S.C.C. File No. 37896

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N :

BELL CANADA and BELL MEDIA INC.

APPLICANTS
(Appellants)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

- and -

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSIONS

INTERVENER

REPLY OF THE APPLICANTS, BELL CANADA and BELL MEDIA INC., TO THE RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL

(Pursuant to Rule 28(1) of the *Rules of the Supreme Court of Canada*)

MCCARTHY TÉTRAULT LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Steven G. Mason (smason@mccarthy.ca)
Brandon Kain (bkain@mccarthy.ca)
Steven Tanner (stanner@mccarthy.ca)
James S.S. Holtom (jholtom@mccarthy.ca)
Richard Lizius (rlizius@mccarthy.ca)
Tel: (416) 601-8200
FAX: (416) 868-0673

Counsel for the Applicants

GOWLING WLG (CANADA) LLP
Suite 2600, 160 Elgin Street
Ottawa, ON K1P 1C3

Jeff Beedell (jeff.beedell@gowlingwlg.com)
Tel: (613) 786-0171
FAX: (613) 563-9869

Ottawa Agent for Counsel to the Applicants

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

DEPARTMENT OF JUSTICE CANADA
ONTARIO REGIONAL OFFICE
The Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, ON M5X 1K6

Michael H. Morris
(michael.morris@justice.gc.ca)
Tel.: (416) 973-9704
Roger Flaim
(roger.flaim@justice.gc.ca)
Tel.: (416) 952-6889
Laura Tausky
(laura.tausky@justice.gc.ca)
Tel.: (416) 952-5864
FAX: (416) 973-0809

Counsel for the Respondent,
Attorney General of Canada

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Civil Litigation Section
50 O'Connor Street
Suite 500
Ottawa, ON K1H 0H8

Christopher M. Rupar
(crupar@justice.gc.ca)
Tel: (613) 670-6290
FAX: (613) 694-1920

Ottawa Agent for Counsel to the
Respondent

CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION
Les Terrasses de la Chaudière
Central Building
1 Promenade du Portage
Gatineau, Quebec J8X 4B1

Crystal Hulley-Craig
(crystal.hulley@crtc.gc.ca)
Tel: (819) 956-2095
FAX: (819) 953-0589

Counsel for the Intervener
(pursuant to *Rule 22(2)(c)(iii)*)

TABLE OF CONTENTS

STATEMENT OF ARGUMENT IN REPLY

1. In Broadcasting Regulatory Policy CRTC 2016-334 and Broadcasting Order CRTC 2016-335 ("**CRTC Order**"), the Canadian Radio-Television and Telecommunications Commission ("**CRTC**") claimed the power to control the content of individual television programs.[1] In doing so, it transformed itself from a regulator – which sets standards – into an editor. Before both the CRTC and the Federal Court of Appeal, Bell Canada and Bell Media Inc. ("**Bell**") argued that the CRTC has no authority to dictate the content of individual programs through an order under s. 9(1)(h) of the *Broadcasting Act*.[2] This, Bell submits, raises an issue of public importance.

2. In response, the Attorney General ("**AG**") simply asserts that the CRTC's interpretation of s. 9(1)(h) is not an issue of public importance. Rather than take this issue head-on, the AG attempts to evade the issue by raising matters of process – whether Bell's leave application raises a "new" freedom of expression-based attack on the CRTC Order, and whether future cases might also raise the issue.

3. ***First***, contrary to the AG's argument, Bell is not raising a new constitutional argument for the first time on appeal.[3] Bell's argument has always been that s. 9(1)(h) does not permit program-specific orders. Both before the CRTC, and before the Federal Court of Appeal, Bell argued that s. 9(1)(h) does not allow the CRTC to target individual programs.[4] The impact of the CRTC's interpretation of s. 9(1)(h) on freedom of expression is obvious and inevitable, as the Federal Court of Appeal proceedings demonstrate.

4. The Federal Court of Appeal's concern for this issue was apparent. At the hearing, Justice Near tested the extremes of the CRTC's interpretation, asking the AG whether it meant the CRTC "could also use 9(1)(h) to prohibit a particular channel from carrying a particular program

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[1] Broadcasting Regulatory Policy CRTC 2016-334 and Broadcasting Order CRTC 2016-335 ("CRTC Order"), Application for Leave to Appeal of the Applicants (Bell Canada and Bell Media Inc.) ("AR"), Tab 2A.

[2] *Broadcasting Act*, S.C. 1991, c. 11, s 9(1)(h).

[3] Memorandum of Argument of the Attorney General in Response to the Application for Leave to Appeal ("AG's Memorandum") at paras. 2, 16-19.

[4] Broadcasting Regulatory Policy CRTC 2016-334 at paras. 41, 52, AR, Tab 2A; *Bell Canada v. Canada (A.G.)*, 2017 FCA 249 at para. 15, AR, Tab 2B.

altogether". The AG's answer was "yes", "[t]here is no limit to what [the CRTC] can do under that power".[5] Later, in response to Bell's submission that the CRTC had seized editorial control over the content of television, Justice Gleason asked Bell's counsel whether the exercise of that power would implicate s. 2(b) of the *Charter*. Bell responded that it would, arguing that this spoke to the indefensibility of the CRTC's interpretation.[6]

5. Consistent with s. 2(b) of the *Charter*, the obligation to interpret s. 9(1)(h) with concern for freedom of expression is compelled by s. 2(3) of the *Broadcasting Act* itself, which requires the Act is to "be construed and applied in a manner that is consistent with the freedom of expression and…programming independence enjoyed by broadcasting undertakings." Section 9(1)(h) cannot be read without s. 2(3) as its interpretive aid.[7]

6. The impact of the CRTC's interpretation of s. 9(1)(h) on freedom of expression is raised in this Court again because it speaks directly to the public importance of the issue.[8] Television is one of the single largest speech platforms in Canada, reaching millions of Canadians.[9] The CRTC's alleged power to control the content of all such speech makes its interpretation of s. 9(1)(h) an issue of public importance.

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[5] FCA Transcript Excerpt, Exhibit "A", Atwell Affidavit, AR, Tab 4A, p. 143.

[6] The digital audio recording of this portion of the hearing cuts in mid-hearing, well after this submission had been made.

[7] Section 2(3) of the *Broadcasting Act* does not prevent the CRTC from imposing standards applicable to all programs. While the CRTC lacks the jurisdiction to make orders targeting individual programs under s. 9(1)(h), it is not contested here that it may issue regulations of general application under s. 10. For example, s. 8 of the *Broadcasting Distribution Regulations*, SOR/97-555 (enacted pursuant to s. 10 of the *Broadcasting Act*), provide that illegal, abusive, obscene or misleading material shall not be distributed. This application of the s. 10 regulation-making power is not at issue in this appeal.

[8] *Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 40, 43.

[9] Notice of Hearing: Let's Talk TV – Broadcasting Notice of Consultation CRTC 2014-190, 24 April 2014 ("BNC 2014-190") at para. 13; *Canadian Broadcasting Corp. v. Ontario (A.G.)*, [1959] S.C.R. 188 at 203, per Locke J. (concurring); CMI Report at 11, AR, Tab 4B at 161.

7. ***Second***, the AG argues that the "impact on freedom of expression from a 9(1)(h) order that prohibits the broadcast of *the entire output of a television station* (whatever the impact is) is no different than the impact from a 9(1)(h) order that prohibits simultaneous substitution *for a particular program*" (emphasis in original). Therefore, the AG says that freedom of expression concerns are "simply not a material issue".[10]

8. In effect, the AG's argument is this: in this case, it has not been argued that the CRTC cannot interfere with freedom of expression by issuing a s. 9(1)(h) order prohibiting the distribution of a programming service (*i.e.*, it can order broadcasting distribution undertakings not to carry a particular channel). Thus, it is of no moment that a s. 9(1)(h) order targeting individual programs also interferes with freedom of expression.

9. While, in this case, Bell has not challenged the CRTC's power to make s. 9(1)(h) orders compelling or prohibiting the carriage of channels, that fact is irrelevant. It does not bear on whether s. 9(1)(h) authorizes orders directed at individual programs. Regardless of whether or not s. 9(1)(h) allows the CRTC to make orders in relation to entire channels, it does not follow that s. 9(1)(h) authorizes program-specific restrictions on freedom of expression.

10. As s. 2(3) of the *Broadcasting Act* makes clear, interferences with freedom of expression are presumptively <u>not</u> authorized. Explicit statutory language and justification would be necessary to displace this presumption. Bell's argument has always been that s. 9(1)(h) does not contemplate orders directed to specific programs. Because it refers only to programming services, s. 9(1)(h) does not allow program-specific orders.

11. The power to target individual programs was reserved to the Governor in Council for matters of "urgent importance" under s. 26(2) of the *Broadcasting Act.* The legislative history of s. 9(1)(h) shows that it was only ever intended to address programming services (*i.e.* channels) to ensure Canadian channels are distributed in preference to American ones. And, in *Star Choice* the CRTC itself held that s. 9(1)(h) does not apply to individual programs. Section 9(1)(h) cannot reasonably be interpreted to empower the CRTC to control the content of specific programs.

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[10] AG's Memorandum at para. 19.

12. This issue of public importance – whether the CRTC's interpretation of s. 9(1)(h) is defensible – cannot be assumed away by wrongly placing orders that target channels and orders that target specific programs on equal footing, as the AG has done. This argument must be rejected.

13. ***Third***, the AG argues that – notwithstanding that the CRTC has arrogated to itself editorial control over television programming – the full impact of the CRTC's interpretation of s. 9(1)(h) remains to be seen. Therefore, says the AG, future cases in which the CRTC dictates the content of a single program for distribution can be "judged by a reviewing court on the basis of the facts arising in those cases".[11]

14. This argument must also be rejected. Because the Federal Court of Appeal upheld the CRTC's interpretation of s. 9(1)(h), the issue has been determined. In any future case in which the CRTC issues a program-specific s. 9(1)(h) order, the salient fact will be that the CRTC is exercising editorial control over the content of television programs which the Federal Court of Appeal has said it has the power to do. The underlying facts – the particular program targeted, and particular terms and conditions imposed – will not give rise to future arguments about the CRTC's interpretation of s. 9(1)(h) which will have already been determined.

15. The issues of public importance raised by this case are ripe for determination, transcend the particular context of this litigation and have broader implications for the broadcasting regime as a whole. The record is detailed. The issues have been constant throughout the litigation. And the arguments have been exhaustively briefed in multiple proceedings before the CRTC. Unless leave is granted and the CRTC Order set aside, the CRTC's interpretation will calcify. Orders made under s. 9(1)(h) can only be appealed if they raise questions of law and only with leave of the Federal Court of Appeal.[12] If leave to appeal is denied, and this decision stands, in future cases where the CRTC targets a specific program with a s. 9(1)(h) order, leave to appeal to the Federal Court of Appeal may not be granted because the appealable issue will have been finally

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[11] AG's Memorandum at paras. 2, 21.

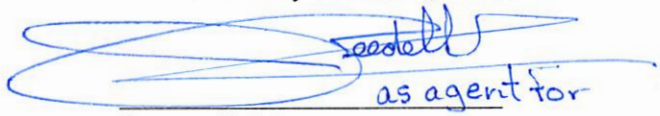
[12] *Broadcasting Act*, s. 31(2).

resolved. This case will serve as precedent justifying future program-specific orders with all their attendant implications for freedom of expression.

16. Leave to appeal should be granted so that these issues may be heard and decided by this Court.

17. ***Lastly***, the AG says that the role of the "margin of appreciation" approach in the standard of review analysis is not a matter of public importance. The AG says that, notwithstanding conflicting appellate decisions (between provinces and even within the Federal Court of Appeal itself), the issue is settled.[13] The AG relies on the individual reasons of two judges of this Court in *Wilson* who rejected the margin of appreciation approach.[14] But the other seven judges of this Court who sat on *Wilson* did not join in those reasons. Even the reasons relied on by the AG recognize that reasonableness "takes its colour from the context" and must be "assessed in the context of the particular type of decision making involved".[15] How that differs from the "margin of appreciation" approach (which in practice considers similar contextual factors) remains unclear. The issue is far from settled.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of March, 2018.



Steven G. Mason
Brandon Kain
Steven Tanner
James Holtom
Richard Lizius
Counsel for the Applicants

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[13] AG's Memorandum at paras. 3, 24-28.

[14] *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 at paras. 18 (*per* Abella J., concurring), and 73 (*per* Cromwell J., concurring).

[15] *Wilson* at paras. 22 (*per* Abella J., concurring), and 73 (*per* Cromwell J., concurring).

TABLE OF AUTHORITIES

STATUTORY PROVISIONS

Statutes / Legislation	**Paragraph(s)**
Broadcasting Act, S.C. 1991, c. 11, ss. 9(1)(h), 10, 31(2)	1, 5, 15
Broadcasting Distribution Regulations, SOR/97-555, s. 8	5
Supreme Court Act, R.S.C. 1985, c. S-26, ss. 40, 43	6