

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.**

NOTICE OF MOTION

TAKE NOTICE THAT the Moving Parties, the Alliance of Canadian Cinema, Television and Radio Artists, the Communications, Energy and Paperworkers Union of Canada and Friends of Canadian Broadcasting, will make a motion in writing under pursuant to Rule 369 of the *Federal Court Rules*.

THE MOTION IS FOR:

1. An order granting the Alliance of Canadian Cinema, Television and Radio Artists; the Communications, the Energy and Paperworkers Union of Canada; and the Friends of Canadian Broadcasting (hereinafter "the Moving Parties") an extension of time from the time limits of the Order of Justice Létourneau, dated March 30, 2010, to serve and file a Notice of Intention to Participate in these proceedings in Form 323;

2. An order granting the Moving Parties an extension of time from the time limits of the Order of Justice Letourneau, dated March 30, 2010, to serve and file a Book of Authorities and a Memorandum of Fact and Law of no more than 15 pages, addressing the following two issues:

1. In light of the Canadian Radio-television and Telecommunications Commission's ("CRTC") mandate to regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in s. 3(1) of the *Broadcasting Act*, does the Value for Signal ("VFS") regime being proposed by the CRTC accord with, or follow by necessary implication from, the objectives of the Act that:

i) concern the essential role Canadian program content plays in maintaining and enhancing Canada's national identity and cultural sovereignty;

ii) require the Canadian broadcasting system "to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada" including by encouraging "a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity" and by "employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children..."; and that

iii) delineate in considerable further detail the character and content of Canadian broadcast programming as a matter quite distinct from the means through which that content is conveyed to Canadian audiences.

2. Taking into account the disparate objectives of, and interests served by, these respective statutory schemes, is the pith and substance of the VFS regime proposed by the Commission the creation of a new copyright interest in local TV broadcasts, or the regulation of a public service provided by the Canadian broadcasting system?

3. An order granting the Moving Parties leave to make oral submissions to the Court upon the hearing of this Reference;

4. An order there shall be no costs of this motion awarded either to or against the Moving Parties; and
5. Such further and other relief as counsel may advise and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

6. The Canadian Radio-television and Telecommunications Commission (the "CRTC") has referred the following question to the Federal Court of Appeal: "Is the Commission empowered, pursuant to its mandate under the *Broadcasting Act*, to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations?"
7. Prior to this referral, the CRTC held public hearings, commenced by Broadcasting Notice of Public Hearing CRTC 2009-411 (the "CRTC proceeding"). The Moving Parties made written submissions to the CRTC proceeding.
8. On March 30, 2010, Justice Lévesque made a Procedural Order pursuant to which any person who filed individual comments in the CRTC proceeding may become a party to this Reference by serving and filing a Notice of Intention to Participate within 20 days of that Order.
9. Justice Lévesque further ordered that parties supporting the CRTC's jurisdiction and who would answer the question in the affirmative were to serve and file a Joint Memorandum of Fact and Law and a Book of Authorities within 70 days of his Order.

Parties who supported the CRTC's jurisdiction who wished to comment on separate issues were to serve and file a separate Memorandum of Fact and Law, not exceeding 10 pages in length within 70 days of the Order. Parties who opposed the CRTC's jurisdiction and who would answer the question in the negative were to serve their materials 20 days thereafter. All of the above materials were served and filed as of June 28, 2010.

10. While the Moving Parties were aware of and keenly interested in this Reference, the moving parties did not file a Notice of Intention to Participate, as they believed that the issues that they would have intended to address would have been dealt with by the numerous parties to this reference. It was not until all of the current parties filed their written arguments, a process that concluded on June 28, 2010, that it became apparent that important and relevant issues relating to the cultural, social and political objectives of the *Act* which bear upon the question before this Court, were all but entirely ignored. Accordingly the Moving Parties agreed to bring this joint motion for the purpose of offering their assistance to this Court by addressing these key issues.
11. This matter is now set down for hearing in Toronto on September 13 and 14, 2010.

The Interests of the Moving Parties

12. This case raises issues of broad public interest and importance relating to the objects and purposes of the *Broadcasting Act* which declare that it is the broadcasting policy of Canada that the Canadian broadcasting system ... "provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty."

13. The current parties are corporations motivated by a direct commercial interest in these proceedings. The arguments they have presented on both sides of this issue suffer from a common and fundamental deficiency: they fail to recognize and properly explore the link between the financial sustainability of local broadcasters and the Canadian programming objectives of the *Broadcasting Act*.
14. The Moving Parties would answer the CRTC's reference question in the affirmative and believe that the authority to establish a such a compensation scheme is necessary for the realization of the objectives of the *Act*, and in particular those that serve to "enrich and strengthen the cultural, political, social, and economic fabric of Canada." However, unlike the current Parties that would also answer the Reference question in the affirmative, the Moving Parties bring a unique perspective to these issues as the creators of the cultural content of Canadian programming, in the case of Alliance of Canadian Cinema, Television and Radio Artists ("ACTRA") and the Communications, Energy and Paperworkers Union of Canada ("CEP"), or as the audience for that programming, in the case of Friends of Canadian Broadcasting.
15. ACTRA is one of Canada's leading cultural organizations with 21,000 members who are professional performers working in the English language recorded media. ACTRA members are a vital part of Canada's \$85 billion cultural industries and have a stake in a robust domestic television, film and digital media production, distribution and exhibition system. ACTRA's national office is located at 625 Church Street, 3rd floor, in Toronto, Ontario.

16. The Communications, Energy and Paperworkers Union of Canada has more than 120,000 members who work in the telecommunications, broadcasting, energy, print and forestry sectors across Canada. The CEP is Canada's largest media union with approximately twenty thousand members who work for conventional and specialty television broadcasters and major newspapers. In the case of local TV stations, the CEP's members work both on- and off-screen, in technical, program production and host functions.
17. Friends of Canadian Broadcasting is an independent, not-for profit, non-partisan watchdog group supported by 66,000 households in Canada. Its mission is to defend and enhance the quality and quantity of Canadian programming in Canadian audio-visual services. Its offices are located at 238-131 Bloor Street West Toronto, Ontario.
18. The Moving Parties share a commitment to a robust Canadian broadcasting system and to promoting Canadian content in programming, and have advocated these themes for many years before the CRTC and various Parliamentary Committees. The Moving Parties have been active in the public policy debate about the regulation of both the content and means for conveying media in Canada, and have made submissions to the CRTC on the very policy initiative that has given rise to this reference.
19. The interests and perspective of the Moving Parties are distinct from those of the other parties, and as the creators of and the audiences for Canadian programming, have specialized expertise that will allow them to be of assistance to this Court in dealing the issues raised by this reference as these engage Canadian cultural sovereignty and other non-commercial objectives of the *Broadcasting Act*.

20. The granting of this motion would not cause prejudice to any of the parties in this proceeding.
21. Section 3, 18.3, and 28(2) of the *Federal Courts Act* and Rules 8, 323 359, 360, 362, 363, 364, and 369 of the *Federal Court Rules*.
22. Such further and other grounds as counsel may advise and this Honourable Court permits.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. Affidavit of Peter Murdoch, sworn July 5, 2010;
2. Affidavit of Stephen Waddell, sworn July 6, 2010;
3. Affidavit of Ian Morrison, sworn July 5, 2010; and,
4. Such further and other material as counsel may advise and this Honourable Court permits.

July 6, 2010



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FEDERAL COURT OF APPEAL

Proceeding commenced at Toronto

NOTICE OF MOTION

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