

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20100707

Docket: A-303-09

Citation: 2010 FCA 178

**CORAM: NOËL J.A.
NADON J.A.
DAWSON J.A.**

BETWEEN:

IN THE MATTER OF THE *BROADCASTING ACT*, S.C. 1991, c. 11;

**AND IN THE MATTER OF THE CANADIAN RADIO-TELEVISION
AND TELECOMMUNICATIONS COMMISSION'S BROADCASTING
REGULATORY POLICY CRTC 2009-329 AND BROADCASTING
ORDER CRTC 2009-452**

**AND IN THE MATTER OF AN APPLICATION BY WAY OF A
REFERENCE TO THE FEDERAL COURT OF APPEAL PURSUANT
TO SECTIONS 18.3(1) AND 28(2) OF THE *FEDERAL COURTS ACT*,
R.S.C. 1985, c. F-7**

Heard at Ottawa, Ontario, on June 1, 2010.

Judgment delivered at Ottawa, Ontario, on July 7, 2010.

REASONS FOR JUDGMENT BY:

NOËL J.A.

CONCURRED IN BY:

NADON J.A.
DAWSON J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an application for a reference by the Canadian Radio-television and Telecommunications Commission (the CRTC). The question being referred is:

Do retail Internet service providers (ISPs) carry on, in whole or in part, “broadcasting undertakings” subject to the *Broadcasting Act*, [S.C. 1991, c. 11 (the *Broadcasting Act*)] when, in their role as ISPs, they provide access through the Internet to “broadcasting” requested by end-users?

The terms “broadcasting” and “broadcasting undertaking” are as defined in the *Broadcasting Act* as amended.

[2] Two groups take opposite views as to how this question should be answered. The Coalition, composed of Bell Aliant Regional Communications, LP, Bell Canada, Cogeco Cable Inc., MTS Allstream Inc., Rogers Communications Inc., Telus Communications Company and Videotron Ltd., along with Shaw Communications Inc. (Shaw) submit that the question should be answered in the negative.

[3] The Cultural Group, composed of the Alliance of Canadian Cinema, Television & Radio Artists (ACTRA), Canadian Film & Television Production Association (CFTPA), Directors Guild of Canada (DGC) and Writers Guild of Canada (WGC) argues that the question should be answered in the affirmative.

[4] In conformity with the order issued by this Court on July 31, 2009, the supporting affidavits and documentary exhibits filed by the members of the two groups, along with the affidavit of Namir Anani, Executive Director, Policy Development and Research at the CRTC, filed by the CRTC, are the materials that constitute the case to be determined on the reference pursuant to Rule 322 of the *Federal Courts Rules*, SOR/98-106.

[5] The statutory provisions that are relevant to the analysis are set out in the Annex appended to these reasons.

RELEVANT FACTS

[6] On May 17, 1999, the CRTC issued a report of broadcasting in new media: *New Media*, Broadcasting Public Notice CRTC 1999-84; Telecom Public Notice CRTC 99-14, Notice of Application of the CRTC, Tab A (the New Media Report). It concluded that while some new media services fell within the meaning of “broadcasting” in the *Broadcasting Act*, their regulation was not necessary to implement the Act’s broadcasting policy. By CRTC Public Notice 1999-197 (the New Media Exemption Order), the CRTC exempted those undertakings, classified as “new media broadcasting undertakings”, from any or all of the requirements of Part II of the *Broadcasting Act* and *Regulations*, pursuant to its powers under subsection 9(4) of the *Broadcasting Act*.

[7] On October 15, 2008, the CRTC issued Broadcasting Notice of Public Hearing CRTC 2008-11, initiating a public proceeding to determine, amongst other things, whether the New Media Exemption Order continued to be appropriate or needed to be revised.

[8] Having reviewed the legal opinions filed by the interested parties, the CRTC issued Broadcasting Regulatory Policy CRTC 2009-329 detailing its findings on June 4, 2009 (the 2009 CRTC Policy). In this Policy, the CRTC did not determine the issue as to whether ISPs are subject to the *Broadcasting Act* when they provide access to broadcasting through the Internet. Rather, the CRTC decided that it would refer the question to this Court for determination. The CRTC noted that the outcome of the reference is important to determine whether ISPs are subject to the New Media Exemption Order and whether the proposed amendments to impose reporting requirements and undue preference provisions would apply to them.

[9] On July 28, 2009, the CRTC issued Broadcasting Order CRTC 2009-452 (the Reference Order) ordering the referral of the question currently before this Court. The Reference Order also clarifies the context for the referral:

4. With respect to its determination to refer this matter to the Court, the Commission stated the following in its regulatory policy:

The issue of the applicability of the Act to ISPs was raised primarily in relation to the proposal by cultural groups in the Proceeding for a levy on ISPs to create a fund to support the creation and presentation of Canadian new media broadcasting content. Although the Commission has determined that funding (and, consequently, a levy) is neither necessary nor appropriate at this time, it considers that the question as to whether ISPs are subject to the Act must be resolved. If ISPs were subject to the Act, they would fall within the scope of the New Media Exemption Order given that it was intended to encompass all broadcasting undertakings whose services are delivered and accessed over the Internet. Accordingly, legal certainty with respect to the status of ISPs under the Act is necessary in order to know whether ISPs are subject to the New Media Exemption Order and, as such, whether the proposed amendments to that order to impose reporting requirements and undue preference provisions for new media broadcasting undertakings will apply to them.

The Commission notes that, pursuant to subsection 4(4) of the *Broadcasting Act*, a telecommunications common carrier, as defined in the *Telecommunications Act*, when acting solely in that capacity, is not subject to the *Broadcasting Act*. Likewise, pursuant to section 4 of the *Telecommunications Act*, that statute does not apply in respect of broadcasting by a broadcasting undertaking. The legal issue as to whether ISPs are subject to the *Broadcasting Act* raises fundamental questions regarding the distinction, for the purpose of the *Broadcasting Act* and the *Telecommunications Act*, between telecommunications common carriers and broadcasting undertakings.

[10] The CRTC, in referring the question to the Court, made a number of findings as to the workings of the Internet and the role of ISPs. The CRTC describes the Internet as a network of networks that allows for the communication of digital information. It is composed of interconnected computers usually called “hosts” and “routers”. Hosts, such as Internet users and content providers such as website servers, are end-systems that send and receive data while routers are network computers that relay data from host to host.

[11] Network providers, such as retail ISPs, are entities that deploy routers and other network infrastructure to interconnect their subscribers with the other networks that make up the Internet. In addition, ISPs generally provide their subscribers with hardware such as a modem and/or router to connect them to their network, as well as customer authentication (e.g. username and password).

[12] The CRTC defined ISPs in the Glossary of New Media Terms appended in the New Media Report:

A company or other organization which provides access to the Internet to its customers via one or a combination of dial-up lines (similar to telephone service), coaxial cable ISDN, xDSL or other dedicated lines. The most typical example is a home user who pays a fee to connect to the ISP’s server. The connection is made by a “modem” which makes the electronic data from the home user’s computer transmittable over a telephone line. The data then passes through the telephone company’s facilities in the same way as a normal telephone call. The “call” is received by the ISP which “routes” the user’s requests for information to the server that is “hosting” the desired data.

[13] In other words, ISPs provide the infrastructure to enable end-user subscribers to access the content, applications and services made available by others on the Internet. In order to access

“broadcasting” through the Internet, the end-user must make use of the services of an ISP. In addition, content-providers depend on ISPs’ services for the delivery of their content to end-users. In their role as providers of “access through the Internet to “broadcasting””, ISPs do not select or originate programming or package or aggregate programming services.

[14] Although ISPs may perform these functions when they operate their own websites, the CRTC emphasized (Referral Order, paragraph 10) that this activity is separate and distinct from their role as ISPs which is to provide for the transmission of content requested by their end-users. The focus of the reference is restricted to this last function. ISPs fulfill this function using either their own facilities or facilities leased from another ISP, or a combination of both.

[15] ISPs which qualify as telecommunication common carriers are currently regulated under the *Telecommunications Act*, S.C. 1993, c. 38 (the *Telecommunications Act*) as providers of telecommunications services. The issue underlying the referred question is whether ISPs should be considered a “broadcasting undertaking” and regulated under the *Broadcasting Act* when they provide access to “broadcasting”.

[16] In the New Media Report which led to the New Media Exemption Order, the CRTC made a number of specific findings which support the assumption that “broadcasting” takes place on the Internet:

- a. Information transmitted on the Internet is not thereby displayed in a public place and is not therefore excluded from the definition of “broadcasting”:

36. [The Commission] considers that the Internet is not in and of itself a "public place" in the sense intended by the Act. Programs are not transmitted to cyberspace, but through it, and are received in a physical place, e.g. in an office or home.

- b. The fact that programs are transmitted to end-users by means of the Internet does not exclude the activity from the definition of "broadcasting":

38. The Commission notes that the definition of "broadcasting" includes the transmission of programs, whether or not encrypted, by other means of telecommunication. This definition is, and was intended to be, technologically neutral. Accordingly, the mere fact that a program is delivered by means of the Internet, rather than by means of the airwaves or by a cable company, does not exclude it from the definition of "broadcasting".

- c. The delivery of content over the Internet from a host server to end-users involves the "transmission" of the content:

39. The fact that an end-user activates the delivery of a program is not, in the Commission's view, determinative. As discussed below, on-demand delivery is included in the definition of "broadcasting". Further, the Commission considers that the particular technology used for the delivery of signals over the Internet cannot be determinative. Based on a plain meaning of the word, and recognizing the intent that the definition be technologically neutral, the Commission considers that the delivery of data signals from an origination point (e.g. a host server) to a reception point (e.g. an end-user's apparatus) by means of the Internet involves the "transmission" of the content.

- d. The words "broadcasting receiving apparatus" include personal computers of Web TV boxes when used to access the Internet:

40. The Commission notes that the definition of "broadcasting receiving apparatus" includes a "device, or combination of devices, intended for or capable of being used for the reception of broadcasting". The Commission considers that an interpretation of this definition that includes only conventional televisions and radios is not supported by the plain meaning of the definition and

would undermine the technological neutrality of the definition of "broadcasting". In the Commission's view, devices such as personal computers, or televisions equipped with Web TV boxes, fall within the definition of "broadcasting receiving apparatus" to the extent that they are or are capable of being used to receive broadcasting.

- e. Programs which may be accessed by the end-user as and when the end-user accesses them are "for reception by the public":

44. In the Commission's view, there is no explicit or implicit statutory requirement that broadcasting involve scheduled or simultaneous transmissions of programs. The Commission notes that the legislator could have, but did not, expressly exclude on-demand programs from the Act. As noted by one party, the mere ability of an end-user to select content on-demand does not by itself remove such content from the definition of broadcasting. The Commission considers that programs that are transmitted to members of the public on-demand are transmitted "for reception by the public".

- f. Digital audio and video services transmitted over the Internet are "broadcasting":

46. By contrast, the ability to select, for example, camera angles or background lighting would not by itself remove programs transmitted by means of the Internet from the definition of "broadcasting". The Commission notes that digital television can be expected to allow this more limited degree of customization. In these circumstances, where the experience of end-users with the program in question would be similar, if not the same, there is nonetheless a transmission of the program for reception by the public, and, therefore, such content would be "broadcasting". These types of programs would include, for example, those that consist of digital audio and video services.

THE PARTIES' POSITIONS

The Coalition's Position

[17] The Coalition submits that the reference question should be answered in the negative. It argues that the definition of “broadcasting undertaking” is to be interpreted in light of the object of the *Broadcasting Act* and it is evident that, by enabling end-users to access “broadcasting” through the Internet, ISPs fall outside of this definition. The definition of “broadcasting undertaking” is not exhaustive. However, unlike distribution and programming undertakings and networks, ISPs do not exercise any control over creating, choosing, or acquiring rights to the content that end-users receive. ISPs play no editorial role nor do they “receive” programs; rather, they simply provide a passive connection through which “programs” may travel. Indeed, the courts have consistently found ISPs to be mere conduits, analogous to telephone lines, and therefore not liable for copyright-infringing or defamatory content that is sent or accessed using their facilities.

[18] As the primary focus of the *Broadcasting Act* is to foster the enrichment of Canada via the broadcasting of programs that promote Canadian artistic creativity, expression and talent, the Coalition is of the view that its interpretation is in line with Parliament's intent. As mere conduits, ISPs have no meaningful role to play in ensuring the attainment of these objectives. Parliament could not have intended to capture undertakings with the characteristics of ISPs. Rather, it is submitted that the function of the ISPs are at the core of the policy objectives of the *Telecommunications Act*.

[19] As recognized at section 28 of the *Telecommunications Act*, telecommunications carriers (including satellite carriers) may transmit broadcasting programming in their capacity as telecommunications carriers. The Coalition argues that the services offered by the ISPs are much like the satellite services provided by Telesat Canada or the Video Dial Tone services which the CRTC has maintained should be regulated under the *Telecommunications Act*. The Coalition submits that the function performed by ISPs in providing Internet access to end-users is consistent with the objectives of the *Telecommunications Act* to ensure the efficiency, accessibility and reliability of Canadian telecommunications and infrastructure.

Shaw's Position

[20] Like the Coalition, Shaw also submits that the reference question should be answered in the negative. Broadcasting is restricted to the “transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus”. As ISPs do not engage in the “transmission of programs” for “reception by the public”, they do not engage in broadcasting.

[21] Shaw relies on the Supreme Court's decision in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427, (CAIP). The Court found that, given their role as a mere conduit of information, ISPs do not communicate to the public pursuant to paragraph 2.4(1)(b) of the *Copyright Act*, R.S.C. 1985, c. C-42 (the *Copyright Act*). The Court also noted that its approach was comparable to that taken in *Electric Despatch Co. of Toronto v. Bell Telephone Co. of Canada*, (1891), 20 S.C.R. 83. (*Electric*

Despatch) where the owner of the mode of transmission, in this case Bell, was found not to be engaged in the transmission itself. Shaw submits that, in accordance with the rules of statutory interpretation, since the acts deal with the same subject-matter and no contrary intention is apparent, the same interpretation of the word “transmission” is applicable under the *Broadcasting Act*.

[22] ISPs also do not telecommunicate for “reception by the public”. Indeed, the data conveyed by ISPs is done so exclusively to the user to whom the individual data packets are addressed. This is contrasted with content providers who typically make website content available to multiple users. Shaw relies on the Supreme Court’s decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 wherein the Court concluded that a single transmission to a single individual is not a communication to the public.

[23] More broadly, Shaw argues that ISPs are not “broadcasting undertakings” because there is no “broadcasting” when a content provider makes program content available over the Internet. Contrary to the unidirectional sending of telecommunications signals by a source to multiple passive recipients which constitutes the essence of broadcasting, Internet users request and receive data via an individualized communication with the source. Shaw relies on this Court’s decision in *WIC TV Amalco Inc. v. ITV Technologies, Inc.*, 2005 FCA 96, (2003) 29 C.P.R. (4th) 182 where the distinction between broadcasting and web casting was recognized.

[24] Shaw argues that the Internet is not part of the “Canadian broadcasting system” that Parliament intended to regulate with the *Broadcasting Act*. Pursuant to paragraphs 3(1)(a) and (b) of

the *Broadcasting Act*, the Canadian broadcasting system “shall be effectively owned and controlled by Canadians” and “makes use of radio frequencies that are public property”. Canadians do not “effectively own and control” the Internet and the Internet does not make use of “radio frequencies that are public property”. Furthermore, the express limitation that broadcasting be confined to the transmission of programs by means of “broadcasting receiving apparatus” excludes computers as found in *R. v. Bahr*, 2006 ABPC 360, 434 A.R. 1. The technological neutrality argument raised by the Cultural Group cannot override the legislative language or intent: *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424, [2005] 2 F.C.R. 654 at paragraphs 153 to 164.

[25] In any case, a finding that ISPs engage in broadcasting would be, it is argued, an untenable interpretation of the *Broadcasting Act*. Highly customizable content has been recognized by the CRTC not to constitute broadcasting. ISPs are unaware of the content of the data packets being relayed and have therefore no knowledge of whether the programs are customizable to a significant degree. They would have no idea when they were broadcasting and when they were not.

[26] As for the scope of the definition of “broadcasting undertakings”, Shaw contends that the use of the word “include” within this definition was not intended to permit the creation of undertakings beyond those already enumerated: “distribution undertaking”, “programming undertaking” and “network”. In light of their content-neutral role, Shaw, like the Coalition, argues that ISPs constitute none of those undertakings and that their traffic management practices do not change the nature of the transmission nor alter this conclusion.

The Cultural Group's Position

[27] The Cultural Group contends that the reference question should be answered in the affirmative. It submits that, as assumed in the question posed by the CRTC, the delivery of audio and audiovisual content to ISP subscribers through the Internet is “broadcasting” as it involves the transmission of programs by means of telecommunications. Contrary to Shaw’s assertion, the fact that the Internet makes no use of public owned radio frequencies does not exclude it from the scope of the *Broadcasting Act*. Indeed, Parliament’s intent that the *Broadcasting Act* be technologically neutral was made clear during its review of Canadian broadcasting and telecommunications policy in the late 1980s.

[28] This transmission of programs is “for reception by the public” by a computer, or “broadcasting receiving apparatus” as recognized by the CRTC in the New Media Report at paragraphs 2 to 5. Furthermore, as evidenced by the deletion of the words “made on demand of a particular person for reception only by that person” in the final enactment of Bill C-40, the subscriber’s demand for the program does nothing to change the fact that its subsequent transmission constitutes broadcasting.

[29] Turning to the issue of whether ISPs can come within the definition of “broadcasting undertaking”, the Cultural Group notes that the word “includes” indicates that the definition is not limited to the undertakings enumerated. The CRTC need not bring ISPs within any particular class of broadcasting undertaking. ISPs need only constitute “undertakings” that engage in “broadcasting”, a criterion which they satisfy. Nevertheless, ISPs could be said to constitute

“distribution undertakings”, “new media broadcasting undertakings” or be part of some new class of undertaking that the CRTC could create.

[30] With regard to the alleged passive nature of ISPs, the Cultural Group notes that subsection 2(1) of the *Broadcasting Act* makes no distinction between the active or passive nature of a “distribution undertaking” or “programming undertaking”. The underlying principles in the Supreme Court decisions *Capital Cities Comm. v. C.R.T.C.*, [1978] 2 S.C.R. 141 (*Capital Cities*) and *Public Service Board et al. v. Dionne et al.*, [1978] 2 S.C.R. 191 demonstrate that, as part of the single system which is the broadcasting system, ISPs are regulated by the *Broadcasting Act* along with the content of the programs they transmit. Parliament has not excluded transmission intermediaries from the definition of “broadcasting” based on their passive or active role. As such, the ISPs’ passive role is irrelevant to the application of the *Broadcasting Act*.

ANALYSIS

[31] The question as framed is based on the assumption that “broadcasting” takes place on the Internet. This assumption is based on a number of prior findings made by the CRTC, i.e. that the delivery of content on the Internet involves the “transmission” of the content; that computers constitute a “broadcasting receiving apparatus”; that the content transmitted on the Internet can be a “program” and that such transmission is “for reception by the public”.

[32] In its memorandum of fact and law, Shaw took issue with these findings. In particular Shaw challenged the fundamental assumption that “broadcasting” takes place on the Internet.

However, at the hearing of the appeal, counsel for Shaw acknowledged that in dealing with the question, the Court must accept the assumption on which it is framed. He nevertheless expressed the concern that the Court might be viewed as sanctioning the underlying findings.

[33] To be clear, neither the assumption that “broadcasting” takes place on the Internet nor the underlying findings made by the CRTC are in issue in this proceeding with the result that the Court in answering the referred question cannot be viewed as making any pronouncement with regard to the assumption or any of these findings.

[34] Turning to the question, the parties expressed the common view during the hearing that the answer turns on whether ISPs, when providing access to “broadcasting”, are themselves “broadcasting”. Counsel for Shaw and for the Coalition conceded that if ISPs are thereby “broadcasting”, they must be viewed as “broadcasting undertakings”. If not, counsel for the Cultural Group agreed that the opposite conclusion must be reached.

[35] When regard is had to the wording of the definition, the issue to be decided is whether, when providing access to the “transmission of programs ...”, ISPs are broadcasting. The answer to this question hinges on a consideration of the findings of the CRTC as to how programs are transmitted on the Internet on the one hand, and the exact purport of the definition of the word “broadcasting”, on the other.

[36] In the Reference Order, the CRTC provides a detailed explanation as to how “transmission” takes place on the Internet (Reference Order, paragraphs. 12 to 16):

12. For the purposes of transmission on the Internet, content is broken down into data packets. In order for an end-user to access content on the Internet, the end-user must send a request to a host server or network device. Data packets are transmitted from host servers or network devices via switches and routers, which examine the header information and determine the appropriate transmission route for the packets. Packets are transmitted through multiple routers until they reach the end-user’s ISP for delivery to the computer or other Internet aware device operated by the end-user.
13. ISPs enable end-users to access the Internet and enable the delivery of content through the Internet to end-users, as described above. To that end, the ISPs’ routers respond to end-user activity by routing data packets using Internet protocol. The functions and operations of ISPs do not generally differ according to the type of content being delivered to the end-user – whether it be alphanumeric, audio or audiovisual.
14. Source and destination Internet addresses for each packet are assigned by the end-user device and are not generally modified by ISPs. The ISP reads the packet’s header to determine the most appropriate transmission route. The ISP’s routers route packets of data sourced from or destined to an end-user’s computer or other Internet aware device. Upon reception of packets, the end-user device reassembles the packets of data and translates the data into a format which will be accessible to the end-user.
15. ISPs deploy routers and other network infrastructure to interconnect their subscribers with the other networks that make up the Internet. In addition, ISPs generally provide their subscribers with hardware such as a modem and/or router to connect them to their network, as well as customer authentication (e.g. username and password).
16. In order to access broadcasting through the Internet, the end-user must make use of the services of an ISP. In addition, content providers depend on ISPs’ services for the delivery of their content to end-users. In their role as providers of access to broadcasting, ISPs do not select or originate programming or package or aggregate programming services. While ISPs may perform these functions when they operate their own websites, this activity is separate from their role as ISPs, which is to provide for the transmission of content requested by their end-users.

[Emphasis added.]

[37] Relying on these findings, Shaw and the Coalition emphasize the fact that the role of ISPs is restricted to the provision of the mode of transmission and is content-neutral. They argue that only content providers, who place content on a server with the view that it be accessed by end-users, transmit the content and can be said to be “broadcasting”. The Cultural Group for its part contends that transmission cannot take place without ISPs and that by enabling the delivery of the content from content providers to end-users, ISPs partake in the transmission even if their role is content-neutral. According to the Cultural Group, both ISPs and content providers transmit the content.

[38] The referred question assumes that programs are transmitted on the Internet. The issue which must be elucidated is by whom? The answer turns on whether the definition of “broadcasting”, beyond being aimed at the person who transmits the program, extends to the person whose sole involvement is to provide the mode of transmission.

[39] I agree with the Cultural Group that the definition of “broadcasting” when read on its own can include a person whose sole involvement is to provide the mode of transmission since no distinction is made as to the active or passive nature of the involvement. However, this ceases to be the case when the definition is considered contextually having regard to the scheme and purpose of the *Broadcasting Act*.

[40] The distinction between the person providing the mode of transmission and the person making the transmission was examined by the Supreme Court in *Electric Despatch* in a context which, although involved with dated technology, remains relevant (*Electric Despatch*, page 91):

The wires constitute the mode of transmission by which the one lessee transmits the message along the wires to the other. It is the person who breathes into the instrument the message which is transmitted along the wires who alone can be said to be the person who "transmits" the message. The owner's of the telephone wires, who are utterly ignorant of the nature of the message intended to be sent, cannot be said within the meaning of the covenant to transmit a message of the purport of which they are ignorant.

[Emphasis added.]

[41] More than a century later, the Supreme Court relied on this interpretation in *CAIP* (paragraph 96). The issue in *CAIP* was whether ISPs – referred to in that case as “Internet intermediaries” – were shielded from copyright infringement liability by virtue of paragraph 2.4(1)(b) of the *Copyright Act*. This provision makes it clear that such liability cannot be visited upon persons whose only involvement is providing the means of telecommunication of an infringing work to the public:

2.4 (1) For the purposes of communication to the public by telecommunication,

...

(b) a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public;

...

2.4 (1) Les règles qui suivent s’appliquent dans les cas de communication au public par télécommunication :

[...]

b) n’effectue pas une communication au public la personne qui ne fait que fournir à un tiers les moyens de télécommunication nécessaires pour que celui-ci l’effectue;

[...]

[Emphasis added.]

[42] After an extensive analysis, the Supreme Court held that Internet intermediaries came within this exception. In coming to this conclusion Binnie J., writing for a unanimous Court, relied on the Copyright Board's assessment of the workings of the Internet which, in all essential aspects, is the same as that made by the CRTC in this case, and recognized the content-neutral role of Internet intermediaries. Although the Internet intermediaries were providing the means of communication, they were not "communicating" the infringing work as they had nothing to do with the content (*CAIP*, paragraphs. 92 and 95):

92. So long as an Internet intermediary does not itself engage in acts that relate to the content of the communication, i.e., whose participation is content neutral, but confines itself to providing "a conduit" for information communicated by others, then it will fall within [paragraph] 2.4(1)(b). The appellants support this result on a general theory of "Don't shoot the messenger!"

....

95. Having properly instructed itself on the law, the Board found as a fact that the "conduit" begins with the host server. No reason has been shown in this application for judicial review to set aside that conclusion.

[43] The Cultural Group argues that the decision in *CAIP* has no bearing on the referred question because it was reached on the basis of paragraph 2.4(1)(b) of the *Copyright Act* and no such provision exists under the *Broadcasting Act*. According to the Cultural Group, if Parliament had wished to similarly exclude re-transmitters or other transmission intermediaries from the definition of "broadcasting", it could have done so. The fact that Parliament did not do so is a clear sign that it intended such intermediaries to be included within the definition.

[44] However, the distinction between the means of communication and the communication itself is as fundamental to the *Broadcasting Act* as it is to the *Copyright Act*. In this respect, subsection 4(4) of the *Broadcasting Act* bears resemblance to subsection 2.4(1) of the *Copyright Act* in that it provides:

<p>4. (4) <u>For greater certainty</u>, this Act does not apply to any telecommunications common carrier, as defined in the <i>Telecommunications Act</i>, when <u>acting solely in that capacity</u>.</p>	<p>4. (4) <u>Il demeure entendu</u> que la présente loi ne s’applique pas aux entreprises de télécommunication – au sens de la <i>Loi sur les télécommunications</i> – <u>n’agissant qu’à ce titre</u>.</p>
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[Emphasis added.]

[45] A “telecommunications common carrier” is in turn, defined in subsection 2(1) of the *Telecommunications Act* as:

<p>2. (1) a person who owns or operates a <u>transmission facility used by that person or another person to provide telecommunications services to the public</u> for compensation.</p>	<p>2. (1) propriétaire ou exploitant d’une <u>installation de transmission grâce à laquelle sont fournis par lui-même ou une autre personne des services de télécommunication au public</u> moyennant contrepartie.</p>
--	--

[Emphasis added.]

[46] It is apparent that subsection 4(4) of the *Broadcasting Act* also excludes from the operation of the Act transmission intermediaries when working solely in that capacity. Furthermore, while *CAIP* involved the *Copyright Act*, the reliance placed on *Electric Despatch* and in particular the finding that content-neutral transmission intermediaries cannot be said to “transmit” the content can have a wider applicability.

[47] Both the *Copyright Act* and the *Broadcasting Act* – like the covenant at issue in *Electric Despatch* – are concerned with the content being transmitted rather than the means of conveying this content. As the owners of the telephone wires in *Electric Despatch*, ISPs are “utterly ignorant” of the nature of the message intended to be sent, and therefore cannot be said to “transmit” a “program” the purport of which they have no knowledge (*Electric Despatch*, p. 91).

[48] Relying on the logic adopted by Binnie J. in *CAIP* in construing the word “communicate” under the *Copyright Act*, I am of the view that the definition of “broadcasting” is also directed at the person who transmits a program and that a person whose sole involvement is to provide the mode of transmission is not transmitting the program and hence, is not “broadcasting”.

[49] This interpretation is consistent with the policy objectives set out in subsection 3(1) of the *Broadcasting Act*. The primary focus is on the cultural enrichment of Canada through the broadcasting of programs which involve a significant amount of Canadian artistic creativity in their production, encourage Canadian expression and the use of Canadian talent, and which reflect Canada’s linguistic duality and multicultural society. The *Broadcasting Act* sets out specific provisions on programming content to achieve these objectives such as the allocation of broadcasting time, the character and volume of advertising, and the carriage of foreign programming (subsection 10(1) of the *Broadcasting Act*). Furthermore, in setting out the manner in which the *Broadcasting Act* is to be interpreted, subsection 2(3) refers to the “freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings”.

[50] Because ISPs' sole involvement is to provide the mode of transmission, they have no control or input over the content made available to Internet users by content producers and as a result, they are unable to take any steps to promote the policy described in the *Broadcasting Act* or its supporting provisions. Only those who "transmit" the "program" can contribute to the policy objectives.

[51] Nevertheless, the Cultural Group argues that the ISPs' inability to contribute to the achievement of the policy objectives is no basis for excluding them from the definition of "broadcasting". In support of this contention, the Cultural Group points to the power given to the CRTC pursuant to subsection 9(4) of the *Broadcasting Act* to exempt by order those who carry on broadcasting undertakings from compliance with the Act or a regulation made thereunder, where such compliance would not contribute to the implementation of the broadcasting policy. Subsection 9(4) provides:

9. (4) The Commission shall, by order, on such terms and conditions as it deems appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order from any or all of the requirements of this Part or of a regulation made under this Part where the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).

9. (4) Le Conseil soustrait, par ordonnance et aux conditions qu'il juge indiquées, les exploitants d'entreprise de radiodiffusion de la catégorie qu'il précise à toute obligation découlant soit de la présente partie, soit de ses règlements d'application, dont il estime l'exécution sans conséquence majeure sur la mise en oeuvre de la politique canadienne de radiodiffusion.

[52] According to the Cultural Group, this shows that the definition of “broadcasting” was intended to be broad, reaching all those who partake in the transmission including entities whose sole function is to provide the mode of transmission. To the extent that in performing this function ISPs cannot contribute to the policy objectives, Parliament has given the CRTC the power to issue the appropriate exemptions.

[53] This argument might have some weight were it not for the fact that, as we have seen, the *Broadcasting Act* specifically provides that it does not apply to a telecommunications common carrier when acting solely in that capacity. Furthermore, it would be highly unusual for a statute to be construed in a manner that overshoots its objects. The Cultural Group has not identified any logic or reason that could possibly justify such an odd result.

[54] Properly understood, subsection 9(4) allows the CRTC to exempt broadcasting undertakings from compliance with the Act where, for instance, the programs which they broadcast by reason of their type or nature do not contribute in a material manner to the broadcasting policy. The existence of this power does not suggest, as the Cultural Group contends, that Parliament contemplated that “broadcasting” should be given a meaning that extends to those who cannot contribute to the policy objectives.

[55] The Cultural Group further argues that the role of ISPs and content providers are inseparable, and that, as such, both are “transmitting” programs. In this respect, the Cultural Group relies on the decision of the Supreme Court *Capital Cities* for the proposition that the *Broadcasting*

Act was intended to capture all transmitters as part of the single system that is the Canadian broadcasting system. It emphasizes the following words found at page 162 of this decision:

... Programme content regulation is inseparable from regulating the undertaking through which programmes are received and sent on as part of the total enterprise. ...

[56] In *Capital Cities* there was no question that the entities concerned were involved in broadcasting: they were cable television companies. The question before the Court was whether the provinces ought to retain regulatory control over cable television stations and their programming because the cable infrastructure was located wholly within the province. The Court's conclusion that the cable infrastructure fell within federal jurisdiction stemmed from the fact that the signals that were received and retransmitted by the companies were extra provincial in origin and the technology involved did not change that fact.

[57] I do not see how this decision can be of assistance to the Cultural Group. It was reached at a time when the regulatory scheme did not include the *Telecommunications Act* and once the Court found that the undertaking fell within federal jurisdiction, it was assumed that the *Broadcasting Act* would apply. The most that can be taken from this decision is that undertakings that receive broadcasting signals and send them to their subscriber by a different technology are properly regulated by the federal government as interprovincial undertakings.

[58] Finally, throughout its submissions, the Cultural Group has emphasized the fact that the *Broadcasting Act* was meant to be technologically neutral. The suggestion is that the *Broadcasting*

Act should evolve with the development of new means of transmission and apply regardless of the technology used to broadcast programs. The assumption made by the CRTC that “broadcasting” takes place on the Internet supports this view (New Media Exemption Order, para. 39). However, this does not assist in determining who is doing the “broadcasting”.

[59] In providing access to “broadcasting”, ISPs do not transmit programs. As such, they are not “broadcasting” and therefore they do not come within the definition of “broadcasting undertaking”. In so holding, I wish to reiterate as was done in *CAIP* that this conclusion is based on the content-neutral role of ISPs and would have to be reassessed if this role should change (*CAIP*, para. 92).

[60] I would therefore answer the reference question as follows: Retail ISPs do not carry on, in whole or in part, “broadcasting undertakings” subject to the *Broadcasting Act* when, in their role as ISPs, they provide access through the Internet to “broadcasting” requested by end-users.

“Marc Noël”

J.A.

“I agree
M. Nadon J.A.”

“I agree
Eleanor R. Dawson J.A.”

ANNEX

RELEVANT LEGISLATION

(A) The *Broadcasting Act*, S.C. 1991, c. 11:

INTERPRETATION

2. (1) In this Act,

“broadcasting”, « radiodiffusion », means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;

“broadcasting receiving apparatus”, « récepteur », means a device, or combination of devices, intended for or capable of being used for the reception of broadcasting;

“broadcasting undertaking”, « entreprise de radiodiffusion », includes a distribution undertaking, a programming undertaking and a network;

...

“distribution undertaking”, « entreprise de distribution », means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or

DÉFINITIONS

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

« émission », “program”, 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.

« entreprise de distribution », “distribution undertaking”, Entreprise de réception de radiodiffusion pour retransmission, à l’aide d’ondes radioélectriques ou d’un autre moyen de télécommunication, en vue de sa réception dans plusieurs résidences permanentes ou temporaires ou locaux d’habitation, ou en vue de sa réception par une autre entreprise semblable.

« entreprise de programmation », “programming undertaking”, Entreprise de transmission d’émissions soit directement à l’aide d’ondes radioélectriques ou d’un autre moyen de télécommunication, soit par l’intermédiaire, d’une entreprise de distribution, en vue de leur réception par le public à l’aide d’un récepteur.

« entreprise de radiodiffusion », “broadcasting undertaking”, S’entend notamment d’une entreprise de

dwelling unit or to another such undertaking;

...

“network”, « réseau », includes any operation where control over all or any part of the programs or program schedules of one or more broadcasting undertakings is delegated to another undertaking or person;

“program”, « émission », 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;

“programming undertaking”, « entreprise de programmation », means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus;

“radio waves”, « ondes radioélectriques », means electromagnetic waves of frequencies lower than 3 000 GHz that are propagated in space without artificial guide;

...

(2) For the purposes of this Act, “other means of telecommunication” means any wire, cable, radio, optical or other

distribution ou de programmation, ou d’un réseau.

[...]

« ondes radioélectriques », “radio waves”, Ondes électromagnétiques de fréquences inférieures à 3 000 GHz transmises dans l’espace sans guide artificiel.

« radiodiffusion », “broadcasting”, Transmission, à l’aide d’ondes radioélectriques ou de tout autre moyen de télécommunication, d’émissions encodées ou non et destinées à être reçues par le public à l’aide d’un récepteur, à l’exception de celle qui est destinée à la présentation dans un lieu public seulement.

« récepteur », “broadcasting receiving apparatus”, Appareil ou ensemble d’appareils conçu pour la réception de radiodiffusion ou pouvant servir à cette fin.

« réseau », “network”, Est assimilée à un réseau toute exploitation où le contrôle de tout ou partie des émissions ou de la programmation d’une ou plusieurs entreprises de radiodiffusion est délégué à une autre entreprise ou personne.

[...]

(2) Pour l’application de la présente loi, sont inclus dans les moyens de télécommunication les systèmes électromagnétiques — notamment les fils, les câbles et les systèmes radio ou optiques — , ainsi que les autres procédés techniques

electromagnetic system, or any similar technical system.

(3) This Act shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings.

semblables.

(3) L'interprétation et l'application de la présente loi doivent se faire de manière compatible avec la liberté d'expression et l'indépendance, en matière de journalisme, de création et de programmation, dont jouissent les entreprises de radiodiffusion.

BROADCASTING POLICY FOR CANADA

Declaration

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

(a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;

(b) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;

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

(d) the Canadian broadcasting

POLITIQUE CANADIENNE DE RADIODIFFUSION

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

a) le système canadien de radiodiffusion doit être, effectivement, la propriété des Canadiens et sous leur contrôle;

b) le système canadien de radiodiffusion, composé d'éléments publics, privés et communautaires, utilise des fréquences qui sont du domaine public et offre, par sa programmation essentiellement en français et en anglais, un service public essentiel pour le maintien et la valorisation de l'identité nationale et de la souveraineté culturelle;

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

system should

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

(e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;

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) 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

(f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;

(g) the programming originated by broadcasting undertakings should be of high standard;

(h) all persons who are licensed to carry on broadcasting undertakings have a responsibility for the programs they broadcast;

(i) the programming provided by the Canadian broadcasting system should

(i) be varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes,

(ii) be drawn from local, regional, national and international sources,

(iii) include educational and community programs,

(iv) provide a reasonable

scientifiques et techniques;

e) tous les éléments du système doivent contribuer, de la manière qui convient, à la création et la présentation d'une programmation canadienne;

f) toutes les entreprises de radiodiffusion sont tenues de faire appel au maximum, et dans tous les cas au moins de manière prédominante, aux ressources — créatrices et autres — canadiennes pour la création et la présentation de leur programmation à moins qu'une telle pratique ne s'avère difficilement réalisable en raison de la nature du service — notamment, son contenu ou format spécialisé ou l'utilisation qui y est faite de langues autres que le français ou l'anglais — qu'elles fournissent, auquel cas elles devront faire appel aux ressources en question dans toute la mesure du possible;

g) la programmation offerte par les entreprises de radiodiffusion devrait être de haute qualité;

h) les titulaires de licences d'exploitation d'entreprises de radiodiffusion assument la responsabilité de leurs émissions;

i) la programmation offerte par le système canadien de radiodiffusion devrait à la fois:

(i) être variée et aussi large que possible en offrant à l'intention des hommes, femmes et enfants

opportunity for the public to be exposed to the expression of differing views on matters of public concern, and

(v) include a significant contribution from the Canadian independent production sector;

(j) educational programming, particularly where provided through the facilities of an independent educational authority, is an integral part of the Canadian broadcasting system;

(k) a range of broadcasting services in English and in French shall be extended to all Canadians as resources become available;

(l) the Canadian Broadcasting Corporation, as the national public broadcaster, should provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains;

(m) the programming provided by the Corporation should

(i) be predominantly and distinctively Canadian,

(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,

de tous âges, intérêts et goûts une programmation équilibrée qui renseigne, éclaire et divertit,

(ii) puiser aux sources locales, régionales, nationales et internationales,

(iii) renfermer des émissions éducatives et communautaires, (iv) dans la mesure du possible, offrir au public l'occasion de prendre connaissance d'opinions divergentes sur des sujets qui l'intéressent,

(v) faire appel de façon notable aux producteurs canadiens indépendants;

j) la programmation éducative, notamment celle qui est fournie au moyen d'installations d'un organisme éducatif indépendant, fait partie intégrante du système canadien de radiodiffusion;

k) une gamme de services de radiodiffusion en français et en anglais doit être progressivement offerte à tous les Canadiens, au fur et à mesure de la disponibilité des moyens;

l) la Société Radio-Canada, à titre de radiodiffuseur public national, devrait offrir des services de radio et de télévision qui comportent une très large programmation qui renseigne, éclaire et divertit;

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

- (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;
- (n) where any conflict arises between the objectives of the Corporation set out in paragraphs (l) and (m) and the interests of any other broadcasting undertaking of the Canadian broadcasting system, it shall be resolved in the public interest, and where the public interest would be equally served by resolving the conflict in favour of either, it shall be resolved in favour of the objectives set out in paragraphs (l) and (m);
- (o) programming that reflects the aboriginal cultures of Canada should be provided within the Canadian broadcasting system as resources become available for the purpose;
- (i) être principalement et typiquement canadienne,
- (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;
- n) les conflits entre les objectifs de

(p) programming accessible by disabled persons should be provided within the Canadian broadcasting system as resources become available for the purpose;

(q) without limiting any obligation of a broadcasting undertaking to provide the programming contemplated by paragraph (i), alternative television programming services in English and in French should be provided where necessary to ensure that the full range of programming contemplated by that paragraph is made available through the Canadian broadcasting system;

(r) the programming provided by alternative television programming services should

(i) be innovative and be complementary to the programming provided for mass audiences,

(ii) cater to tastes and interests not adequately provided for by the programming provided for mass audiences, and include programming devoted to culture and the arts,

(iii) reflect Canada's regions and multicultural nature,

(iv) as far as possible, be acquired rather than produced by those services, and

(v) be made available throughout Canada by the most cost-

la Société énumérés aux alinéas l) et m) et les intérêts de toute autre entreprise de radiodiffusion du système canadien de radiodiffusion doivent être résolus dans le sens de l'intérêt public ou, si l'intérêt public est également assuré, en faveur des objectifs énumérés aux alinéas l) et m);

o) le système canadien de radiodiffusion devrait offrir une programmation qui reflète les cultures autochtones du Canada, au fur et à mesure de la disponibilité des moyens;

p) le système devrait offrir une programmation adaptée aux besoins des personnes atteintes d'une déficience, au fur et à mesure de la disponibilité des moyens;

q) sans qu'il soit porté atteinte à l'obligation qu'ont les entreprises de radiodiffusion de fournir la programmation visée à l'alinéa i), des services de programmation télévisée complémentaires, en anglais et en français, devraient au besoin être offerts afin que le système canadien de radiodiffusion puisse se conformer à cet alinéa;

r) la programmation offerte par ces services devrait à la fois :

(i) être innovatrice et compléter celle qui est offerte au grand public,

(ii) répondre aux intérêts et goûts de ceux que la programmation offerte au grand

efficient means;

(s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,

(i) contribute significantly to the creation and presentation of Canadian programming, and

(ii) be responsive to the evolving demands of the public; and

(t) distribution undertakings

(i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,

(ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,

(iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and

(iv) may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to

public laisse insatisfaits et comprendre des émissions consacrées aux arts et à la culture,

(iii) refléter le caractère multiculturel du Canada et rendre compte de sa diversité régionale,

(iv) comporter, autant que possible, des acquisitions plutôt que des productions propres,

(v) être offerte partout au Canada de la manière la plus rentable, compte tenu de la qualité;

s) les réseaux et les entreprises de programmation privés devraient, dans la mesure où leurs ressources financières et autres le leur permettent, contribuer de façon notable à la création et à la présentation d'une programmation canadienne tout en demeurant réceptifs à l'évolution de la demande du public;

t) les entreprises de distribution :

(i) devraient donner priorité à la fourniture des services de programmation canadienne, et ce en particulier par les stations locales canadiennes,

(ii) devraient assurer efficacement, à l'aide des techniques les plus efficaces, la

the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities.

(iii) devraient offrir des conditions acceptables relativement à la fourniture, la combinaison et la vente des services de programmation qui leur sont fournis, aux termes d'un contrat, par les entreprises de radiodiffusion,

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

(iv) peuvent, si le Conseil le juge opportun, créer une programmation — locale ou autre — de nature à favoriser la réalisation des objectifs de la politique canadienne de radiodiffusion, et en particulier à permettre aux minorités linguistiques et culturelles mal desservies d'avoir accès aux services de radiodiffusion.

...

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

[...]

APPLICATION

4. (1) This Act is binding on Her Majesty in right of Canada or a province.

(2) This Act applies in respect of broadcasting undertakings carried on in whole or in part within Canada or on board

APPLICATION

4. (1) La présente loi lie Sa Majesté du chef du Canada ou d'une province.

(2) La présente loi s'applique aux entreprises de radiodiffusion exploitées — même en partie — au Canada ou à bord :

(a) any ship, vessel or aircraft that is

(i) registered or licensed under an Act of Parliament, or

(ii) owned by, or under the direction or control of, Her Majesty in right of Canada or a province;

(b) any spacecraft that is under the direction or control of

(i) Her Majesty in right of Canada or a province,

(ii) a citizen or resident of Canada, or

(iii) a corporation incorporated or resident in Canada; or

(c) any platform, rig, structure or formation that is affixed or attached to land situated in the continental shelf of Canada.

(3) For greater certainty, this Act applies in respect of broadcasting undertakings whether or not they are carried on for profit or as part of, or in connection with, any other undertaking or activity.

(4) For greater certainty, this Act does not apply to any telecommunications common carrier, as defined in the Telecommunications Act, when acting solely in that capacity.

...

a) d'un navire, bâtiment ou aéronef soit immatriculé ou bénéficiant d'un permis délivré aux termes d'une loi fédérale, soit appartenant à Sa Majesté du chef du Canada ou d'une province, ou relevant de sa compétence ou de son autorité;

b) d'un véhicule spatial relevant de la compétence ou de l'autorité de Sa Majesté du chef du Canada ou d'une province, ou de celle d'un citoyen canadien, d'un résident du Canada ou d'une personne morale constituée ou résidant au Canada;

c) d'une plate-forme, installation, construction ou formation fixée au plateau continental du Canada.

(3) La présente loi s'applique aux entreprises de radiodiffusion exploitées ou non dans un but lucratif ou dans le cours d'une autre activité.

(4) Il demeure entendu que la présente loi ne s'applique pas aux entreprises de télécommunication — au sens de la Loi sur les télécommunications — n'agissant qu'à ce titre.

[...]

10. (1) The Commission may, in furtherance of its objects, make regulations

(a) respecting the proportion of time that shall be devoted to the broadcasting of Canadian programs;

(b) prescribing what constitutes a Canadian program for the purposes of this Act;

(c) respecting standards of programs and the allocation of broadcasting time for the purpose of giving effect to the broadcasting policy set out in subsection 3(1);

(d) respecting the character of advertising and the amount of broadcasting time that may be devoted to advertising;

(e) respecting the proportion of time that may be devoted to the broadcasting of programs, including advertisements or announcements, of a partisan political character and the assignment of that time on an equitable basis to political parties and candidates;

(f) prescribing the conditions for the operation of programming undertakings as part of a network and for the broadcasting of network programs, and respecting the broadcasting times to be reserved for network programs by any such undertakings;

(g) respecting the carriage of any

10. (1) Dans l'exécution de sa mission, le Conseil peut, par règlement :

a) fixer la proportion du temps d'antenne à consacrer aux émissions canadiennes;

b) définir « émission canadienne » pour l'application de la présente loi;

c) fixer les normes des émissions et l'attribution du temps d'antenne pour mettre en oeuvre la politique canadienne de radiodiffusion;

d) régir la nature de la publicité et le temps qui peut y être consacré;

e) fixer la proportion du temps d'antenne pouvant être consacrée à la radiodiffusion d'émissions — y compris les messages publicitaires et annonces — de nature partisane, ainsi que la répartition équitable de ce temps entre les partis politiques et les candidats;

f) fixer les conditions d'exploitation des entreprises de programmation faisant partie d'un réseau ainsi que les conditions de radiodiffusion des émissions de réseau et déterminer le temps d'antenne à réserver à celles-ci par ces entreprises;

g) régir la fourniture de services de programmation — même étrangers — par les entreprises de distribution;

h) pourvoir au règlement — notamment par la médiation — de différends concernant la fourniture

foreign or other programming services by distribution undertakings;

(h) for resolving, by way of mediation or otherwise, any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertakings;

(i) requiring licensees to submit to the Commission such information regarding their programs and financial affairs or otherwise relating to the conduct and management of their affairs as the regulations may specify;

(j) respecting the audit or examination of the records and books of account of licensees by the Commission or persons acting on behalf of the Commission; and

(k) respecting such other matters as it deems necessary for the furtherance of its objects.

(2) A regulation made under this section may be made applicable to all persons holding licences or to all persons holding licences of one or more classes.

(3) A copy of each regulation that the Commission proposes to make under this section shall be published in the Canada Gazette and a reasonable opportunity shall be given to licensees and other interested persons to make

de programmation et survenant entre les entreprises de programmation qui la transmettent et les entreprises de distribution;

i) préciser les renseignements que les titulaires de licences doivent lui fournir en ce qui concerne leurs émissions et leur situation financière ou, sous tout autre rapport, la conduite et la direction de leurs affaires;

j) régir la vérification et l'examen des livres de comptes et registres des titulaires de licences par le Conseil ou ses représentants;

k) prendre toute autre mesure qu'il estime nécessaire à l'exécution de sa mission.

(2) Les règlements s'appliquent soit à tous les titulaires de licences, soit à certaines catégories d'entre eux.

(3) Les projets de règlement sont publiés dans la Gazette du Canada, les titulaires de licences et autres intéressés se voyant accorder la possibilité de présenter leurs observations à cet égard.

representations to the Commission with respect thereto.

(B) The *Telecommunications Act*, S.C. 1993, c. 38

INTERPRETATION

2. (1) In this Act,

“broadcasting undertaking,” « entreprise de radiodiffusion », has the same meaning as in subsection 2(1) of the Broadcasting Act;

“Canadian carrier,” « entreprise canadienne », means a telecommunications common carrier that is subject to the legislative authority of Parliament;

“Canadian telecommunications policy objectives”, Version anglaise seulement, means the objectives set out in section 7;

“charge,” Version anglaise, seulement, includes to receive in payment;

“Commission”, « Conseil », means the Canadian Radio-television and Telecommunications Commission;

“control”, « contrôle », means control in any manner that results in control in fact, whether directly through the ownership of securities or indirectly through a trust, agreement or arrangement, the ownership of any body corporate or otherwise;

DÉFINITIONS

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

« administration publique », “public Authority”, S’entend notamment de Sa Majesté du chef du Canada ou d’une province.

« appareil de transmission exclu », “exempt transmission apparatus”, Appareil effectuant une ou plusieurs des opérations suivantes :

a) commutation des télécommunications;

b) saisie, réception, mise en mémoire, classement, modification, récupération, sortie ou tout autre traitement de l’information;

c) commande de la vitesse, du code, du protocole, du contenu, de la forme, de l’acheminement ou d’autres aspects semblables de la transmission de l’information.

[...]

« Conseil », “Commission”, Le Conseil de la radiodiffusion et des télécommunications canadiennes.

“decision”, « décision », “decision” includes a determination made by the Commission in any form;

“exempt transmission apparatus”, « appareil de transmission exclu » “exempt transmission apparatus” means any apparatus whose functions are limited to one or more of the following:

(a) the switching of telecommunications,

(b) the input, capture, storage, organization, modification, retrieval, output or other processing of intelligence, or

(c) control of the speed, code, protocol, content, format, routing or similar aspects of the transmission of intelligence;

“intelligence”, « information », means signs, signals, writing, images, sounds or intelligence of any nature;

...

“Minister”, « ministre », means the Minister of Industry;

“person”, « personne », includes any individual, partnership, body corporate, unincorporated organization, government, government agency and any other person or entity that acts in the name of or for the benefit of another, including a trustee, executor, administrator, liquidator of the succession, guardian, curator or tutor;

« contrôle », “control”, Situation qui crée une maîtrise de fait, soit directe, par la propriété de valeurs mobilières, soit indirecte, en particulier au moyen d’une fiducie, d’un accord, d’une entente ou de la propriété d’une personne morale.

« décision », “decision”, Toute mesure prise par le Conseil, quelle qu’en soit la forme.

« entreprise canadienne », “Canadian carrier”, Entreprise de télécommunication qui relève de la compétence fédérale.

« entreprise de radiodiffusion », “broadcasting undertaking”, S’entend de l’entreprise au sens de la Loi sur la radiodiffusion.

« entreprise de télécommunication », “telecommunications common carrier”, Propriétaire ou exploitant d’une installation de transmission grâce à laquelle sont fournis par lui-même ou une autre personne des services de télécommunication au public moyennant contrepartie.

« fournisseur de services de télécommunication », “telecommunications service provider”, La personne qui fournit des services de télécommunication de base, y compris au moyen d’un appareil de transmission exclu.

« information », “intelligence”, Signes, signaux, écrits, images, sons ou renseignements de toute nature.

“prescribed”, Version anglaise seulement, means prescribed by regulation;

“public authority”, « administration publique », includes Her Majesty in right of Canada or a province;

“rate”, « tarif », “rate” means an amount of money or other consideration and includes zero consideration;

“special Act”, « loi spéciale », “special Act” means an Act of Parliament respecting the operations of a particular Canadian carrier;

“telecommunications”, « telecommunication », means the emission, transmission or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system;

“telecommunications common carrier”, « entreprise de télécommunication », means a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation;

“telecommunications facility”, « installation de télécommunication », means any facility, apparatus or other thing that is used or is capable of being used for telecommunications or for any operation directly connected with telecommunications, and includes a

« installation de télécommunication », “telecommunications facility”, Installation, appareils ou toute autre chose servant ou pouvant servir à la télécommunication ou à toute opération qui y est directement liée, y compris les installations de transmission.

« installation de transmission », “transmission facility”, Tout système électromagnétique — notamment fil, câble ou système radio ou optique — ou tout autre procédé technique pour la transmission d’information entre des points d’arrivée du réseau, à l’exception des appareils de transmission exclus.

[...]

« loi spéciale », “special Act”, Loi fédérale relative aux activités d’une entreprise canadienne particulière.

« ministre », “Minister”, Le ministre de l’Industrie. « ministre »

« personne », “person”, Sont compris parmi les personnes les particuliers, les sociétés de personnes, les personnes morales, les organisations non personnalisées, les gouvernements ou leurs organismes, ainsi que les personnes ou entités qui agissent au nom ou pour le compte d’autrui, notamment les fiduciaires, les liquidateurs de succession, les exécuteurs testamentaires, les administrateurs successoraux, les curateurs et les tuteurs.

transmission facility;

“telecommunications service”, « service de télécommunication », means a service provided by means of telecommunications facilities and includes the provision in whole or in part of telecommunications facilities and any related equipment, whether by sale, lease or otherwise;

“telecommunications service provider”, « fournisseur de services de télécommunication », means a person who provides basic telecommunications services, including by exempt transmission apparatus;

“transmission facility”, « installation de transmission », means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system, for the transmission of intelligence between network termination points, but does not include any exempt transmission apparatus.

(2) The Commission may define the expression “network termination point” for purposes of the definition “transmission facility” in subsection (1).

...

APPLICATION

4. This Act does not apply in respect of broadcasting by a broadcasting

« service de télécommunication », “telecommunications service”, Service fourni au moyen d’installations de télécommunication, y compris la fourniture — notamment par vente ou location — , même partielle, de celles-ci ou de matériel connexe.

« tarif », “rate”, Somme d’argent ou toute autre contrepartie; la présente définition vise également les tarifs n’entraînant aucune contrepartie.

« télécommunication », “telecommunications”, La transmission, l’émission ou la réception d’information soit par système électromagnétique, notamment par fil, câble ou système radio ou optique, soit par tout autre procédé technique semblable.

(2) Le Conseil peut définir l’expression « point d’arrivée du réseau » pour les besoins de la définition de « installation de transmission » au paragraphe (1).

[...]

CHAMP D’APPLICATION

4. La présente loi ne s’applique pas aux entreprises de radiodiffusion pour tout

undertaking.

ce qui concerne leurs activités de radiodiffusion.

...

[...]

CANADIAN TELECOMMUNICATIONS POLICY

POLITIQUE CANADIENNE DE TÉLÉCOMMUNICATION

7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives

7. La présente loi affirme le caractère essentiel des télécommunications pour l'identité et la souveraineté canadiennes; la politique canadienne de télécommunication vise à :

(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

a) favoriser le développement ordonné des télécommunications partout au Canada en un système qui contribue à sauvegarder, enrichir et renforcer la structure sociale et économique du Canada et de ses régions;

(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

b) permettre l'accès aux Canadiens dans toutes les régions — rurales ou urbaines — du Canada à des services de télécommunication sûrs, abordables et de qualité;

(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

c) accroître l'efficacité et la compétitivité, sur les plans national et international, des télécommunications canadiennes;

(d) to promote the ownership and control of Canadian carriers by Canadians;

d) promouvoir l'accession à la propriété des entreprises canadiennes, et à leur contrôle, par des Canadiens;

(e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points

e) promouvoir l'utilisation d'installations de transmission canadiennes pour les

outside Canada;

(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;

(g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;

(h) to respond to the economic and social requirements of users of telecommunications services; and

(i) to contribute to the protection of the privacy of persons.

télécommunications à l'intérieur du Canada et à destination ou en provenance de l'étranger;

f) favoriser le libre jeu du marché en ce qui concerne la fourniture de services de télécommunication et assurer l'efficacité de la réglementation, dans le cas où celle-ci est nécessaire;

g) stimuler la recherche et le développement au Canada dans le domaine des télécommunications ainsi que l'innovation en ce qui touche la fourniture de services dans ce domaine;

h) satisfaire les exigences économiques et sociales des usagers des services de télécommunication;

i) contribuer à la protection de la vie privée des personnes.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-303-09

STYLE OF CAUSE: **IN THE MATTER OF THE *BROADCASTING ACT*, S.C. 1991, c.11;
**AND IN THE MATTER OF THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION'S BROADCASTING REGULATORY POLICY CRTC 2009-329 AND BROADCASTING ORDER CRTC 2009-452
AND IN THE MATTER OF AN APPLICATION BY WAY OF A REFERENCE TO THE FEDERAL COURT OF APPEAL PURSUANT TO SECTIONS 18.3(1) AND 28(2) OF THE *FEDERAL COURTS ACT*, R.S.C. 1985, c. F-7****

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Dawson J.A.

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