

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20150723**

**Docket: 15-A-40**

**Citation: 2015 FCA 172**

**PRESENT: WEBB J.A.**

**BETWEEN:**

**ABORIGINAL VOICES RADIO INC.**

**Appellant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Toronto, Ontario, on July 22, 2015.

Order delivered at Ottawa, Ontario, on July 23, 2015.

**REASONS FOR ORDER BY:**

**WEBB J.A.**

**Federal Court of Appeal**



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**REASONS FOR ORDER**

**WEBB J.A.**

[1] The Canadian Radio-television and Telecommunications Commission (CRTC), in a Broadcasting Decision dated June 25, 2015 (CRTC 2015-282), revoked the broadcasting licences for five Type B Native radio stations held by Aboriginal Voices Radio Inc. (AVR) – CKAV-FM Toronto, CKAV-FM-2 Vancouver, CKAV-FM-3 Calgary, CKAV-FM-4 Edmonton, and CKAV-FM-9 Ottawa. The revocation is effective July 25, 2015.

[2] Subsection 31(2) of the *Broadcasting Act*, S.C. 1991, c. 11, provides that a person may appeal a decision of the CRTC to this Court if leave to appeal is granted and the appeal is on a question of law or jurisdiction. AVR has brought a motion for leave to appeal the decision of the CRTC referred to in paragraph 1 above. However, the motion for leave to appeal has not yet been heard, nor is it ready to be heard as the Crown has not yet filed its motion record. Because the effective date for the revocation of the licences is July 25, 2015, AVR has also brought a motion for an order staying the decision of the CRTC pending the determination of AVR's motion for leave to appeal and, if leave to appeal is granted, final judgment on the merits of the appeal.

[3] The Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311; [1994] S.C.J. No. 17 set out a three part test to determine whether a stay of a judgment should be granted:

**43** Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. [...]

### *Serious Question*

[4] In applying this test in this case, it is important to remember that this stay application arises before leave to appeal has been granted. The question of whether “there is a serious question to be tried” is the matter to be determined when the application for leave to appeal is considered. Since the application for leave to appeal is not properly before me, the analysis of

whether there is a serious question to be tried and, hence, in effect, whether leave to appeal should be granted is a matter that should be deferred until the leave application is heard. In applying the test for a stay at this stage, the question will be whether AVR has raised a serious question that should be considered in the leave application. In my view, this would also mean that any stay should only be granted until the leave application is determined.

[5] AVR has raised a number of issues that it proposes to pursue in its application for leave to appeal. At this stage it would not be appropriate to review all of them to determine if there is a serious question to be addressed in the application for leave to appeal, as this could be perceived as prejudging the question of whether leave to appeal should be granted. It is sufficient at this stage if AVR has raised at least one serious question that should be considered in the leave application.

[6] AVR has raised the issue of whether violations of the conditions of one particular license could form the basis for revocation of other licenses. It appears that the seriousness of the violations of the conditions of the licences varies from station to station. In particular, at the hearing of this motion, it was acknowledged by both parties that the most serious violations relate to the Ottawa radio station. This station has not been broadcasting since October 3, 2014. There was no dispute that not broadcasting for a period of several months is a serious breach of the conditions of that broadcasting licence.

[7] While counsel for the Crown pointed to admissions made by AVR at the CRTC hearing that it was not complying with the conditions of the other licenses, the exact nature of the failure

to comply with the conditions of each one of the other licences in relation to the broadcasting requirements of such licences is not clear. Whether it was appropriate to revoke all five broadcasting licences in the circumstances of this case is a serious question that should be considered in the application for leave to appeal. As noted above, at this stage it would not be appropriate to determine whether leave to appeal should be granted. Rather the analysis should only determine whether there is a serious question for determination at the application for leave to appeal.

[8] I am satisfied that AVR has raised at least one serious question to be addressed at the application for leave to appeal. Whether leave to appeal will be granted is a matter to be determined when that application is addressed.

#### *Irreparable Harm*

[9] With respect to irreparable harm, I am satisfied that AVR has established, on a balance of probabilities, that it will suffer irreparable harm if the stay is not granted and AVR is ultimately successful in obtaining leave to appeal, and in appealing the decision to revoke the licences for the radio stations located in Vancouver, Calgary, Edmonton, and Toronto. Being forced to cease operations, and hence, lose whatever sources of revenue these stations have, would more likely than not, cause irreparable harm if it is ultimately determined that the licences should not have been revoked.

[10] However, the situation related to the radio station in Ottawa is different. This station has not been broadcasting since October 3, 2014. There was no indication whether this radio station

would resume broadcasting or continue to be off air if the stay is granted in relation to the licence for this radio station. Since this radio station has not been broadcasting for some time it is far from clear what irreparable harm would now be suffered if the stay of the decision to revoke the broadcasting licence for this station is not granted. As a result, I am not satisfied that AVR has established that it would suffer irreparable harm if the stay is not granted in relation to the broadcasting licence for the Ottawa radio station.

### *Balance of Convenience*

[11] The licences for the radio stations in Vancouver, Edmonton, Calgary and Toronto were granted to AVR several years ago. The balance of convenience weighs in favour of allowing these stations to continue to broadcast at least until the application for leave to appeal is determined. The harm that would be suffered by AVR if these stations have to cease broadcasting and AVR is successful in obtaining leave to appeal, outweighs the harm that would be suffered if these stations continue to broadcast for a few more weeks until the application for leave to appeal is determined and AVR is unsuccessful.

[12] As a result, I will allow the motion of AVR in part and grant a stay of the decision of the CRTC to revoke the broadcasting licences for CKAV-FM Toronto, CKAV-FM-2 Vancouver, CKAV-FM-3 Calgary, and CKAV-FM-4 Edmonton. This stay will apply until the application for leave to appeal is determined. If leave to appeal is not granted, then this stay will terminate. If leave to appeal is granted then this Court may decide whether or not this stay should continue or whether or not a different stay should be granted on such terms as are then determined to be appropriate.

[13] It was also noted that the licences for the radio stations in Vancouver, Calgary, Edmonton, and Toronto were scheduled to expire on August 31, 2015, in any event. In *Genex Communications Inc. v. Canada (Canadian Radio-television and Telecommunications Commission)*, 2004 FCA 279, [2004] F.C.J. No. 1400, (*Genex*) this court noted that:

**3** In view of the breadth of the Federal Court's jurisdiction and its general administrative jurisdiction over federal administrative tribunals (*Canada (HRC) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, paragraphs 35 and 36), this Court has jurisdiction to grant interim relief so that, in exercising its function of reviewing administrative tribunals and agencies, a party's appeal will not be made illusory.

[14] In *Genex*, the CRTC had refused to renew a broadcasting licence and this Court continued that licence pending the determination of the appeal. In this case, by revoking the broadcasting licences in issue, the CRTC effectively also refused to renew these licences. Since this Court has the power to ensure that any appeal rights are meaningful I would also conclude that this Court has the power to ensure the any rights to seek leave to appeal are also not illusory. As a result, in the event that the application for leave to appeal is not determined by August 31, 2015, the broadcasting licences for these four radio stations shall continue on the same terms and conditions as those that were applicable to these licences prior to the decision of the CRTC referred to in paragraph 1 above, until the leave application is determined.

[15] Since the radio station in Ottawa is not broadcasting and since I have found that AVR has not satisfied the required test for obtaining a stay of the decision revoking the broadcasting licence for the Ottawa radio station, there is no basis upon which this licence could or should be extended by this Court.

[16] In its Notice of Motion, AVR also requested “an Order directing the [CRTC] to stay enforcement of the call for applications for new broadcasting licences on CKAV-FM Toronto, CKAV-FM-2 Vancouver, CKAV-FM3 Calgary, CKAV-FM-4 Edmonton, and CKAV-FM-9 Ottawa”. In AVR’s memorandum of fact and law, the only request of AVR in Part IV – Order Sought is that AVR “requests that its motion to stay the Decision be granted”. In the first paragraph of its memorandum, AVR defines the Decision as the decision of the CRTC to revoke the five broadcasting licences referred to above. As a result, this stay will only apply to the decision to revoke the licences.

[17] The costs of this motion shall be in the cause.

"Wyman W. Webb"

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J.A.



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** 15-A-40

**STYLE OF CAUSE:** ABORIGINAL VOICES RADIO  
INC. v. ATTORNEY GENERAL  
OF CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JULY 22, 2015

**REASONS FOR ORDER BY:** WEBB J.A.

**DATED:** JULY 23, 2015

**APPEARANCES:**

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