOR ORDER

EVANS J.A.

[1] The Communications, Energy and Paperworkers Union of Canada (CEP) has brought a motion in writing for leave to appeal a decision of the Canadian Radio-television and Telecommunications Commission (CRTC). The decision in question is said to be contained in a letter, dated February 28, 2008, and signed by Mr. Michel Arpin (Arpin letter), the CRTC's Vice Chairman, Broadcasting.

[2] This letter was written in response to a complaint by CEP about certain structural changes being implemented by CanWest MediaWorks Inc. (CanWest) which, CEP alleges, would infringe

the *Broadcasting Act*, S.C. 1991, c. 11, and Regulations, and the terms and conditions of CanWest's broadcasting licence. CEP was concerned that, if implemented, the changes would result in significant job losses for its members. CEP requested that the CRTC hold a public hearing on its complaint pursuant to subsection 18(3) of the *Broadcasting Act*.

[3] The Arpin letter stated that: (i) in the absence of evidence from CEP supporting its allegations, the writer was unable to conclude that CanWest's plans would put it in breach of its licence; (ii) there was no evidence that CanWest was currently in breach of its obligations as a licensee; and (iii) no public meeting should be held at this time since the Commission would, if necessary, examine the issues more closely at CanWest's 2009 licence renewal, when the plans to which CEP objected would be in operation.

[4] As a result, CEP's complaint was not put on the agenda of a meeting of the CRTC or of any of its delegates authorized to make binding decisions, and no further action was taken on it.

[5] In an order dated June 11, 2008, Noël J.A. granted the CRTC leave to intervene in CEP's application for leave to appeal the Arpin letter pursuant to subsection 31(2) of the *Broadcasting Act*.

31. (1) Except as provided in this Part, every decision and order of the Commission is final and conclusive.

(2) An appeal lies from a decision or order of the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction if leave therefor is obtained from that Court on application

31. (1) Sauf exceptions prévues par la présente partie, les décisions et ordonnances du Conseil sont définitives et sans appel.

(2) Les décisions et ordonnances du Conseil sont susceptibles d'appel, sur une question de droit ou de compétence, devant la Cour d'appel fédérale.

made within one month after the making of the decision or order sought to be appealed from or within such further time as that Court under special circumstances allows.

L'exercice de cet appel est toutefois subordonné à l'autorisation de la cour, la demande en ce sens devant être présentée dans le mois qui suit la prise de la décision ou ordonnance attaquée ou dans le délai supplémentaire accordé par la cour dans des circonstances particulières.

[6] The CRTC took the position before Noël J.A. that the Arpin letter did not constitute a “decision of the Commission” for the purpose of subsection 31(2) and that, since there was no decision to appeal, CEP’s application for leave to appeal should be dismissed. In its response to CEP’s application for leave, CanWest did not make this point.

[7] Noël J.A. granted the CRTC leave to intervene in CEP’s application for leave to appeal, on the condition that it presented evidence and made submissions regarding the CRTC’s processes and procedures in handling complaints, and whether the Arpin letter was a “decision” which could be appealed. The CRTC has complied with this condition by filing a record including an affidavit sworn by Robert A. Morin, its Secretary General, and a memorandum of fact and law.

[8] I agree with the CRTC that the Arpin letter is not a “decision” within the meaning of subsection 31(2) of the *Broadcasting Act* and that CEP’s application for leave to appeal must therefore be dismissed.

[9] Essentially the same question was decided by this Court in *Centre for Research-Action on Race Relations v. Canada (Canadian Radio-television and Telecommunications Commission)* (2000), 266 N.R. 344 (F.C.A.) (*Centre for Research-Action*). Writing for the Court, Strayer J.A.

stated that the Commission comprises the full and part time members of the Commission and that since the letter was signed by the CRTC's Executive Director, Broadcasting, it could not constitute a "decision" of the CRTC which was capable of being the subject of an appeal under subsection 31(2).

[10] CEP seeks to distinguish *Centre for Research-Action* on the ground that the letter in that case had been written by a member of the CRTC's staff, whereas the letter in the present case was written by a Vice Chairman of the CRTC. I do not agree. The central question is whether the Vice Chairman had the legal authority to make a "decision of the Commission" with respect to the complaint.

[11] The *Broadcasting Act* empowers the CRTC to, among other things, hold a public hearing and issue a decision in connection with a complaint made to it.

18.(3) The Commission may hold a public hearing, make a report, issue any decision and give any approval in connection with any complaint or representation made to the Commission or in connection with any other matter within its jurisdiction under this Act if it is satisfied that it would be in the public interest to do so.

18.(3) Les plaintes et les observations présentées au Conseil, de même que toute autre question relevant de sa compétence au titre de la présente loi, font l'objet de telles audiences, d'un rapport et d'une décision — notamment une approbation — si le Conseil l'estime dans l'intérêt public.

[12] The *Canadian Radio-television and Telecommunications Commission Act*, R.S.C. 1985, c. C-22 (CRTC Act) provides that the Commission comprises the full-time and part-time members appointed by the Governor in Council.

3.(1) There is hereby established a commission, to be known as the Canadian Radio-television and Telecommunications Commission, consisting of not more than thirteen full-time members and not more than six part-time members, to be appointed by the Governor in Council.

3.(1) Est constitué le Conseil de la radiodiffusion et des télécommunications canadiennes, composé d'au plus treize membres à temps plein et six membres à temps partiel, nommés par le gouverneur en conseil.

[13] The CRTC Act also provides that a majority of the full-time members and a majority of the part-time members constitute a quorum of the Commission.

10.(3) A majority of the full-time members from time to time in office and a majority of the part-time members from time to time in office constitute a quorum of the Commission.

10.(3) Le quorum est constitué par la majorité de chaque catégorie de conseillers en fonction.

[14] However, the *Broadcasting Act* authorizes the Chairperson of the Commission to establish panels of three members each to deal with, hear and determine any matter on behalf of the Commission.

20.(1) The Chairperson of the Commission may establish panels, each consisting of not fewer than three members of the Commission, at least two of whom shall be full-time members, to deal with, hear and determine any matter on behalf of the Commission.

20.(1) Le président du Conseil peut former des comités — composés d'au moins trois conseillers dont deux à temps plein — chargés de connaître et décider, au nom du Conseil, des affaires dont celui-ci est saisi.

[15] In addition, the *Broadcasting Act* enables the Commission to delegate powers to special or standing committees of the Commission established by a Commission by-law.

11.(1) The Commission may make by-laws

11.(1) Le Conseil peut, par règlement administratif :

...

[...]

(b) respecting the conduct of business at meetings of the Commission, the establishment of special and standing committees of the Commission, the delegation of duties to those committees and the fixing of quorums for meetings thereof;

b) régir le déroulement de ses réunions, ainsi que la constitution de comités spéciaux et permanents, la délégation de fonctions aux comités et la fixation de leur quorum;

[16] Pursuant to this power, Commission By-law No. 26 established a Broadcasting Committee comprising all members of the CRTC, with a quorum of three. The Committee's delegated powers include the authority "to determine, pursuant to subsection 18(3) of the *Broadcasting Act*, whether it is in the public interest to hold a public hearing in connection with any complaint ... made to the Commission".

[17] It is clear from these provisions that no single member of the CRTC, including the Vice Chairman, Broadcasting, has the authority to exercise the statutory powers of the CRTC, including the power in subsection 18(3) respecting a complaint. Consequently, the Arpin letter cannot be a "decision of the Commission" for the purpose of subsection 31(2) of the *Broadcasting Act*.

[18] CEP also says that, unlike the letter considered in *Centre for Research-Action*, the Arpin letter does not state that it was not a decision of the CRTC, nor does it indicate that it is merely expressing the personal opinion of the author. In my view, these considerations cannot clothe the Vice Chairman, Broadcasting, with a legal authority that he does not possess, so as to convert the Arpin letter into a "decision of the Commission". Similarly, the Arpin letter is not rendered a

“decision of the Commission” because the CRTC’s *Rules of Procedure* and “Fact Sheet” may not adequately explain the process and procedure by which the CRTC handles complaints, and Commission By-Law No. 26 delegating to the Broadcasting Committee the exercise of the CRTC’s power under subsection 18(3) to hold a public hearing is not available to the public.

[19] Although the above considerations do not make the Arpin letter a decision for the purpose of subsection 31(2), they do suggest that the CRTC could do a much better job than it has in ensuring that complainants understand the effect of the kind of letter written by Mr. Arpin, the CRTC’s administrative processes and procedures for dealing with complaints, and who may make decisions in its name. The fact that the experienced counsel retained by CanWest did not question the legal status of the Arpin letter is further evidence that the CRTC needs to ensure that its processes are better understood both by those it regulates and by interested members of the public.

[20] CEP also relies on the alleged deficiencies in the CRTC’s process, and the fact that it was reasonable for CEP to assume from the content and the identity of the author that the Arpin letter was a decision, as the bases for requiring the CRTC to pay its costs in the unsuccessful application for leave to appeal.

[21] Noël J.A. ordered that the parties to the CRTC’s application for leave to intervene in the application for leave to appeal should assume their own costs. While I have some sympathy with CEP’s position, it would be inappropriate to require the CRTC, as an intervener, to pay CEP its costs on the application for leave to appeal.

[22] However, in view of the circumstances described in paragraphs 18-20 above, and the fact, despite the Court's earlier decision in *Centre for Research-Action*, CanWest did not raise the jurisdictional issue, I would make no award of costs on the application for leave to appeal.

[23] For these reasons, I would deny leave to appeal from the Arpin letter and dismiss CEP's motion for leave to appeal, without costs.

“John M. Evans”

J.A.

“I agree.

C. Michael Ryer J.A.”

“I agree.

Johanne Trudel J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: 08-A-32

STYLE OF CAUSE: COMMUNICATIONS, ENERGY
AND PAPERWORKERS UNION
OF CANADA v. CANWEST
MEDIWORKS INC.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: Evans J.A.

CONCURRED IN BY: Ryer J.A.
Trudel J.A.

DATED: July 25, 2008

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