Court File No.: A-113-10

FEDERAL COURT OF APPEAL

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 2010-167 AND BROADCASTING ORDER CRTC 2010-168;

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.

REPLY SUBMISSIONS OF ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS, COMMUNICATIONS ENERGY AND PAPERWORKERS UNION OF CANADA and FRIENDS OF CANADIAN BROADCASTING

INTRODUCTION

1. On July 7, 2010, the Alliance of Canadian Cinema, Television and Radio Artists, the Communications, Energy and Paperworkers Union of Canada, and the Friends of Canadian Broadcasting (the “Moving Parties”) brought a motion for an extension of time to serve and file a Notice of Intention to Participate and a Memorandum of Fact and Law of 15 pages in an Application by way of

Reference to the Federal Court of Appeal that is to be heard on September 13 and 14, 2010 (the "Reference").

2. In essence, the Court is being asked to allow the Moving Parties to file a short factum and to make brief submissions in order to assist the Court in deciding the Reference question put to it. The Moving Parties are not asking for the right to file evidence, nor do they wish their participation to delay the proceedings in any way.

3. On July 13, 2010, the Counsel for the Canadian Radio-television and Telecommunications Commission ("CRTC") wrote to the Registrar of this Court informing the Court that it consented to the relief requested by the Moving Parties if that would not interfere with the current schedule for hearing the Reference.

4. The Responding Parties, Shaw Communications, Bell Canada, Bell Alliant Regional Communications and Cogeco Cable Inc., Rogers Communications Inc. and Telus Communications Company (the "Responding Parties") filed a joint response contesting the motion on Friday, July 16, 2010.

5. The Responding Parties' raised three issues in their submissions:

   1) Whether the Moving Parties met the test for an extension of time;

   2) Whether the Moving Parties should be permitted to file a factum of 15 pages in length; and,

   3) Whether the Court should order costs against the moving parties.

6. These reply submissions will address the first and third issue. The Moving Parties have nothing to add to their July 7 submissions on the second issue.

EXTENSION OF TIME

7. The Responding Parties fail to acknowledge that the test for an extension of time is flexible and contextual, and that the four factors to be considered need not all be met for a court to grant such relief. The Moving Parties addressed that point in paragraph 20 of their July 7 submissions.

Continuing Intention to Pursue the Matter

8. The Responding Parties also fail to recognize that a Reference to the Court is not adversarial litigation. Therefore the policy reasons that require a party to demonstrate a continuing intention to pursue a matter in an adversarial context have little applicability in the present case.

9. In adversarial litigation, there are sound reasons to impose an onus on parties to demonstrate a continuing interest in the matter when seeking relief from specified time limits. Where litigation has not yet commenced, this requirement is a necessary adjunct to the principle of finality which entitles others interested in the matter to know that it has been resolved. Where litigation is underway, this onus ensures that parties act diligently to avoid unnecessary delays and inefficiencies.

10. In a Reference, the Court is not acting as an arbiter of a dispute between competing parties but rather in its advisory role. The criteria of “continuing

intention" should thus be viewed in light of the underlying consideration in the case law governing the test for extension of time, that is, to ensure that justice is done (between the parties or otherwise).

> *Canada (Minister of Human Resources Development)* v. *Hogervorst*, 2007 FCA 41 at para. 33, Motion Record, Tab 5B.
>
> *Canada (Attorney General)* v. *Pentney*, 2008 FC 96 at paras. 34, Motion Record, Tab 5C.

11. The interests of justice to be served in this context require a full and thorough exploration of the legal question engendered by the Reference as it is illuminated by the insights, perspectives and expertise of all parties that have a useful contribution to make. The 'matter' before the Court is not a *lis inter partes* but rather is one raising polyvalent issues concerning multiple stakeholders.

12. The aspect of the "matter" in question that the Moving Parties propose to address concerns the need for the CRTC's mandate to be understood in a manner that reflects the broad cultural objectives of the *Broadcasting Act*. The Moving Parties have demonstrated an intention to pursue that matter by making submissions before the CRTC, by continuing to monitor the course of this Reference, and ultimately by bringing this motion.

13. In the circumstances, it was reasonable and consistent with that intention for the Moving Parties to conclude that this aspect of the matter would be addressed by parties that had made a public commitment to it and that had substantial resources to call upon for that purpose. Only when that belief proved unfounded, was it necessary for them to take additional steps to pursue the matter and as noted in their written submissions of July 7 they did so diligently.

Merits of Moving Parties' Case

14. The Responding Parties assert that the issues the Moving Parties propose to address "have been addressed comprehensively in the written submissions", and refer to various paragraphs of the three Memoranda of Fact and Law filed in this Reference. A review of those paragraphs reveals that in fact little effort has been made to identify, much less explore the issues raised by the Moving Parties.

Joint Written Representations of the Responding Parties, para. 30.

15. Most of the objectives of the *Broadcasting Act* which are set out in detail by section 3 of that *Act* are entirely ignored by the parties. Rather the submissions of the all parties focus almost exclusively on three of the twenty delineated objectives set out in section 3. These respectively concern:

(i) the role of the television stations [s.3(1)(s)];

(ii) the role of the BDUs [s.3(1)(t)]; and

(iii) the requirement that each element of the Canadian broadcasting system contribute to the creation and presentation of Canadian programming." [s. 3(1)(e)].

16. Other than for a passing reference to s. 3(1)(d) to (i) of the *Broadcasting Act*, there is no reference to the extensive and detailed list of the objectives and purposes of the *Act* which concern the character, content and purposes of Canadian programming, or to the role of the technicians, on-air staff, actors,

performers, writers and directors responsible for creating that programming. Rather the objectives of the *Act* are regarded by the parties as creating a playing field on which they compete for commercial gain, and not as the means for achieving the primary goal of providing a public service to Canadian audiences that ensures them access to a "wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity …".

17. In simple terms, the *Broadcasting Act* is fundamentally about Canadian content, not the modalities through which it is delivered. Yet the parties have overwhelmingly focused on the latter, and have virtually ignored the former. Thus little if any effort is made to explore the fundamental question of whether the CRTC has the authority to establish the compensation regime it proposes for the purposes of achieving the cultural, including the Canadian programming goals, explicitly identified by the *Broadcasting Act*. To be sure, the commercial viability of television stations is a necessary condition for realizing the goals of the *Act*, but it is insufficient for that purpose. Yet the written arguments before the Court fail to look beyond commercial considerations.

18. Similarly, the referenced paragraphs dealing the question of copyright fail to explore the essential issue the Moving Parties propose to address which concerns the relationship between broadcasting as a public service, and the private rights created under the *Copyright Act*, including the right to prevent public access to certain intellectual property.

Prejudice

19. The Responding Parties argue that granting this motion would cause prejudice by depriving them of the right to know the “case to be met”. But as noted, this is not an adversarial proceeding in which there is in fact a case to meet. Rather the CRTC is seeking judicial guidance on a complex question of law and jurisdiction that engages important public interest considerations.

> Joint Written Representations of the Responding Parties, paras. 37-40.

20. Furthermore, the Responding Parties’ position on prejudice contradicts their own argument (paras. 28 to 31) that the issues to be addressed by the Moving Parties have already been thoroughly canvassed in the written submissions of parties on both sides of the issue. In other words, the Responding Parties claim that they have already presented arguments on the issues the Moving Parties seek to address, while incongruously arguing that they would be prejudiced by being denied the right to make those same arguments. .

21. The Responding Parties’ claim to prejudice must also be viewed in light of their failure to request in the alternative that they be given leave to respond in writing if this motion is granted.

Reason for Delay and Timeliness of the Application

22. The Responding Parties argue that the Moving Parties have not established a reasonable explanation for the delay.

Joint Written Representations of the Responding Parties, paras. 40- 48.

23. The Moving Parties submit that their motion was brought in timely manner once gaps in the arguments before the Court became apparent. Their timing was guided by recent decisions by the Court in another proceeding in which they were ultimately accorded participatory rights.

24. That case also concerned issues of Canadian cultural sovereignty, but unlike the present case the initial motion by the moving parties was filed in advance of the written arguments being presented by the parties and was dismissed for being premature. Prothonotary Tabib held that the issues the Moving Parties were seeking leave to address might yet have been addressed by the Applicant or one of the Respondents. The Moving Parties were invited to reapply for standing should that not be the case. They did, and were successful.

Public Mobile v. Attorney General of Canada et al., (April 13, 2010), Ottawa T-26-10 (Fed. Ct.) (Proth. Tabib).

Public Mobile v. Attorney General of Canada et al., (June 8, 2010), Ottawa T-26-10 (Fed. Ct.) (Proth. Aronovitch).

25. The *Public Mobile* case involved an application for leave to intervene under Rule 109 of the *Federal Courts Rules*; in this case, the Moving Parties are seeking an extension of the time under Rule 8. Notwithstanding these procedural

differences, both cases involve applications by the same parties for leave to participate in an ongoing proceeding for a similar purpose, namely to assist the Court by providing a perspective and expertise on questions of broad public interest that are relevant to the matter before the Court but that have not have not been raised or explored by the parties to the proceeding.

26. Had the parties brought this motion before the written submissions were filed by the parties, they might well have been greeted with the same objection that was made by the Attorney General and a respondent in the *Public Mobile* matter – that they were premature. It is also argued by the Responding Parties that this Motion might have been brought following the filing of arguments by parties on the affirmative side of the Reference question, but as the Respondents themselves claim, they too addressed the issues the Moving Parties seek leave to address.

Joint Written Representations of the Responding Parties, para. 30.

27. Given the disposition of their initial motion in the *Public Mobile* case, it was prudent for the Moving Parties to wait to review the submissions of the other Parties before bringing this motion.

COSTS

28. Rule 410(2) provides that the costs for a motion to extend time are to be borne by the party bringing the motion, *unless the court orders otherwise*. Rule 400(3)(1)(h) states that when exercising its discretion to award costs, it should

consider the public interest in having the proceeding litigated. Given that they have proceeding reasonably and for the purpose of providing assistance to the Court in a Reference raising broad issues of public concern, the Moving Parties submit that costs should not be awarded against them in this motion.

DATE: July 20, 2010

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APPENDIX A

Federal Courts Rules, SOR/98-106, Rule 400(3)(1)(h)

400. (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. […] Factors in awarding costs (3) In exercising its discretion under subsection (1), the Court may consider […] (h) whether the public interest in having the proceeding litigated justifies a particular award of costs; […]	400. (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer. […] Facteurs à prendre en compte (3) Dans l’exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l’un ou l’autre des facteurs suivants : […] h) le fait que l’intérêt public dans la résolution judiciaire de l’instance justifie une adjudication particulière des dépens;

APPENDIX B

(A) LIST OF AUTHORITIES

(1) *Public Mobile v. Attorney General of Canada et al.*, (April 13, 2010), Ottawa T-26-10 (Fed. Ct.) (Proth. Tabib)

(2) *Public Mobile v. Attorney General of Canada et al.*, (June 8, 2010), Ottawa T-26-10 (Fed. Ct.) (Proth. Aronovitch)

(B) AUTHORITIES CONTAINED IN MOTION RECORD

Canada (Minister of Human Resources Development) v. *Hogervorst*, 2007 FCA 41, Motion Record, Tab 5B

Canada (Attorney General) v. *Pentney*, 2008 FC 96, Motion Record, Tab 5C

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