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A-234-22

2023 FCA 131

Société Radio-Canada (*Appellant*)

v.

Attorney General of Canada (*Respondent*)

INDEXED AS: SOCIÉTÉ RADIO-CANADA V. CANADA (ATTORNEY GENERAL)

Federal Court of Appeal, Noël C.J., Boivin and Goyette JJ.A.—Ottawa, June 8, 2023.

Radiocommunication — Appeal from Canadian Radio-television and Telecommunications Commission (CRTC) decision upholding complaint criticizing Société Radio-Canada (SRC) for having broadcast offensive word on air — Issue giving rise to dispute concerning quotation, on four instances, of book title containing offensive, racist word beginning with letter "N" on SRC's airwaves during segment — Complainant filed complaint with CRTC condemning "N-word" use — SRC's first head of content dismissed complaint, being of opinion that use of "N-word" during segment not abusive or inconsiderate — SRC's French Services Ombudsman refused to intervene after pointing out that use of "N-word" during segment complied with SRC policy — In split decision, CRTC upheld complaint on basis that content broadcast on air went against Canadian broadcasting policy objectives, values set out in Broadcasting Act (Act), ss. 3(1)(d), (g), (m) — In reaching decision, CRTC made no findings based on rules of conduct in respect of what can, cannot be said on airwaves under Radio Regulations, 1986, s. 3(b), Canadian Association of Broadcasters' Equitable Portrayal Code ss. 9, 10 — SRC sought leave to appeal decision, alleging mainly that CRTC could not sanction SRC solely because content broadcast on air was, in its opinion, inconsistent with Canadian broadcasting policy set out in Act, s. 3(1), that in so doing, CRTC exceeded its jurisdiction — Respondent turned against CRTC decision, invoking duty to act in accordance with applicable law — Essentially adopting arguments presented by SRC in support of its appeal, respondent asked that appeal be allowed, decision set aside on ground that CRTC exceeded its jurisdiction, erred in law by ignoring applicable legal framework — Whether CRTC having jurisdiction to control content of programs based on Canadian broadcasting policy set out in Act, s. 3(1), sanction licensees on sole ground that content broadcast on airwaves contravening this policy — CRTC overstepped its jurisdiction by sanctioning SRC on sole basis that content broadcast on air was, in its opinion, inconsistent with Canadian broadcasting policy — To hold otherwise would be tantamount to conferring on CRTC unfettered discretion over what can, cannot be said on air — Act, s. 3(1) not giving CRTC power to sanction SRC — Its purpose rather to describe broadcasting policy that Parliament was pursuing in adopting Act, circumscribe exercise of discretionary power granted to CRTC — Act, s. 5(1), conferring on CRTC task of supervising "all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy", no more jurisdiction-conferring than s. 3(1); both aimed at guiding CRTC in exercising discretionary power conferred upon it, one under guise of policy, other under guise of objects — Contrary to Canadian

broadcasting policy, rules of conduct put in place in order to delineate what can, cannot be said on air — It follows that imposing sanctions on sole basis of this policy, as if it were itself rule of conduct, going against role that Parliament attributed to this policy — Act as it reads allowing for timely action without need to treat policy as though it was rule of conduct — Respondent's motion for judgment on consent granted, CRTC decision set aside — Appeal allowed.

Constitutional Law — Charter of Rights — Fundamental Freedoms — Freedom of speech — Canadian Radio-television and Telecommunications Commission (CRTC) upheld complaint criticizing Société Radio-Canada (SRC) for having broadcast offensive word on air — Issue giving rise to dispute concerning quotation, on four instances, of book title containing offensive, racist word beginning with letter "N" on SRC's airwaves during segment — Complainant filed complaint with CRTC condemning "N-word" use — In split decision, CRTC upheld complaint on basis that content broadcast on air went against Canadian broadcasting policy objectives, values set out in Broadcasting Act (Act), ss. 3(1)(d), (g), (m) — SRC sought leave to appeal decision, alleging, inter alia, that CRTC erred in law by failing to consider SRC's freedom of expression guaranteed by Charter — Whether CRTC conducted balancing exercise required by Charter as construed, applied in Supreme Court decisions Doré v. Barreau du Québec, Loyola High School v. Quebec (Attorney General), Law Society of British Columbia v. Trinity Western University — Majority in CRTC decision did not conduct balancing exercise mandated by Charter, because it was not alive to issue pertaining to SRC's freedom of expression — Act, s. 2(3)(a) imposing duty to construe, apply Act in manner consistent with freedom of expression, journalistic, creative, programming independence enjoyed by broadcasters, including SRC — CRTC decision making no mention of SRC's freedom of expression — Its structure revolving exclusively around issue as to whether broadcast of "N-word" on air consistent with Canadian broadcasting policy — Fact that dissenting members addressed SRC's freedom of expression in detail making majority's silence on this issue even more difficult to explain.

STATUTES AND REGULATIONS CITED

Broadcasting Act, S.C. 1991, c. 11, ss. 2(3)(a), 3(1), Part II, 5(1), 6, 9–17, 18(3), 31(2), 46(5).

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 2(b).

Federal Courts Act, R.S.C., 1985, c. F-7, s. 16(1).

Federal Courts Rules, SOR/98-106, r. 349.

Radio Regulations, 1986, SOR/86-982, s. 3.

Television Broadcasting Regulations, 1987, SOR/87-49, s. 5(1)(b).

CASES CITED

FOLLOWED:

TVA Group Inc. v. Bell Canada, 2021 FCA 153, [2022] 1 F.C.R. 283.

APPLIED:

Loyola High School v. Quebec (Attorney General), 2015 SCC 12, [2015] 1 S.C.R. 613; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *Law Society of British Columbia v. Trinity Western University,* 2018 SCC 32, [2018] 2 S.C.R. 293; *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235.

CONSIDERED:

Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC

2010-168, 2012 SCC 68, [2012] 3 S.C.R. 489; *Capital Cities Comm. v. C.R.T.C.*, [1978] 2 S.C.R. 141, (1977), 81 D.L.R. (3D) 609.

REFERRED TO:

Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44, [2015] 3 S.C.R. 147; *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4TH) 231; *Right to Life Association of Toronto v. Canada (Attorney General)*, 2022 FCA 220; *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 196, 487 N.R. 202; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, [2019] 4 S.C.R. 845; *Genex Communications v. Canada (Attorney General)*, 2005 FCA 283, [2006] 2 F.C.R. 199; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764; *Miller v. Canada (Attorney General)*, 2002 FCA 370, [2003] 3 F.C. D-16, 220 D.L.R. (4TH) 14.

APPEAL from a Canadian Radio-television and Telecommunications Commission decision (Broadcasting Decision CRTC 2022-175) upholding a complaint criticizing the Société Radio-Canada for having broadcast an offensive word on air. Appeal allowed.

WRITTEN SUBMISSIONS

Christian Leblanc and *Eliane Ellbogen* for appellant.

Benoît de Champlain and *Michaël M.F. Fortier* for respondent.

Paul Daly as *amicus curiae*.

SOLICITORS OF RECORD

Fasken Martineau DuMoulin LLP, Montréal, for appellant.

Deputy Attorney General of Canada for respondent.

The following is the English version of the reasons for judgment rendered by

NOËL C.J.:

INTRODUCTION

[1] This is an appeal from the Broadcasting Decision CRTC 2022-175 (the decision) issued on June 29, 2022, in which the Canadian Radio-television and Telecommunications Commission (CRTC) upheld a complaint criticizing the Société Radio-Canada (SRC) for having broadcast an offensive word on air.

[2] The Attorney General of Canada (the Attorney General) asks, on consent of the SRC and by way of a motion brought pursuant to rule 349 of the *Federal Courts Rules*, SOR/98-106, that the appeal be allowed. In so doing, he acknowledges that the CRTC exceeded its jurisdiction and erred in law.

[3] For the reasons that follow, I would grant the Attorney General's motion, set aside the CRTC's decision and return the matter to the CRTC for re-determination on the basis of the applicable law.

THE RELEVANT FACTS

[4] The issue that gave rise to this dispute concerns the quotation on the SRC's airwaves of the title of a book by Pierre Vallières that contains an offensive and racist word beginning with the letter "N". This title, which the CRTC mentions in French in its decision (*Nègres blancs d'Amérique*), was quoted four times—three times in French and once using its English translation—during a segment called *Actualité avec Simon Jodoin: Certaines idées deviennent-elles taboues?*, which was broadcast on August 17, 2020, during the radio program *Le 15-18*. The segment in question, which lasted 6 minutes and 27 seconds, dealt with a petition demanding the dismissal of a Concordia University professor who had mentioned Pierre Vallières's book by its title in class.

[5] On August 28, 2020, an individual whose name has since been struck from the style of cause at his request filed a complaint with the CRTC condemning the use of the "N-word" during the segment. The complaint was referred to Stéphanie Gendron, the first head of content for the program. On September 2, 2020, she dismissed the complaint, being of the opinion that the use of the "N-word" during the segment had not been abusive or inconsiderate.

[6] On September 29, 2020, the complainant requested that Guy Gendron, the SRC's French Services Ombudsman, review Ms. Gendron's decision. On October 26, 2020, Mr. Gendron refused to intervene after pointing out that the use of the "N-word" during the segment complied with the SRC policy codified in a document entitled *Journalistic Standards and Practices*.

[7] On November 26, 2020, the complainant requested that the CRTC review the Ombudsman's decision pursuant to paragraph 5(1)(b) of the *Television Broadcasting Regulations, 1987*, SOR/87-49 (1987 Regulations) and paragraphs 3(1)(d) and (g) of the *Broadcasting Act*, S.C. 1991, c. 11 (the Act). All understood that the complainant intended to rely on paragraph 3(b) of the *Radio Regulations, 1986*, SOR/86-982 (1986 Regulations) rather than paragraph 5(1)(b) of the 1987 Regulations (see note 29 of the written submissions of the Attorney General). Nothing turns on this erroneous designation.

[8] On February 25, 2021, the SRC sent the CRTC its response, in which it asserted that the use of the "N-word" during the segment complied with the Act, the regulations and the conditions of its licence.

THE DECISION OF THE CRTC

[9] In a split decision issued on June 29, 2022, the CRTC upheld the complaint on the basis that the content broadcast on the air "goes against the Canadian broadcasting policy objectives and values set out in paragraphs 3(1)(d), 3(1)(g) and 3(1)(m) of the Act" (Reasons, at paragraph 22).

[10] According to the CRTC [at paragraph 10], this conclusion addresses the "fundamental issue" raised by the complaint, namely:

> … whether the content broadcast by the SRC is consistent with the objective of the Act set out in paragraph 3(1)(g), which states that the programming originated by broadcasting undertakings should be of high standard, and with the social objectives set out in paragraphs 3(1)(d) and 3(1)(m)(viii) of the Act, which indicate that programming should

> contribute to the strengthening of the cultural and social fabric and the reflection of the multicultural and multiracial nature of Canada.

[11] As part of its analysis, the CRTC considered the context in which the “N-word” was used on the air (Reasons, at paragraph 11). It emphasized that the current social context related to racial issues is “changing”, explicitly referring to the events surrounding the tragic death of George Floyd (Reasons, at paragraph 12), and stated that broadcasters must therefore exercise increased vigilance and put in place “all necessary measures … to mitigate the impact of a statement that may be perceived as offensive by its audience” (Reasons, at paragraph 14).

[12] Although the CRTC acknowledged that the “N-word” was not used in a discriminatory manner during the segment, but “rather to quote the title of a book that was central to a current issue” (Reasons, at paragraph 14), it was nevertheless [at paragraph 19]:

> … dissatisfied with the way the subject matter was treated in this segment. It considers that the SRC should have taken all necessary steps to mitigate the impact of the word on the audience, including not repeating it and providing a clear warning at the beginning of the segment. In the Commission’s view, the SRC did not exercise sufficient caution and vigilance in its treatment of the subject matter, which may have had a harmful effect on its audience, particularly the Black community.

[13] This led the CRTC to hold that the broadcast of the segment did not meet “the high programming standard set out in the Act” (Reasons, at paragraphs 19 and 22) and “did not contribute to the strengthening of the cultural and social fabric and the reflection of the multicultural and multiracial nature of Canada provided for in paragraph 3(1)(d) and subparagraph 3(1)(m)(viii) of the Act” (Reasons, at paragraph 20, see also paragraph 22).

[14] As a remedy, the CRTC ordered the SRC to implement four measures, i.e. (Reasons, at paragraphs 23–26):

1. provide a public written apology to the complainant;

2. report to the CRTC on internal measures and programming best practices that it will put in place in order to ensure that it better addresses similar issues in the future, and make sure that this report is made available to the public;

3. indicate to the CRTC how it intends to mitigate the impact of the “N-word” in the segment of the program given that the segment is still available online and via catch-up on the Web platform; and

4. put in place all necessary reasonable measures to mitigate the impact of the broadcast of content that could be offensive, including explicit warnings.

[15] Two members of the CRTC signed distinct dissenting opinions criticizing the majority for ignoring the provisions that applied in this case, namely, section 3 of the 1986 Regulations and paragraph 10(c) of the Canadian Association of Broadcasters’ *Equitable Portrayal Code* (the Code), and for disregarding the freedom of expression guaranteed to the SRC by the *Canadian Charter of Rights and Freedoms* (the Charter). They argued that if the CRTC had disposed of the complaint based on those provisions

and according to the applicable law regarding freedom of expression, it would have dismissed the complaint.

[16] On July 13, 2022, the SRC notified the CRTC that it had provided a public written apology to the complainant. It also committed to adding a warning to the segment of the program available for rebroadcast, thereby implementing the first measure and the third measure mentioned above. In November 2022, the SRC also complied with the second measure by establishing guidelines governing the broadcast of content that could be offensive. In compliance with the fourth measure, these guidelines put in place several mechanisms intended to mitigate the impact of the broadcast of this type of content, including explicit warnings.

INCIDENTAL PROCEDURAL STEPS ON APPEAL

[17] On July 28, 2022, the SRC sought leave to appeal the decision pursuant to subsection 31(2) of the Act. Leave was granted on September 12, 2022. The notice of appeal, which seeks to overturn the decision, was filed on November 8, 2022. It alleges that the CRTC could not sanction the SRC solely because the content broadcast on the air was, in its opinion, inconsistent with the Canadian broadcasting policy set out in subsection 3(1) of the Act, and that in so doing, the CRTC exceeded its jurisdiction. The notice of appeal also alleges that the CRTC erred in law by failing to consider certain applicable provisions as well as the values of the Charter, more precisely freedom of expression.

[18] In the meantime, the complainant requested, on August 18, 2022, that his name be struck from the style of cause because he did not want to be exposed to legal costs and had suffered several negative consequences by reason of the fact that his name was associated with the decision of the CRTC. This request was granted on September 7, 2022, in the course of the SRC's motion for leave to appeal (file 22-A-11).

[19] On December 14, 2022, the Attorney General turned against the decision of the CRTC, invoking his duty to act in accordance with the applicable law. He now asks that the appeal be allowed and that the decision be set aside. In so doing, the Attorney General agreed with the SRC that the CRTC exceeded its jurisdiction and failed to take into account the applicable legal framework as well as the SRC's freedom of expression as guaranteed by the Charter.

[20] On January 6, 2023, the CRTC sought leave to intervene in order to oppose the Attorney General's motion and defend its decision. On February 1, 2023, leave was denied on the ground that this intervention would violate the principles of impartiality and finality of administrative decisions (see the order dated February 1, 2023, dismissing the CRTC's motion for leave to intervene, citing in support *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147, at paragraphs 65 and 72; and *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3, at paragraph 17).

[21] That same day, the Court, acting on its own motion with the view of obtaining a complete picture of the issues before it, appointed Professor Paul Daly as an *amicus curiae*, or "friend of the court", and gave him the mandate of advancing any argument that the CRTC would have been entitled to advance in resisting the Attorney General's motion, without regard to the jurisprudential constraints limiting its participation.

[22] Given that the Attorney General asks that the appeal be allowed, the record, once completed, was assigned on April 27, 2023, to a panel of three judges for adjudication. Subsection 16(1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7 provides that only a panel so composed can grant this remedy, should it prove to be justified.

THE ARGUMENTS OF THE ATTORNEY GENERAL AND THE SRC

[23] The Attorney General asks that the appeal be allowed and the decision set aside on the ground that the CRTC exceeded its jurisdiction and, in addition, erred in law by ignoring the legal framework applicable to the matter before it. In so doing, the Attorney General essentially adopts the arguments presented by the SRC in support of its appeal.

[24] The Attorney General acknowledges from the outset that certain jurisdiction-conferring provisions of the Act give the CRTC the power to control the content of the programs broadcast on the air by the SRC (written submissions of the Attorney General, at paragraph 40; reply of the Attorney General, at paragraph 5), but he submits that these provisions were not invoked or applied in this matter. In this case, the CRTC rested its decision on nothing but a failure to achieve the Canadian broadcasting policy objectives set out in subsection 3(1) of the Act. According to the Attorney General, the CRTC erred in relying on this provision because neither subsection 3(1) of the Act nor any other provision authorizes the CRTC to impose sanctions for the broadcast of content deemed to be inappropriate on the sole basis of these objectives (written submissions of the Attorney General, at paragraphs 19–21; reply of the Attorney General, at paragraphs 2 and 4).

[25] In support of this argument, the Attorney General notes that the Supreme Court has repeatedly recognized that subsection 3(1) is not a jurisdiction-conferring provision (written submissions of the Attorney General, at paragraphs18–26, citing *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476 (*Barrie Public Utilities*), at paragraphs 37 and 42; and *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 S.C.R. 489 (*2012 Reference*), at paragraph 22).

[26] Furthermore, the Attorney General considers that even though subsection 5(1) of the Act confers on the CRTC the task of supervising “all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy”, this provision is no more jurisdiction-conferring than subsection 3(1) (written submissions of the Attorney General, at paragraph 28, citing *TVA Group Inc. v. Bell Canada*, 2021 FCA 153, [2022] 1 F.C.R. 283 (*TVA Inc.*), at paragraph 35, leave to appeal to S.C.C. refused, 39861 (May 12, 2022)).

[27] According to the Attorney General, the CRTC must carry out its supervisory duties within the framework of the powers conferred on the CRTC by sections 9 to 17 of the Act, under the heading “General Powers” (reply of the Attorney General, at paragraph 26). More specifically, the Attorney General submits that section 12 of the Act allows the CRTC to sanction any failure to comply with Part II (sections 5 to 34) of the Act or the terms of any regulation, licence, decision or order made under this Part (written submissions of the Attorney General, at paragraphs 30–34). It follows, according to the Attorney General, that section 12 of the Act allows the CRTC to ensure that the content broadcast on the airwaves is compliant with the conditions of licences

issued pursuant to section 9 of the Act and with the requirements imposed on broadcasters by the regulations promulgated pursuant to section 10 of the Act (written submissions of the Attorney General, at paragraph 40; reply of the Attorney General, at paragraph 27).

[28] In this case, the Attorney General contends that the CRTC could have imposed sanctions on the SRC on the ground that the content broadcast contravened sections 9 and 10 of the Code (which were imposed on the SRC as conditions of its licence) and paragraph 3(b) of the 1986 Regulations, if it had made a finding to that effect, but that it did not exercise this power (written submissions of the Attorney General, at paragraphs 53–54 and 59–60). In so doing, the CRTC would have applied the wrong legal framework to the facts, which in itself amounts to an error of law (written submissions of the Attorney General, at paragraph 61).

[29] That said, the Attorney General submits that nothing prevents the CRTC from turning to the Canadian broadcasting policy objectives in order to construe the content of the applicable provisions (reply of the Attorney General, at paragraph 28). There is also nothing that prevents it from amending the terms of the broadcasting licences or the applicable regulations in order to better reflect the Canadian broadcasting policy, but until then, the CRTC must apply the provisions as they read, which it did not do (reply of the Attorney General, at paragraphs 3 and 5). The Attorney General argues that to hold otherwise would be tantamount to conferring unfettered discretion on the CRTC (written submissions of the Attorney General, at paragraphs 34–35, citing *2012 Reference*, at paragraphs 27–28; reply of the Attorney General, at paragraphs 32–33).

[30] Moreover, and on a completely different note, the Attorney General contends that because the decision circumscribes the use that may be made of the “N-word” on the airwaves, it necessarily engages the SRC’s freedom of expression as guaranteed by the Charter (written submissions of the Attorney General, at paragraph 66). However, the CRTC did not point to any specific consideration requiring that restrictions be placed on this freedom. According to the Attorney General, it follows that the decision does not reflect the proportionate balancing that must be conducted in these circumstances (written submissions of the Attorney General, at paragraphs 65 and 68, citing *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 (*Loyola*), at paragraph 4). He submits that this error is as fatal as the other errors already pointed to.

THE ARGUMENTS OF THE *AMICUS CURIAE*

[31] In response to the Attorney General’s arguments, the *amicus curiae* (the *amicus*) submits that the decision lies within the CRTC’s jurisdiction and that it took into account the applicable legal framework. He further maintains that the CRTC complied with the balancing exercise mandated by the Charter. He therefore asks that the motion for judgment on consent be dismissed. Failing this, the *amicus* asks that the matter be returned to the CRTC for reconsideration and re-determination.

[32] According to the *amicus*, the jurisdiction of the CRTC in matters pertaining to the supervision of the Canadian broadcasting system is sufficiently broad to allow it to police the compliance of the content broadcast on the air solely on the basis of objectives of the Canadian broadcasting policy. In his view, this power finds its source in subsection 5(1), which [TRANSLATION] “grants the CRTC the jurisdiction to regulate and

supervise the Canadian broadcasting system" in order to implement the Canadian broadcasting policy set out in subsection 3(1) of the Act (response of the *amicus*, at paragraph 31; see also paragraphs 47–52, referring to *Capital Cities Comm. v. C.R.T.C.*, [1978] 2 S.C.R. 141, (1977), 81 D.L.R. (3d) 609 (*Capital Cities*), at page 171). While the jurisdiction of the CRTC, insofar as it pertains to its regulation-making power, is [TRANSLATION] "strictly governed by sections 9 and 10 of the Act" as well as by the rulings *2012 Reference* and *TVA Inc.* (response of the *amicus*, at paragraphs 31 and 61–63), its jurisdiction, as it pertains to its supervisory powers, is not so limited (response of the *amicus*, at paragraphs 31 and 41–42). The *amicus* submits that this jurisdiction can be exercised by virtue of subsection 18(3), which allows the CRTC, if it is satisfied that it would be in the public interest to do so, to dispose of any complaint within its jurisdiction "under this Act", which includes that conferred by subsections 3(1) and 5(1) of the Act (response of the *amicus*, at paragraphs 37 and 41).

[33] The *amicus* further submits that this approach gives meaning to each key word in subsection 5(1) and gives effect to Parliament's intention, which is to create a body that would act as a [TRANSLATION] "watchdog for the Canadian broadcasting system" (response of the *amicus*, at paragraph 59). To fully assume this role, the CRTC must be able to intervene as needed—that is, without having to wait for the licence renewal process and without having to rely on a specific regulation or on the conditions attached to a licence in order to sanction an inappropriate use of the airwaves. Only this approach would allow the CRTC to ensure that the Canadian broadcasting system functions properly in a context of rapid social change (response of the *amicus*, at paragraphs 43 and 51).

[34] The *amicus* stresses that this is the approach that was used by the CRTC in the present matter and that it is consistent with the role that it played in the past (response of the *amicus*, at paragraph 51, citing Broadcasting Decision CRTC 2005-348, at paragraph 30; Broadcasting Decision CRTC 2007-423, at paragraphs 38–40; and Broadcasting Decision CRTC 2009-548, at paragraphs 17–19, 21 and 24). Indeed, in disposing of the complaint on the basis of the Canadian broadcasting policy, the CRTC drew the attention of the SRC and of all licence holders [TRANSLATION] "to its expectations regarding high-quality programming, the strengthening of the cultural and social fabric, and the need to reflect the multicultural and multiracial character of Canada" (response of the *amicus*, at paragraph 53).

[35] Although the CRTC disposed of the complaint on the sole basis of the policy objectives, the *amicus* asserts that it nevertheless considered all relevant provisions, i.e., paragraph 3(b) of the 1986 Regulations and sections 9 and 10 of the Code. Indeed, he contends that the peripheral references in the reasons to notions and key words embodied in these provisions, together with the dissenting opinions which make specific reference to these provisions, show that the CRTC took them into account (response of the *amicus*, at paragraphs 69–80).

[36] Finally, the *amicus* maintains that the CRTC complied with the balancing obligation imposed on it by the Charter. In his view, the only issue for this Court to decide is whether the CRTC was "alive" to this question (response of the *amicus*, at paragraphs 30, 81, 83–84, 86 and 95, citing *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 (*Doré*), at paragraphs 55–56; and *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293 (*Trinity Western*

University), at paragraphs 55–56). This, according to the *amicus*, is the case; he submits that since the dissenting members considered the SRC's freedom of expression, it should be inferred that the majority did the same (response of the *amicus*, at paragraph 87). Even though this is said nowhere, he also invites the Court to read the decision of the CRTC as if the majority had endeavoured to show that the infringement of the SRC's freedom of expression was justified in a free and democratic society (response of the *amicus*, at paragraphs 88–94).

ANALYSIS

[37] Before proceeding with the analysis, the Court would like to thank Professor Daly for having accepted to play the role of *amicus* and for having vigorously and thoroughly advanced the arguments capable of supporting the decision of the CRTC in the face of the motion brought by the Attorney General. This has provided the Court with the assurance that it has before it the full articulation of the two theses that are in play.

- *The issues*

[38] The Attorney General's motion raises the following two issues:

1. Does the CRTC have the jurisdiction to control the content of programs based on the Canadian broadcasting policy set out in subsection 3(1) of the Act and sanction licensees on the sole ground that the content broadcast on the airwaves contravenes this policy?

2. Did the CRTC conduct the balancing exercise required by the Charter as construed and applied in *Doré*, *Loyola* and *Trinity Western University*?

- *Are these issues moot?*

[39] It is appropriate to first recall that an appellate court does not usually address issues that have become moot. In this case, although the SRC has put in place the four measures imposed by the decision under appeal, neither the *amicus* nor the parties ask that the motion brought by the Attorney General be dismissed on this ground, presumably because they share the view that there remains a live controversy between the parties or that the Court should exercise its discretion to dispose of the motion despite its mootness in light of the importance of the issues (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 (*Borowski*), at page 353; *Right to Life Association of Toronto v. Canada (Attorney General)*, 2022 FCA 220, at paragraph 8).

[40] I agree. Setting aside the decision would have a practical effect on the SRC's rights since it would do away with the ongoing requirement flowing from the fourth measure imposed by the CRTC (see paragraph 14 above). In any event, the jurisdictional and constitutional issues raised by the Attorney General are sufficiently important to warrant this Court's involvement even if they were found to be moot (*Borowski* at pages 358–362; *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 196, 487 N.R. 202, at paragraph 16).

- *The standard of review*

[41] Subsection 31(2) of the Act establishes an appeal mechanism pursuant to which an appeal only lies on questions of law or jurisdiction. In these circumstances, the standards of appellate review apply (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paragraphs 36–52; *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, [2019] 4 S.C.R. 845, at paragraphs 4 and 34–35). Therefore, the correctness standard should be applied to the two issues that the Court has been called upon to decide (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraph 8).

- *Does the CRTC have the jurisdiction to control the content of programs based on the Canadian broadcasting policy set out in subsection 3(1) of the Act and sanction licensees on the sole ground that the content broadcast on the airwaves contravenes this policy?*

[42] I note from the outset that it is well established that Parliament may regulate what can and cannot be said on the airwaves and that it has delegated to the CRTC the power to do so (*Genex Communications v. Canada (Attorney General)*, 2005 FCA 283, [2006] 2 F.C.R. 199 (*Genex*), at paragraphs. 131–137). No one takes issue with this. Indeed, all are agreed that the CRTC has validly established rules of conduct towards this end and that it can sanction any instance of non-compliance pursuant to section 12 of the Act. In this case, the applicable rules of conduct were established pursuant to paragraph 3(b) of the 1986 Regulations, promulgated pursuant to subsection 10(1) of the Act, as well as by sections 9 and 10 of the Code, which were imposed on the SRC as a condition for its licence pursuant to subsection 9(1) of the Act (see condition 7 in Appendix 4 of the Broadcasting Decision CRTC 2013-263; this licence was renewed administratively by Broadcasting Decision CRTC 2018-407).

[43] These rules of conduct require broadcasters to be vigilant and sensitive with respect to the language and expressions used on the air to refer to individuals or groups based on, among other things, race. They prohibit, in particular, the broadcast of offensive content that tends or is likely to expose these individuals or groups to hatred on the basis of race.

[44] The CRTC made no findings based on these rules of conduct; rather, it made findings on the sole basis of the Canadian broadcasting policy. If it did otherwise, nothing can explain why it did not mention the applicable rules of conduct, if only to circumscribe the issue that it had to decide. I note in this respect that when the CRTC has, in the past, made a finding based on these rules, these were referred to in express terms (see, for example, Broadcasting Decisions CRTC 2005-348, at paragraph 30; and CRTC 2007-423, at paragraph 41).

[45] The *amicus* contends that this omission is inconsequential because in any event, the CRTC has the power to sanction the SRC on the sole ground that the content broadcast on the air is, in its opinion, inconsistent with the Canadian broadcasting policy set out in subsection 3(1) of the Act.

[46] Subsection 3(1) does not give the CRTC this power. The Supreme Court has repeatedly recognized that subsection 3(1) is not a jurisdiction-conferring provision. Instead, its purpose is to describe the broadcasting policy that Parliament was pursuing in adopting the Act, and circumscribe the exercise of the discretionary power granted to the CRTC (*2012 Reference*, at paragraphs 22–23 and 25; *Barrie Public Utilities*, at

paragraphs 37 and 42; see also *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, at paragraphs 50 and 74).

[47] The *amicus* does not take issue with this case law, but rather rests his case on subsection 5(1) of the Act; he contends that unlike subsection 3(1), subsection 5(1) is not so limited and allows for the same result. Subsection 5(1) reads as follows:

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

[48] In support of this argument, the *amicus* cites the following passage from *Capital Cities*, through which the Supreme Court, he contends, would have confirmed that subsection 5(1) (section 15 at the time) is a jurisdiction-conferring provision in terms of supervising what can and cannot be said on the air (at page 171):

> In my opinion, having regard to the embracive objects committed to the Commission under s. 15 of the Act [now section 5 of the Act], objects which extend to the supervision of "all aspect of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act", it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the *Broadcasting Act*. Although one could mature as a result of a succession of applications, there is merit in having it known in advance.

[49] This passage has neither the reach nor the meaning that the *amicus* attributes to it. In so saying, the Supreme Court merely confirmed that the CRTC may develop guidelines applicable to a specific industry—cable distribution, in that case—that will serve to guide the exercise of the discretionary powers conferred upon it by sections 9 to 17 of the Act, including the power to issue and amend licences. Indeed, this is the role that the guidelines played in *Capital Cities* as they served to inform the CRTC in the exercise of its discretionary power to amend licences under paragraph 9(1)(c) of the Act (paragraph 17(1)(b) at the time).

[50] This jurisprudential statement was later codified and is now set out in section 6 of the Act, which reads as follows:

> **Policy guidelines and statements**
>
> **6** The Commission may from time to time issue guidelines and statements with respect to any matter within its jurisdiction under this Act, but no such guidelines or statements issued by the Commission are binding on the Commission.

[51] *Capital Cities* is more in line with the Attorney General's position that subsection 5(1) is no more attributive of jurisdiction than subsection 3(1) because both are aimed at guiding the CRTC in exercising the discretionary power conferred upon it, one under the guise of a policy and the other under the guise of objects. This is indeed the conclusion that was reached by this Court in *TVA Inc.* (at paragraph 35). This decision is binding on

us and the *amicus* has provided no reason that would allow us to depart from it (*Miller v. Canada (Attorney General)*, 2002 FCA 370, [2003] 3 F.C. D-16, 220 D.L.R. (4th) 149, at paragraph 10).

[52] Indeed, subsection 5(1), by its wording, provides that the objects to be pursued by the CRTC are to develop a regulatory framework and to supervise what is said over the air with the view of implementing the Canadian broadcasting policy. It follows that the argument advanced by the *amicus* according to which the CRTC may rely on this policy as though it was in and of itself a rule of conduct that forms part of the regulatory framework governing what can be said on the air must fail.

[53] Contrary to the Canadian broadcasting policy, which is intended to guide the exercise of the discretionary power conferred upon the CRTC, rules of conduct are put in place in order to delineate what can and cannot be said on the air. It follows that imposing sanctions on the sole basis of this policy, as if it were itself a rule of conduct, goes against the role that Parliament attributed to this policy.

[54] The *amicus* submits that the CRTC must be able to rely on the Canadian broadcasting policy in order to intervene on a timely basis [TRANSLATION] “within a context of rapid social change” (response of the *amicus*, at paragraph 51). Although it is true that the CRTC must be able to act promptly, the Act as it reads allows for timely action without the need to treat the policy as though it was a rule of conduct. Alleged breaches of the existing rules of conduct may be brought to the attention of the CRTC at any time by way of complaints filed pursuant to subsection 18(3) of the Act, and, when the circumstances so require, nothing prevents the CRTC from imposing the appropriate sanctions as and when needed based on the rules of conduct established towards that end.

[55] As the Attorney General points out, the CRTC may amend the rules of conduct prospectively in order to adapt them to the new realities emerging from the changing social landscape, if it considers it necessary to do so. In addition, nothing prevents the CRTC from relying on the Canadian broadcasting policy in order to clarify the meaning and the scope of the existing rules of conduct. However, it remains that the CRTC cannot sanction licensees on the sole basis that what is said on the air is, in its opinion, inconsistent with the Canadian broadcasting policy, without more. As the Attorney General submits, to hold otherwise would be tantamount to conferring on the CRTC an unfettered discretion over what can and cannot be said on the air.

[56] The Attorney General is therefore correct in arguing, with the support of the SRC, that the CRTC overstepped its jurisdiction by sanctioning the SRC on the sole basis that the content broadcast on the air was, in its opinion, inconsistent with the Canadian broadcasting policy.

- *Did the CRTC conduct the balancing exercise required by the Charter as construed and applied in* Doré*,* Loyola *and* Trinity Western University*?*

[57] The second issue is whether the CRTC conducted the proportionate balancing exercise required by the Charter as set out in *Doré*, *Loyola* and *Trinity Western University*. This issue must be considered together with the duty imposed on the CRTC by paragraph 2(3)(a) of the Act to construe and apply the Act in a manner that is consistent with the freedom of expression and journalistic, creative and programming

independence enjoyed by broadcasters, including the SRC (see subsection 46(5) of the Act).

[58] The *amicus* does not challenge the fact that the decision, because it circumscribes how the "N-word" may be used on the air, restricts the SRC's freedom of expression, and therefore engages paragraph 2(b) of the Charter. It follows that the CRTC had a duty to balance the opposing interests and "ask how the Charter value at issue will best be protected in view of the statutory objectives" (*Doré*, at paragraph 56; see, to the same effect, *Loyola*, at paragraphs 4 and 39; and *Trinity Western University*, at paragraph 80). The *amicus*, however, maintains that the CRTC discharged this duty. With respect, this argument must fail.

[59] First, the decision makes no mention of the SRC's freedom of expression. Its structure revolves exclusively around the issue as to whether the broadcast of the "N-word" on the air is consistent with the Canadian broadcasting policy.

[60] Second, this silence is not remedied by the record as constituted, which in no way suggests that the majority was "alive" to its duty to ensure that the SRC's freedom of expression was not restricted more than necessary in order to attain the objectives contemplated by the Act (compare *Trinity Western University*, at paragraph 55, where the evidence showed that the decision-makers were alive to the Charter issue for having debated it at length in the process leading to the decision).

[61] Contrary to what the *amicus* asserts, the fact that the dissenting members addressed the SRC's freedom of expression in detail makes the majority's silence on this issue even more difficult to explain. These opinions are more in line with the Attorney General's thesis that the majority was not alive to the issue pertaining to the SRC's freedom of expression, which explains why it did not conduct the balancing exercise mandated by the Charter.

DISPOSITION

[62] For these reasons, I would grant the Attorney General's motion for judgment on consent, allow the appeal of the SRC and set aside the decision of the CRTC. Given that Parliament has mandated the CRTC to act as the initial decision-maker with respect to what can and cannot be said on the air, I would return the matter to the CRTC so that it may re-determine the merits of the complaint in light of the record as constituted before it, without limiting its discretion to add to it, and based on the rules of conduct set out in paragraph 3(b) of the 1986 Regulations and in sections 9 and 10 of the Code, after duly weighing the impact that its decision could have on the SRC's freedom of expression.

[63] Given that the parties have both succeeded, they should bear their respective costs. As for the *amicus*, the order appointing him specifically provides that he is not exposed to any costs arising from these proceedings.

BOIVIN J.A.: I agree

GOYETTE J.A.: I agree