Federal Court of Appeal  Cour d'appel fédérale

Date: 20150727

Docket: A-97-14

Citation: 2015 FCA 173

CORAM: **GAUTHIER J.A.**
NEAR J.A.
SCOTT J.A.

BETWEEN:

ROSS EADIE

Appellant

and

MTS INC.

Respondent

and

SHAW COMMUNICATIONS INC., COGECO CABLE INC., ROGERS COMMUNICATIONS PARTNERSHIP, BCE INC., TELUS COMMUNICATIONS COMPANY and QUEBECOR MEDIA INC.

Interveners

and

CANADIAN HUMAN RIGHTS COMMISSION

Intervener

Heard at Winnipeg, Manitoba, on February 4, 2015.

Judgment delivered at Ottawa, Ontario, on July 27, 2015.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: NEAR J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Ross Eadie appeals the decision of Justice Peter B. Annis of the Federal Court (the judge) allowing MTS Inc.'s (MTS) application for judicial review of the decision of the Canadian Human Rights Commission (the CHRC) referring Mr. Eadie's complaint regarding the accessibility of MTS's broadcasting services to the Canadian Human Rights Tribunal (the Tribunal). More particularly, the judge's decision deals with the CHRC's conclusion that the subject of the complaint could not be more appropriately dealt with, initially or completely, by the Canadian Radio-television and Telecommunications Commission (the CRTC), as well as with the thoroughness of the CHRC investigation.

[2] MTS has also filed a cross-appeal against the judge's decision not to deal with the new question of jurisdiction raised by MTS in its application for judicial review. Before the judge, MTS argued that the CRTC has exclusive jurisdiction to deal with the subject-matter of the complaint filed by Mr. Eadie with the CHRC.

[3] The CHRC has been granted leave to intervene, as have six Broadcasting Distribution Undertakings (BDUs), who represent 91% of the broadcasting industry and who presented their submissions jointly.

[4] The BDUs, including MTS, urged the Court to determine whether the CRTC has exclusive jurisdiction to deal with the subject-matter of the complaint. However, as explained below, I do not find it appropriate to deal with the merits of this issue.

[5] Thus, this appeal turns on the very unusual facts of this case and on whether the judge properly concluded that the decision of the CHRC was unreasonable (judge's reasons, published under the neutral citation: 2014 FC 61).

[6] For the reasons that follow, I am of the view that the appeal and cross-appeal should be dismissed.

I. BACKGROUND

[7] Mr. Eadie, who is blind, subscribes to the digital television services of MTS, a BDU. He filed a complaint with the CHRC raising three distinct allegations of discrimination in the provision of those services, contrary to section 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [CHRA]. The first two allegations in Mr. Eadie's complaint, which pertain to MTS's failure to pass on all available Descriptive Video (DV) and to the absence of a "one-button" means of turning DV on and off through the set top box (STB) provided by MTS, were resolved by the CRTC in the course of the process it put in place to address outstanding issues relating to the accessibility of DV programming (see paragraphs 45-46 below).

[8] Thus, the only remaining allegation of discrimination before the CHRC was that the STB supplied by MTS does not provide "audible cues" to facilitate both access and use of the interactive programming guide (also referred to as Electronic Programming Guide or EPG). In his complaint, Mr. Eadie states that "[t]he MTS infrastructure service contributes to systemic discrimination within the whole Canadian television broadcasting system against the people who are blind" (A.B. Compendium 1, Tab 1).

[9] Even prior to the CHRC's investigation, the only real issue between the parties in respect of the lack of "audible cues" was whether or not there existed a technical solution that could accommodate Mr. Eadie and whether procuring such an accommodation would impose undue hardship on MTS. Indeed, there was no dispute that Mr. Eadie could not use the EPG without the assistance of a sighted person. Both Mr. Eadie and MTS agreed that this was a systemic problem in the Canadian broadcasting industry.

A. *Preliminary Section 41 objections*

[10] MTS filed two preliminary objections to Mr. Eadie's complaint on the basis of paragraph 41(1)(*b*) of the CHRA. In both, MTS argued that the complaint could be more appropriately dealt with by the CRTC, which shares jurisdiction with the CHRC over the matter in dispute by virtue of the *Broadcasting Act*, S.C. 1991, c. 11. In November 2008 and June 2009, the CHRC ruled on these objections and declined to dismiss the complaint at the preliminary stage. Following those decisions, the CHRC ordered an investigation into Mr. Eadie's complaint.

B. *The Investigation Report*

[11] As the parties disagree as to the breadth and thoroughness of the CHRC's investigation, I will simply excerpt the methodology described in the investigation report dated September 14, 2011, which speaks for itself.

[12] The report states as follows:

> *Methodology*
>
> 35. The following parties were interviewed/consulted during the course of the investigation:
>
> Ross Eadie – the complainant
>
> Candace Bishoff, Director, Law, Manitoba Telecom Services Inc.
>
> 36. All documentation provided by both parties was reviewed for the preparation of the investigation report. As well, the investigator obtained relevant Public Notices and Decisions cited in the report from the CRTC's website. The respondent provided a copy of the Progress Report prepared by the CRTC-mandated Described Video Working Group which the investigator reviewed with the complainant to obtain his feedback.

[13] In light of the methodology adopted, the report consists mainly of a summary of the representations made by the two sides and a description of the process followed since the complaint was filed, including attempts at conciliation.

[14] In order to request that the Chairperson of the Tribunal institute an inquiry pursuant to paragraphs 44 (3)(*a*), the Commission had to address two distinct issues. First, it had to be

satisfied that an inquiry is warranted (subparagraphs 44 (3)(*a*)(*i*)) and second, that the complaint should not be referred to the CRTC pursuant to subparagraph 44 (2)(*b*).

[15] The first issue addressed in the report is whether or not the subject-matter of the complaint could more appropriately be dealt with, initially or completely, by the CRTC (paragraph 44(2)(*b*) and subparagraph 44(3)(*a*)(*ii*) of the CHRA and all other relevant provisions are reproduced in Annex A). The investigator notes that according to the complainant, although the CRTC has the technical capacity to deal with the issue, it is Industry Canada's responsibility to enforce accessibility to "set top box features and broadcast menu features" (paragraph 25 of the report).

[16] The investigator writes at paragraph 26:

> 26. In his letter dated July 9, 2008 to support his position further, the complainant cites the following excerpt from the Broadcasting Notice of Public Hearing CRTC 2008-8, Telecom Public Notice CRTC 2008-8, Ottawa, 10 June 2008:
>
> "16. The Commission notes that it does not regulate terminal equipment [digital set top boxes]*or the design and manufacture of communications devices intended for accessing telecommunication or broadcasting services. Accordingly, the Commission invites comments on which measures, short of regulating terminal equipment, would improve the accessibility of telecommunications and broadcasting services to persons with disabilities."
>
> (* I note that there is no reference to STBs in the public notice itself.)

[17] The public notice excerpted in the investigator's report included a footnote after the first sentence of paragraph 16 that was not reproduced in the investigation report (A.B. Compendium 2, p. 7). This footnote reads as follows:

> The Commission notes that certification of terminal equipment is the responsibility of Industry Canada. In Telecom Decision 2007-20, the Commission stated that standards are more comprehensively determined by entities such as the Canadian Standards Association and/or Industry Canada.

[18] At paragraph 28 of the report, the investigator mentions that the American *Twenty-First Century Communications and Video Accessibility Act* of 2010 [CVAA] deals with "[u]ser interfaces on digital apparatus" and "[a]ccess to video programming guides and menus provided on navigation devices." She also notes that the CVAA makes reference to whether or not the required technology is achievable and that if a company determines that it isn't, it must document its attempts in a report and provide it to the Committee concerned for its review. The investigator states that "it is unclear when these solutions will become available."

[19] The investigator's analysis in respect of whether or not the subject-matter of the complaint could more appropriately be dealt with by the CRTC consists of the following three paragraphs:

> *Analysis*
>
> 29. It does not appear that the CRTC can make any orders regarding digital set top boxes and related software regarding accessibility because it seems to be beyond the CRTC's jurisdiction. It appears that the CRTC can only encourage broadcast entities in this regard.
>
> 30. While the DV Working Group report does mention the inaccessibility of the menus of set top boxes, it appears to be awaiting developments in the United States based on legislative enactments in this regard.
>
> 31. As well, it is unclear when the solutions will become available and therefore, when the issues in the complaint will be remedied while the complainant appears to have provided evidence to demonstrate that there are options available currently.

[20] The investigator therefore recommends that the CHRC deal with the complaint because:

- she is not satisfied that the CRTC procedure will address the allegation of discrimination; and
- the other procedure is not likely to be completed within a reasonable time.

[21] The report neither refers to nor describes the CRTC complaint process available to Mr. Eadie. The CHRC is well aware of this process, having previously considered it in issuing decisions under paragraph 41(1)(*b*) of the CHRA in similar complaints. In its very first communication to the CHRC, in response to the CHRC's April 16, 2008 letter advising that Mr. Eadie had filed a complaint, MTS noted the fact that Mr. Eadie had not filed a complaint with the CRTC. The simple fact that a complainant has not used a process falling within paragraph 41(1)(*b*) does not relieve the CHRC of its responsibility to consider that process, as required by subparagraph 44(3)(*a*)(*ii*) of the CHRA. Thus, presumably the investigator does not refer to the CRTC process in her report because she concludes that the subject-matter of the complaint appears to be beyond the jurisdiction of the CRTC.

[22] The investigator's recommendation that an inquiry was justified within the meaning of subparagraph 44 (3)(*a*)(*i*) and the Commission's ultimate finding in that respect is not the subject of the appeal. However, because the investigator's comments in respect of undue hardship provide context relevant to the question of the thoroughness of the investigation, I will add a few words in respect of this aspect of her report.

[23] The investigator states, at paragraph 68 of the report, that although MTS has taken steps to evaluate the three solutions proposed by the complainant (see paragraphs 49, 55 to 64 of the report), MTS has not established that providing the functionality requested by Mr. Eadie (full access to EPG menus with audible cues) would create undue hardship. In particular, the investigator notes that MTS has not demonstrated that it has evaluated the cost of "after market solutions" and determined them to be prohibitive.

[24] It is not clear what "after market solutions" the investigator believes MTS should have evaluated. The investigator may be referring to Code Factory's TV Speak, which is Windows-based software for use on a computer, and is mentioned at paragraphs 61 and 63 of the investigation report. It was undisputed that MTS's licence for its main digital television platform, Microsoft Mediaroom, forbids MTS from adding software or functionality to the platform or from making any changes to its infrastructure without Microsoft's consent, and that MTS sought to add the functionality requested by Mr. Eadie. Microsoft refused on the basis that such functionality was not currently available.

[25] It is noteworthy that while the CHRC was investigating Mr. Eadie's complaint, Microsoft was actively participating in the Video Programming and Emergency Access Advisory Committee (VPAAC), put in place under the CVAA. As noted above, the CVAA was referred to in the investigation report (see paragraph 18, above). VPAAC was divided into various working groups, each composed of original equipment manufacturers, software developers, EPG providers, as well as subscribers with disabilities. One of these working groups examined the accessibility of user interfaces such as STBs.

C. *CHRC decision*

[26] The CHRC issued its decision on April 25, 2012, after reviewing, among other things, the investigation report, further responding submissions by the parties, and the final report of the CRTC DV working group dated September 30, 2011 (see list of material before the CHRC at Tab 1 of the Appeal Book, Compendium 2).

[27] In respect of subparagraph 44(3)(*a*)(*ii*) of the CHRA, while the CHRC adopted the recommendation of the investigator, it added detailed reasons addressing the specific issues raised in MTS's further responding submissions. I will only reproduce the portions most relevant to my analysis:

> While the Respondent recognizes the Commission's concurrent jurisdiction to deal with this complaint, it argues that the Commission should refer the complaint to the CRTC, as the complaint can more appropriately be dealt with under another Act of Parliament, namely the *Broadcasting Act*. […]
>
> The Complainant, however, asserts in his submissions that the CRTC has refused to exercise its jurisdiction over STBs. This is referred to in the Investigation Report at paragraphs 26 and 29. This is not challenged by the Respondent (see paragraph 19 of the Respondent's October 11, 2011 submission), however, the Respondent argues that the Commission also lacks jurisdiction over STBs.
>
> In the Commission's view, the fact that the CRTC has refused to exercise jurisdiction over STBs confirms that the complaint cannot be more appropriately dealt with under a procedure provided for under another Act of Parliament, i.e. the *Broadcasting Act*. It cannot be said that the CRTC will either initially or completely deal with a human rights complaint when it refuses to exercise its jurisdiction over the very source of the complaint. Moreover, if the CRTC does not have jurisdiction over STBs, then a proceeding under the CHRA relating to discrimination resulting from the use

> of STBs will not necessarily involve the same evidence and considerations as a proceeding before the CRTC.
>
> Moreover, in the Commission's view, the DV working group is not a procedure provided for under an "Act of Parliament" as contemplated in paragraph 44(2)(b) of the CHRA. […] [I]t is not an adjudicative body that can order a human rights remedy for the complainant.
>
> With respect to the *Figliola* decision, because the CRTC has not exercised jurisdiction over the STBs, it cannot be said that this is a situation which involves potential re-litigation […]. This is not a situation where the Commission is being asked to review a decision of the CRTC. The CRTC has not made a decision with respect to the subject matter of this part of the complaint and it has indeed refused to deal with it entirely.

[28] With respect to the assertion of MTS that, like the CRTC, the CHRC did not have jurisdiction directly over the equipment manufacturers or the STBs *per se*, and thus, presumably, according to Mr. Eadie's rationale, could not deal with the complaint, the Commission notes:

> The Commission's jurisdiction is, therefore, focussed on the provision of the service which includes the manner in which the Respondent makes broadcasts available to the Complainant. This necessarily involves examining the accessibility of the menu items that flow from the service. While the equipment itself and the manufacturer of the equipment may be beyond the jurisdiction of the Commission, it is the Respondent's selection and use of this equipment in the provision of its service that concerns the Commission.

D. *Federal Court decision*

[29] MTS filed an application for judicial review of the CHRC's April 25, 2012 decision with the Federal Court.

[30] On January 17, 2014, the judge allowed MTS's application, setting aside the CHRC's decision and referring it back for redetermination. The judge concluded at paragraph 85 of his reasons that:

> Accordingly, I am satisfied that the Commission's decision must be set aside on its unreasonable conclusion that the CRTC declined jurisdiction in a fashion different from itself and by its failure to conduct a thorough investigation on jurisdictional issues. In other words, the decision cannot reasonably be sustained either on the evidence or in law and must be set aside.

[31] With respect to the new argument that the CRTC had exclusive jurisdiction over the subject-matter of the complaint, the judge concluded at paragraph 93 of his reasons that he had "no jurisdiction to determine whether the CRTC has exclusive jurisdiction, thereby requiring the complaint to be dismissed pursuant to section 41(1)(*c*)."

E. *CRTC process*

[32] A general overview of the *Broadcasting Act*, the CRTC, and the CRTC's process for dealing with accessibility issues is useful to understanding the issues in this appeal, as MTS argued and the judge found that such matters should have been more thoroughly investigated.

[33] Section 3 of the *Broadcasting Act* outlines Canada's broadcasting policy. Paragraph 3(1)(*p*) stipulates that "programming accessible by disabled persons should be provided within the Canadian broadcasting system as resources become available for the purpose", while subsection 3(2) states 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."

[34] Pursuant to section 5 of the *Broadcasting Act*, the CRTC "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)", having regard to the regulatory policy set out in subsection 5(2).

[35] The general powers of the CRTC include the issuance of licences on terms deemed appropriate for the implementation of the broadcasting policy set out in subsection 3(1), and the CRTC may make regulations in accordance with subsection 10(1), which includes very broad language at paragraph 10(1)(*k*).

[36] The *Broadcasting Act* also empowers the CRTC to make inquiries (section 12), to hold public hearings (section 18), and to issue mandatory orders or decisions (subsection 12(2)). Orders made under subsection 12(2) may be made an order of the Federal Court or any superior court of a province and will be enforceable in the same manner as orders by those courts (section 13). The CRTC has the authority to determine questions of fact or law in relation to any matter within its jurisdiction under the Act (section 17).

[37] At the relevant time, the *CRTC Rules of Procedure*, C.R.C. c. 375 provided for a consumer complaint procedure (as of April 1, 2011, this procedure is set out in Part II of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, SOR/2010-277). Mr. Eadie did not file such a complaint with the CRTC. The only

explanation for his failure to do so appears to be that he believed, from conversations in another context, that the CRTC refused to exercise its jurisdiction over STBs.

[38] In 2008, the CRTC decided to upgrade its policies in respect of the accessibility of telecommunications and broadcasting services to persons with disabilities. It initiated "a proceeding to address unresolved issues related to the accessibility of telecommunications and broadcasting services (including broadcasting services provided via the internet and/or to mobile devices) to persons with disabilities". The first step in the process was to hold public hearings. The CRTC expressly notes at paragraph 11 of its Notice of Public Hearing 2008-08 that as a result of this proceeding, it could impose additional obligations on some or all telecommunication service providers and broadcasting undertakings (which include all BDUs like MTS) (CRTC Notice of Public Hearing 2008-8, A.B. Compendium 2, Tab 2).

[39] It is to this document that the investigator refers at paragraph 26 of her report and upon which she seems to have relied to conclude, at paragraph 29 of her report, that regulating STBs and other related software appears to be beyond the CRTC's jurisdiction. However, as mentioned earlier, it is clear from the footnote to the paragraph quoted by the investigator (paragraph 16), that in the cited passage, the CRTC was referring more particularly to issues involving the certification of terminal equipment and the setting of standards for such equipment, which is dealt with by Industry Canada and/or the Canadian Standards Association.

[40] On November 28, 2008, following a first set of written and oral submissions on the issues by interested parties, the CRTC published a circular letter (A.B. Compendium 1, Tab 8B1, p. 405) to groups representing persons with disabilities, stating:

> Please identify all of the fully accessible devices (and, where applicable, the software that would make the devices fully accessible) of which you are currently aware, that provide access to broadcasting and telecommunications services for persons who are blind, visually impaired, deaf, hard of hearing and who have a mobility impairment or cognitive impairment. This includes, at a minimum, set top boxes and wireless devices. For each device or software provide a detailed description, its functionalities, the manufacturer and where it can be obtained. Where you are aware of network modifications that such devices or software may require, please provide details.
>
> (emphasis added)

[41] A similar letter was sent to BDUs. Replies were to be filed by December 15, 2008.

[42] The CRTC received a number of responses, including from many organizations representing individuals with visual impairments. Such organizations also participated in later aspects of the CRTC process.

[43] Mr. Eadie participated in the public hearing, providing both written and oral submissions (Teghtsoonian Affidavit, Exhibit J). In his written representations, he touches only briefly on the third issue raised in his complaint to the CHRC:

> 6. […] Well the current digital box and programming menu technology is not adaptable for us folk who are blind. While the CRTC does not need to regulate standards, it can regulate the telco's and broadcast system into paying some intelligent programmers to invent the voice output for the broadcast system, similar to the voice ou7tpu8t now available for cell phones.

> 16. Why not use the huge amount of revenue made from selling radio waves to cell phone companies? What is the amount 4 billion dollars. It would not take that much to research and design accessibility in both systems.
>
> (*sic* throughout; emphasis added)

[44] During his oral submissions, the Commissioner of the CRTC expressly asked Mr. Eadie about issues related to STBs (A.B. Compendium No. 1, Tab 7 p.111).

[45] On July 21, 2009, the CRTC issued Broadcasting and Telecom Regulatory Policy CRTC 2009-430 dealing with the accessibility of telecommunication and broadcasting services. Through this communication, the CRTC settled the first allegation of discrimination in Mr. Eadie's complaint by noting its intent to impose two conditions relating to DV on broadcasting licence renewal. It is worth mentioning that at paragraph 3 of the Policy, the CRTC notes that it must act in a manner that is consistent with the *Canadian Charter of Rights and Freedoms*. At paragraph 6, the CRTC states that in considering whether or not the proposed accommodations for persons with disabilities are reasonable, it "has also utilized leading Canadian human rights principles that recognize that equality is a fundamental value and central component of the public interest."

[46] Among the measures to be taken to deal with problems identified during the public hearing, the CRTC explains that it will form a DV working group to develop common practices and other solutions that will improve the accessibility of DV including "providing one or more simple means for viewers to access embedded described video". It is through participation in this

CRTC DV working group that Mr. Eadie's second allegation of discrimination was resolved, even though its solution directly involved STBs (the so-called one-button solution).

[47] The DV working group's final report recommended, among other things, that the CRTC establish an original equipment manufacturer subcommittee with engineering and procurement expertise to drive the process of simplifying access to DV programming and that the DV working group become a permanent advisory body for discussion, analysis, and feedback on DV issues and development.

[48] In its final report, the DV working group also referred to developments in the UK and Australia (including the Ocean Blue software referred to at paragraph 49 of the investigation report), and recommended that such developments be monitored by the CRTC for compatibility with North American technology (which includes MTS Microsoft Mediaroom) and their potential applicability in Canada.

[49] As Mr. Eadie noted in his memorandum, the DV working group was disbanded in 2013. In 2014, the CRTC conducted a formal review of its policies. This culminated in the issuance of the Broadcasting Regulatory Policy, 2015-104, which was provided to this Court by the parties after the hearing.

[50] In this policy, the CRTC mentions that the BDUs generally recognized the need for an audible EPG to enhance accessibility for those who are blind or have visual impairments, but that the BDUs noted that changing EPGs could prove very expensive. However, the CRTC was

satisfied that there was an increased feasibility of procuring accessible equipment from manufacturers in the United States, who under the American legislation (CVAA), must by December 20, 2016 ensure that on-screen text menus and program guides displayed on television by STBs and other video programming equipment are accessible to people who are blind or have visual impairment. Thus, the CRTC found that despite the cost, it is now possible to make the means of accessing content more accessible in Canada, given that a significant proportion of the equipment suppliers to the Canadian BDU industry are based in the US and the accessibility requirements set out under the CVAA are largely in line with what individual interveners and user groups have generally requested. Accordingly, the CRTC notified the public that it would issue proposed amendments to the *Broadcasting Distribution Regulations*, SOR/97-555 to require BDUs to make accessible STBs and remote controls available to subscribers where they are available for procurement and compatible with the BDU distribution system.

[51] As certain interveners had expressed concerns as to what the expression "where available for procurement" meant, the CRTC also announced that it would impose a set of annual reporting requirements as conditions of the licensing of BDUs, requiring the BDUs to detail, for example:

- The availability of accessible STBs and remote controls to customers and their accessibility features;
- The penetration of accessible STBs within the customer base.

[52] This policy will be relevant when the CHRC reconsiders this matter, unless it becomes moot.

II. ISSUES

[53] Mr. Eadie and the CHRC argue that the judge made numerous errors of law, including applying the wrong test to determine whether or not the investigation was thorough, and failing to follow *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 [*Halifax*], a binding precedent of the Supreme Court of Canada. That said, there is no need to detail these alleged errors as the role of this Court on an appeal of a decision dealing with an application for judicial review is to determine whether the judge selected the standard of review appropriate to each issue and applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness*, 2013 SCC 36 at paragraphs 45 to 47, [2013] 2 S.C.R. 559 [*Agraira*]).

[54] In light of the above, the issues before us in Mr. Eadie's appeal are simply:

i) Did the judge select the appropriate standard of review for the issues before him?

ii) Did the judge apply these standards correctly?

[55] In respect of issue ii), the role of this Court is to step into the shoes of the judge and focus on the administrative decision to determine whether the judge properly applied the standard of review (*Agraira*). Thus as mentioned, I will not deal with many of the particular issues raised by Mr. Eadie and the CHRC in relation to the judge's decision. However, it should be clear that I do not endorse any of the comments made by the judge, except insofar as I expressly say in my reasons.

[56] In respect of the cross-appeal, the issue is whether the judge erred in law in concluding that he had no jurisdiction to determine if the CRTC has exclusive jurisdiction and, if so, whether this Court should decide the issue.

III. Analysis

A. *Cross-appeal*

[57] I will first deal with the question of exclusive jurisdiction of the CRTC raised by MTS and the BDUs in the cross-appeal. This question was not raised before the CHRC; therefore, the appellate standard of review of correctness applies (*Housen v. Nikolaisen*, 2002 SCC 33 at paragraph 8, [2002] 2 S.C.R. 235).

[58] I agree that the judge erred in law when he concluded that he did not have jurisdiction to deal with this new question of law.

[59] The Supreme Court of Canada recently reiterated that on an application for judicial review, a court retains the discretion to decide whether or not to consider a new issue (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*), 2011 SCC 61 at paragraph 22, [2011] 3 S.C.R. 654) [*Alberta*]). The Judge failed to recognize and exercise his discretion in this respect; therefore, this Court must consider whether it is appropriate to decide the issue of exclusive jurisdiction on the cross-appeal. Based on *Alberta*, this Court can exercise its own discretion to consider the issue of exclusive jurisdiction given that the judge has erred in declining to do so.

[60] As explained in *Alberta* at paragraph 23, a Court will generally not exercise its discretion in favour of an applicant on judicial review where the issue could have been, but was not, raised before the relevant Tribunal or administrative decision-maker.

[61] Recognizing this, MTS and the other BDUs submit that the general rule should not apply for the following reasons:

i. MTS did not raise the issue of exclusive jurisdiction because the CHRC invited it to provide its comments regarding paragraph 41(1)(*b*), which assumes that the CHRC shares jurisdiction with the CRTC over the subject-matter of the complaint;

ii. The issue of exclusive jurisdiction of the CRTC is not really a new issue, as the CHRC had to consider, pursuant to subparagraphs 44(3)(*a*)(*ii*) and 41(1)(*c*), whether the complaint was beyond its jurisdiction;

iii. Dealing with the issue of exclusive jurisdiction now would save time and money for the parties as it might avoid further litigation. This is especially important when the standard of review would likely be correctness, as the issue is a jurisdictional question relating to the line between the jurisdictions of two competing administrative decision-makers.

[62] I do not accept MTS's attempt to explain away its failure to raise the issue of exclusive jurisdiction. It is true that in the report attached to the CHRC's first communication with MTS (a letter dated April 16, 2008), the CHRC refers to Mr. Eadie's views on its practice of referring matters to the CRTC pursuant to paragraph 41(1)(*b*). In its reply, MTS did rely on such practices, referencing a recent similar complaint.

[63] However, nothing prevented MTS, who was ably represented at all relevant times, from raising the issue of exclusive jurisdiction if it thought that this was appropriate. It had many opportunities to do so. Certainly, MTS's argument that the CHRC shared jurisdiction was, in itself, a position contrary to the one it now adopts. MTS never raised any issue based on paragraph 41(1)(*c*) of the CHRA.

[64] With this last comment, I turn to the second argument. I do not agree that the CHRC had to consider *proprio motu* whether the complaint was beyond its jurisdiction because the *Broadcasting Act* should be construed as granting jurisdiction over this subject-matter exclusively to the CRTC.

[65] Subparagraph 44(3)(*a*)(*ii*) of the CHRA requires the CHRC to ensure that it has jurisdiction to deal with the complaint. The CHRC did so by examining whether the complaint could fall within section 5 of the CHRA. I do not construe subparagraph 44(3)(*a*)(*ii*) as requiring the CHRC to perform a purposive analysis of every statute regulating the power of other administrative decision-makers to determine if its jurisdiction under the CHRA has been ousted by such a statute when no such argument is advanced by the parties. This is especially so when, as argued by MTS, in the past similar complaints involving potential jurisdictional conflicts with the CRTC have been dealt with on the basis of concurrent jurisdiction.

[66] With respect to the last argument referred to above, what the BDUs are really suggesting is that the Court completely bypass the scheme put in place by the legislator when a complaint is filed with the CHRC.

[67] I do not find this argument persuasive. First, if this had been the only issue before us, I would have been satisfied to allow the appeal and remit the matter to the Tribunal in accordance with the teachings of the Supreme Court of Canada in *Halifax*.

[68] Despite the differing wording of the relevant legislation in *Nova Scotia* and the CHRA, the Supreme Court of Canada made it clear in *Halifax* that courts should not interfere prematurely, as this disregards the legislator's choice as to who should decide issues of jurisdiction over complaints involving human rights. The fact that the standard of review applicable to the main questions of law may be correctness is not sufficient to disregard the legislator's choice.

[69] In the case before us, I am not even convinced that the Court has all of the evidence necessary to deal with the new arguments put forth not only by MTS and the BDUs, but by Mr. Eadie as well.

[70] Indeed, Mr. Eadie argued before us that the complaint did not deal with "broadcasting" as it did not involve a "program" within the meaning of section 2 of the Broadcasting Act. In his view, an EPG is predominately alphanumeric text and therefore falls within the exception in section 2 applicable to "visual images, whether or not combined with sounds, that consist predominately of alphanumeric text". At the hearing before us and in the post-hearing submissions, there was a debate about whether or not EPGs were so excluded. This is not a pure question of law and the CHRC made no useful findings in this respect.

[71] I have concluded, after careful consideration, that it would inappropriate for this Court to deal with this issue at this stage, especially considering that it may not even be necessary to decide the issue at all given that, as mentioned, I believe that the main appeal should be dismissed. This means that the CHRC will have to reconsider whether the complaint could be more appropriately dealt with, initially or completely, by the CRTC and whether the complaint is beyond its jurisdiction. In doing so, the CHRC will now have the opportunity to consider that the CRTC appears to have interpreted its own statute as empowering it to deal with the issue of EPGs and to direct BDUs to make broadcasting more accessible to customers with disabilities through the use of STBs that are more appropriate to meet those needs.

[72] I therefore propose to dismiss the cross-appeal. Considering that the judge did err in respect of his jurisdiction, there should be no order for costs.

B. *Did the judge err in his choice of standard(s) of review?*

[73] Putting aside the question of exclusive jurisdiction, it is clear that the judge applied the standard of reasonableness to the CHRC's conclusion under subparagraph 44(3)(*a*)(*ii*) and paragraph 44(2)(*b*) of the CHRA (whether the complaint could be more appropriately dealt with initially or completely by the CRTC). The judge also applied the reasonableness standard to the issue of whether the investigation was sufficiently thorough (judge's reasons, paragraphs 28-37).

[74] It is not disputed that the judge applied the proper standard to review the merits of the CHRC's conclusion under subparagraph 44(3)(*a*)(*ii*).

[75] Although I agree with Mr. Eadie that the judge often used incorrect language, for example, qualifying the CHRC's decision as "clearly incorrect" (paragraph 55 of the judge's reasons), this is more relevant to the manner in which he applied the standard than the standard he expressly chose to apply. As already mentioned, my analysis will focus on the administrative decision (*Agraira*), thus the fact that the judge may have improperly applied the standard in his own analysis will have no impact on mine.

[76] That said, I disagree with the judge that the issue of whether or not the CHRC's investigation was sufficiently thorough is an issue that should be reviewed on the standard of reasonableness.

[77] In its Notice of Application, MTS alleged that the CHRC breached procedural fairness by failing to conduct an investigation that met the required standard (A.B. Compendium 1, p. 5 at paragraph 3). Affidavit evidence as to what was communicated to the investigator and what else the investigator could have obtained can only be considered to determine whether there was a breach of procedural fairness. Generally, new evidence cannot be considered to determine the reasonableness of the decision *per se*.

[78] All of the case law relied on by the judge was decided on the basis of procedural fairness, applying the standard of correctness. This includes *Canadian Union of Public Employees (Airline Division) v. Air Canada*, 2013 FC 184, *Slattery v. Canada (Canadian Human Rights Commission)*, [1994] 2 F.C. 574, aff'd 205 N.R. 383, *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113, and *Sketchley v. Canada (Attorney General)*, 2005 FCA 404.

[79] As the judge applied a less stringent standard and still found a breach, had he applied the proper test to assess the thoroughness of the investigation, his error regarding the standard of review would have been of little consequence. The applicable test is that a Court can only intervene if it concludes that the investigative flaws are fundamental and could not be remedied by the parties' further responding submissions.

[80] I am not satisfied that the judge applied this test. Therefore, I will do so myself in the section that follows.

C. *Has the judge properly applied the applicable standard of review?*

(1) Thoroughness of the investigation

[81] In determining whether an investigation has been thorough enough to meet the CHRC's duty to act fairly, the Court's focus is on the collection of information, that is, the gathering of evidence relevant to the complaint. In this appeal, the focus is on the CHRC's gathering of evidence relevant to the ultimate conclusion to be made under paragraph 44(2)(*b*) of the CHRA.

[82] How the CHRC analyzes this information, *i.e.*, how it considers and weighs the information following its collection in order to make a recommendation and ultimately reach a conclusion, is not relevant at this stage. The reasonableness of the CHRC's findings and its ultimate conclusion in respect of paragraph 44(2)(*b*) is to be assessed separately. I will do so in subsection 2, below. Unfortunately, the judge comingled these issues in his analysis (judge's

reasons at paragraph 38-63). It is thus not clear what crucial evidence the judge found that the CHRC had failed to obtain.

[83] Indeed, I could not discern any express finding in that respect. That said, one can interpret the judge's comments at paragraph 48 of his reasons as a finding that consideration of the "statutory parameters" of the competing jurisdiction, here the CRTC, is a crucial component of the investigation. One could also argue that the judge implicitly found that the investigator did not have a copy of the legislation setting out the powers and mandate of the CRTC.

[84] Furthermore, the judge appears to suggest, at paragraphs 59-61 of his reasons, that the investigator should have obtained, even via a simple phone call to the CRTC or the DV working group, technical information about the feasibility of the solutions proposed by Mr. Eadie, such as whether these solutions could be more easily evaluated by specialized staff, or when such solutions were likely to be available.

[85] At paragraph 70 of its memorandum, MTS submits the following under the heading "Procedural Fairness":

> a) The CHRC failed to consider or appreciate the significance and impact of the CRTC Accessibility Proceedings. Moreover, the CHRC also failed to consider or appreciate the significance and impact of the DV Working Group deliberations and Reports or the VPAAC Proceedings, which will bear upon any solutions ultimately available in Canada.
>
> b) The CHRC ignored "obviously crucial evidence" that was available to it, including the evidence filed in the CRTC Accessibility Proceedings which evidence is voluminous and includes responses from BDUs across Canada on the state of technology and issues facing BDUs, and was readily available to the public online;

[86] As mentioned, the issues described in paragraph 70 a) are relevant to the reasonableness of the CHRC's analysis and ultimate conclusion, not whether the investigation was sufficiently thorough.

[87] In paragraph 70 b) above, MTS alleges that the CRTC ignored the evidence gathered during the CRTC accessibility proceedings. The vague and general manner in which MTS describes the "obviously crucial evidence" that the CHRC allegedly ignored, makes it impossible for me to conclude that there was a breach of procedural fairness. I cannot find that the CHRC breached its duty by failing to obtain all of the evidence gathered by the CRTC process. The whole point of paragraph 44(2)(*b*) is to avoid unnecessary duplication. Before reaching this conclusion, I did consider the affidavit evidence filed by MTS (affidavit of David Teghtsoonian, sworn June 28, 2012 and affidavit of Susan Wheeler, sworn June 28, 2012) on the assumption that this new evidence was filed to support MTS's allegation that the CHRC breached its duty to act fairly.

[88] Evidently, the investigation carried out was far from perfect, but perfection is not the standard to be applied.

[89] The CHRC was clearly aware of MTS's participation in the CRTC proceedings and of the fact that the CRTC and its DV working group had spent considerable time evaluating possible solutions and had engaged the participation of all other BDUs.

[90] Having considered the extensive further responding submissions of MTS, which cover the legislative scheme as well as the technical aspects of the proceedings before the CRTC, and the final report of the DV working group, I have not been persuaded that there were any fundamental flaws that were not remedied by the parties' further responding submissions (see A.B. Compendium 2, pp. 20-171).

[91] I will now consider whether the CHRC's conclusion on the merits, based on the information collected in the investigation, contains any reviewable error.

(2) The reasonableness of the conclusion under paragraph 44(2)(*b*) of the CHRA

[92] In my view, the CHRC's conclusion under paragraph 44(2)(*b*) of the CHRA is based on a fundamental misapprehension of the facts at the very heart of that conclusion, and was reached using a logic so flawed that it cannot come within the range of outcomes that are justifiable on the facts and the law. Despite the high level of deference owed to the CHRC on such decisions, I would therefore find this decision unreasonable.

[93] Indeed, the CHRC's finding that the CRTC "refused to exercise its jurisdiction over STBs" was determinative. It eliminated any debate as to the more appropriate process, given that a procedure obviously cannot be appropriate when the decision-maker declines jurisdiction over the subject-matter. Furthermore, the CHRC appears to rely on the CRTC's refusal to exercise its jurisdiction to evacuate the debate as to whether or not the CRTC had any jurisdiction to deal with the subject-matter of the complaint.

[94] The CHRC bases its finding that the CRTC had refused to exercise its jurisdiction on paragraphs 26 and 29 of the investigator's report (excerpted above at paragraphs 16 and 19) and on paragraph 19 of MTS's October 11, 2011 submissions, all of which the CHRC misconstrues.

[95] At paragraph 29 of her report, the investigator addresses the issue of whether or not the CRTC has jurisdiction to deal with the complaint, not whether it *refused* to exercise a jurisdiction that it possessed. The investigator concluded that "[i]t does not appear that the CRTC can make any orders regarding digital set-top boxes […] because it seems to be beyond the CRTC's jurisdiction". This statement is based on paragraph 16 of the CRTC's 2008 Public Notice. As discussed above, a footnote to paragraph 16 clarifies that the CRTC was referring to issues involving the certification of terminal equipment and the setting of standards for this equipment, which is dealt with by Industry Canada and/or the Canadian Standards Association.

[96] The CHRC then bolsters its finding that the CRTC has refused jurisdiction on the basis that MTS did not dispute this fact, referencing paragraph 19 of MTS's October 11, 2011 submissions. However, throughout these submissions, MTS clearly and repeatedly asserts its position that the CRTC has jurisdiction to deal with the complaint. At paragraph 19, MTS simply notes that if, as stated by the investigator at paragraph 29 of her report, the CRTC does not have jurisdiction over STBs, then the CHRC is also without jurisdiction over such matters. This cannot reasonably be read as an admission that the CRTC has refused jurisdiction over the complaint, either on its face or in view of the remainder of MTS's October 11, 2011 submissions.

[97] Moreover, to dismiss MTS's argument that the CHRC would equally lack jurisdiction, the CHRC characterizes the subject-matter of the complaint as focussing on "the manner in which [MTS] makes broadcasts available to the Complainant", a matter within the CHRC's jurisdiction. By contrast, when the CHRC erroneously concluded that the CRTC had refused to exercise jurisdiction over the complaint, the CHRC characterized "the very source of the complaint" as being STBs themselves (CHRC's decision, p. 4).

[98] The CHRC cannot, on the one hand, say that the CRTC had refused jurisdiction over the complaint because the heart of the issue lies in the manufacture or design of STBs, over which the CRTC has no control, but then on the other, justify referring the complaint to the Tribunal by stating that the complaint is in fact about the manner in which MTS makes its broadcast services available (which, is nowhere described as being beyond the CRTC's jurisdiction). By doing so, the CHRC was able to avoid the real issue put forth by MTS: that the complaint, insofar as the CRTC is concerned, is indeed about the manner in which BDUs make broadcasting accessible to persons with visual impairments.

[99] This approach allowed the CHRC to avoid having to deal with the fact that the CRTC appears to have jurisdiction to ensure that broadcasting is accessible by persons with disabilities (see paragraph 3(1)(*p*) of the *Broadcasting Act*), and that the CRTC was actively addressing unresolved issues with respect to the accessibility of broadcasting, including the accessibility of the EPG to subscribers with visual impairments. This also enabled the CHRC to disregard the fact that the CRTC had clearly exercised its jurisdiction with respect to the functionalities of STBs when it solved the one-button issue raised by Mr. Eadie in his complaint.

[100] By eliminating the issue of jurisdiction, the CHRC also avoided the need to consider the well-known complaint process of the CRTC, which it has previously considered in its subsection 41(1) analyses for similar complaints.

[101] The errors are particularly important considering that – contrary to the appellant's submissions – the Tribunal cannot address the propriety of having the complaint dealt with by the CRTC initially or completely (paragraph 44(2)(*b*)). This is a screening issue, in respect of which the CHRC's decision is final except for judicial review. By contrast, the Tribunal can address the question of exclusive jurisdiction.

[102] The importance of the screening decision is highlighted by this case, where the CRTC is setting in place rules that are meant to solve the very issue raised in the complaint, and which will apply to all BDUs, including MTS. If the complaint is ultimately referred to the Tribunal, the Tribunal may find it difficult to fashion a remedy that would not contradict or vary the CRTC regulations and the conditions of MTS's licence, which will be renewed later in 2015.

[103] The exercise provided for at paragraph 44(2)(*b*) matters even more now that the Supreme Court of Canada has confirmed that statutory tribunals and administrative decision-makers who have the power to deal with questions of law must protect the rights set out in human rights legislation when dealing with matters within their jurisdiction by applying the principles of the CHRA, including the 3-step legal test set out in *British Columbia (Public Service Employee Relations Commissions) v. B.C.G.S.E.U.*, [1999] 1 S.C.R. 3, 176 D.L.R (4th) 1 [*Meiorin*]: *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R.

650; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422 *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513.

[104] The statutory provisions requiring the CHRC to consider whether there is another more appropriate forum to deal initially or completely with a complaint evidences the legislator's intention that the CHRC must avoid "turf wars" and that the limited public resources of the CHRC should be used when really necessary to fulfill its mandate of ensuring compliance with the CHRA. Coordination among different administrative decision-makers should be the rule, not the exception. Administrative decision-makers can only stand to benefit by recognizing each other's specialized knowledge and resources. This is especially clear in this case, where both the CHRC and the CRTC seek the common goal of ensuring that subscribers with disabilities have equal access to the Canadian broadcasting system.

[105] I therefore conclude that the decision under 44(2)(*b*) was unreasonable, and I would dismiss the appeal.

[106] With respect to costs, I have considered the detailed post-hearing submissions by counsel, and, having regard to all the circumstances, I am of the view that no costs should be granted.

"Johanne Gauthier"
J.A.

"I agree.
D.G.Near J.A."

"I agree.
A.F. Scott J.A."

ANNEX A

Canadian Human Rights Act	Loi canadienne sur les droits de la personne
R.S.C., 1985, c. H-6	L.R.C. (1985), ch. H-6
…	…
Denial of good, service, facility or accommodation	Refus de biens, de services, d'installations ou d'hébergement
5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public.
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	a) d'en priver un individu;
(b) to differentiate adversely in relation to any individual,	b) de le défavoriser à l'occasion de leur fourniture.
on a prohibited ground of discrimination.	…
…	
Commission to deal with complaint	Irrecevabilité
41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
…	…

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;

(c) the complaint is beyond the jurisdiction of the Commission;

c) la plainte n'est pas de sa compétence;

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

e) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

…

…

Report

44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

Rapport

44. (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

Action on receipt of report

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

Suite à donner au rapport

(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,

b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.

it shall refer the complainant to the appropriate authority.

Idem

Idem

(3) On receipt of a report referred to in subsection (1), the Commission

(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :

(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e);

(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e);

(b) shall dismiss the complaint to which the report relates if it is satisfied

b) rejette la plainte, si elle est convaincue :

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

Broadcasting Act

S.C. 1991, c. 11

…

Declaration

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

…

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

…

Further declaration

(2) It is further declared that the

Loi sur la radiodiffusion

L.C. 1991, ch. 11

…

Politique canadienne de radiodiffusion

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

…

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;

…

Déclaration

(2) Il est déclaré en outre que le

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.

…

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).

Regulatory policy

(2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that

(a) is readily adaptable to the different characteristics of English and French language broadcasting and to the different conditions under which broadcasting undertakings that provide English or French language programming operate;

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.

…

Mission

5. (1) Sous réserve des autres dispositions de la présente loi, ainsi que de la Loi sur la radiocommunication et des instructions qui lui sont données par le gouverneur en conseil sous le régime de la présente loi, le Conseil réglemente et surveille tous les aspects du système canadien de radiodiffusion en vue de mettre en oeuvre la politique canadienne de radiodiffusion.

Réglementation et surveillance

(2) La réglementation et la surveillance du système devraient être souples et à la fois :

a) tenir compte des caractéristiques de la radiodiffusion dans les langues française et anglaise et des conditions différentes d'exploitation auxquelles sont soumises les entreprises de radiodiffusion qui diffusent la programmation dans l'une ou l'autre langue;

(b) takes into account regional needs and concerns;

b) tenir compte des préoccupations et des besoins régionaux;

(c) is readily adaptable to scientific and technological change;

c) pouvoir aisément s'adapter aux progrès scientifiques et techniques;

(d) facilitates the provision of broadcasting to Canadians;

d) favoriser la radiodiffusion à l'intention des Canadiens;

(e) facilitates the provision of Canadian programs to Canadians;

e) favoriser la présentation d'émissions canadiennes aux Canadiens;

(f) does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians; and

f) permettre la mise au point de techniques d'information et leur application ainsi que la fourniture aux Canadiens des services qui en découlent;

(g) is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings.

g) tenir compte du fardeau administratif qu'elles sont susceptibles d'imposer aux exploitants d'entreprises de radiodiffusion.

…

…

Regulations generally

Règlements

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

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

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

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

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

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

(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);

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

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

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

(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;

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) 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;

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) respecting the carriage of any foreign or other programming services by distribution undertakings;

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

(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;

h) pourvoir au règlement — notamment par la médiation — de différends concernant la fourniture de programmation et survenant entre les entreprises de programmation qui la transmettent et les entreprises de distribution;

(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;

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) 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

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

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

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

…

…

Inquiries

Compétence

12. (1) Where it appears to the

12. (1) Le Conseil peut connaître de toute question pour laquelle il estime

Commission that

(a) any person has failed to do any act or thing that the person is required to do pursuant to this Part or to any regulation, licence, decision or order made or issued by the Commission under this Part, or has done or is doing any act or thing in contravention of this Part or of any such regulation, licence, decision or order,

(a.1) any person has done or is doing any act or thing in contravention of section 34.1, or

(b) the circumstances may require the Commission to make any decision or order or to give any approval that it is authorized to make or give under this Part or under any regulation or order made under this Part,

the Commission may inquire into, hear and determine the matter.

Mandatory orders

(2) The Commission may, by order, require any person to do, without delay or within or at any time and in any manner specified by the Commission, any act or thing that the person is or may be required to do under this Part or any regulation, licence, decision or order made or issued by the Commission under this Part and may, by order, forbid the doing or continuing of any act or thing that is contrary to this Part, to any such regulation, licence, decision

:

a) soit qu'il y a eu ou aura manquement — par omission ou commission — aux termes d'une licence, à la présente partie ou aux ordonnances, décisions ou règlements pris par lui en application de celle-ci;

a.1) soit qu'il y a ou a eu manquement à l'article 34.1;

b) soit qu'il peut avoir à rendre une décision ou ordonnance ou à donner une permission, sanction ou approbation dans le cadre de la présente partie ou de ses textes d'application.

Ordres et interdiction

(2) Le Conseil peut, par ordonnance, soit imposer l'exécution, sans délai ou dans le délai et selon les modalités qu'il détermine, des obligations découlant de la présente partie ou des ordonnances, décisions ou règlements pris par lui ou des licences attribuées par lui en application de celle-ci, soit interdire ou faire cesser quoi que ce soit qui y contrevient ou contrevient à l'article 34.1.

or order or to section 34.1.

…

Enforcement of mandatory orders

13. (1) Any order made under subsection 12(2) may be made an order of the Federal Court or of any superior court of a province and is enforceable in the same manner as an order of the court.

…

Assimilation à des ordonnances judiciaires

13. (1) Les ordonnances du Conseil visées au paragraphe 12(2) peuvent être assimilées à des ordonnances de la Cour fédérale ou d'une cour supérieure d'une province; le cas échéant, leur exécution s'effectue selon les mêmes modalités.

Procedure

(2) To make an order under subsection 12(2) an order of a court, the usual practice and procedure of the court in such matters may be followed or, in lieu thereof, the Commission may file with the registrar of the court a certified copy of the order, and thereupon the order becomes an order of the court.

Moyens de l'assimilation

(2) L'assimilation peut se faire soit conformément aux règles de pratique et de procédure de la cour applicables en l'occurrence, soit par dépôt, par le Conseil, d'une copie de l'ordonnance certifiée conforme auprès du greffier de la cour. Dans ce dernier cas, l'assimilation est effectuée au moment du dépôt.

…

…

Authority re questions of fact or law

17. The Commission has authority to determine questions of fact or law in relation to any matter within its jurisdiction under this Act.

Compétence

17. Le Conseil connaît de toute question de droit ou de fait dans les affaires relevant de sa compétence au titre de la présente loi.

Where public hearing required

18. (1) Except where otherwise provided, the Commission shall hold a public hearing in connection with

(a) the issue of a licence, other than a licence to carry on a temporary

Audiences publiques : obligation

18. (1) Sont subordonnées à la tenue d'audiences publiques par le Conseil, sous réserve de disposition contraire, l'attribution, la révocation ou la suspension de licences — à l'exception de l'attribution d'une

network operation;

(b) the suspension or revocation of a licence;

c) the establishing of any performance objectives for the purposes of paragraph 11(2)(b); and

(d) the making of an order under subsection 12(2).

licence d'exploitation temporaire d'un réseau — , ainsi que l'établissement des objectifs mentionnés à l'alinéa 11(2) b) et la prise d'une ordonnance au titre du paragraphe 12(2).

Idem

(2) The Commission shall hold a public hearing in connection with the amendment or renewal of a licence unless it is satisfied that such a hearing is not required in the public interest.

Idem

(2) La modification et le renouvellement de licences font aussi l'objet de telles audiences sauf si le Conseil estime que l'intérêt public ne l'exige pas.

Where public hearing in Commission's discretion

(3) The Commission may hold a public hearing, make a report, issue any decision and give any approval in connection with any complaint or representation made to the Commission or in connection with any other matter within its jurisdiction under this Act if it is satisfied that it would be in the public interest to do so.

Audiences publiques : faculté

(3) Les plaintes et les observations présentées au Conseil, de même que toute autre question relevant de sa compétence au titre de la présente loi, font l'objet de telles audiences, d'un rapport et d'une décision — notamment une approbation — si le Conseil l'estime dans l'intérêt public.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE ANNIS DATED JANUARY 17, 2014 DOCKET NO. T-1057-12

DOCKET:	A-97-14
STYLE OF CAUSE:	ROSS EADIE v. MTS INC. AND SHAW COMMUNICATIONS INC., COGECO CABLE INC., ROGERS COMMUNICATIONS PARTNERSHIP, BCE INC., TELUS COMMUNICATIONS COMPANY AND QUEBECOR MEDIA INC.
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	FEBRUARY 4, 2015
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	NEAR J.A. SCOTT J.A.
DATED:	JULY 27, 2015

APPEARANCES:

Raymond D. Hall	FOR THE APPELLANT
Robert A. Watchman	FOR THE RESPONDENT MTS INC.
Richard J. Charney Jonquille Pak	FOR THE INTERVENERS SHAW COMMUNICATIONS INC., ET AL
Fiona Keith Brad Smallwood	FOR THE INTERVENER CANADIAN HUMAN RIGHTS COMMISSION

SOLICITORS OF RECORD:

Raymond D. Hall Winnipeg, Manitoba	FOR THE APPELLANT
Pitblado LLP Winnipeg, Manitoba	FOR THE RESPONDENT MTS INC.
Norton Rose Fulbright LLP Toronto, Ontario	FOR THE INTERVENERS SHAW COMMUNICATIONS INC. ET AL
Canadian Human Rights Commission Ottawa, Ontario	FOR THE INTERVENER CANADIAN HUMAN RIGHTS COMMISSION