SUPREME COURT OF CANADA

CITATION: Reference re *Broadcasting Act*, 2012 SCC 4

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IN THE MATTER OF the *Broadcasting Act*, S.C. 1991, c. 11;

AND IN THE MATTER OF the Canadian Radio-Television and Telecommunications Commission's Broadcasting Regulatory Policy CRTC 2009-329 and Broadcasting Order CRTC 2009-452;

AND IN THE MATTER OF an application by way of a reference to the Federal Court of Appeal pursuant to ss. 18.3(1) and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

Alliance of Canadian Cinema, Television and Radio Artists, Canadian Media Production Association, Directors Guild of Canada and Writers Guild of Canada
Appellants
v.
Bell Aliant Regional Communications, LP, Bell Canada, Cogeco Cable Inc., MTS Allstream Inc., Rogers Communications Inc., TELUS Communications Company, Videotron Ltd. and Shaw Communications Inc.
Respondents
- and -
Canadian Radio-Television and Telecommunications Commission
Intervener

CORAM: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

REASONS FOR JUDGMENT: (paras. 1 to 11): The Court

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REFERENCE RE *BROADCASTING ACT*

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Indexed as: Reference re *Broadcasting Act*

2012 SCC 4

File No.: 33884.

2012: January 16; 2012: February 9.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Communications law — Broadcasting — Internet — Internet service providers providing end-users with access to broadcasting over the Internet — Whether Internet service providers are broadcasters when they provide end-users with access to broadcasting through the Internet — Broadcasting Act, S.C. 1991, c. 11, ss. 2, 3.

The Canadian Radio-television and Telecommunications Commission referred to the Federal Court of Appeal the question of whether retail Internet Service Providers ("ISPs") carry on, in whole or in part, "broadcasting undertakings" subject to the *Broadcasting Act* when, in their role as ISPs, they provide access through the Internet to "broadcasting" requested by end-users. The court held that they do not.

Held: The appeal should be dismissed.

The terms "broadcasting" and "broadcasting undertaking", interpreted in the context of the language and purposes of the *Broadcasting Act*, are not meant to capture entities which merely provide the mode of transmission. The *Broadcasting Act* makes it clear that "broadcasting undertakings" are assumed to have some measure of control over programming. The policy objectives listed under s. 3(1) of

the Act focus on content. When providing access to the Internet, which is the only function of ISPs placed in issue by the reference question, they take no part in the selection, origination, or packaging of content. The term "broadcasting undertaking" does not contemplate an entity with no role to play in contributing to the *Act*'s policy objectives. Accordingly, ISPs do not carry on "broadcasting undertakings" under the *Broadcasting Act* when they provide access through the Internet to "broadcasting" requested by end-users.

Cases Cited

Referred to: *Electric Despatch Co. of Toronto v. Bell Telephone Co. of Canada* (1891), 20 S.C.R. 83; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141.

Statutes and Regulations Cited

Broadcasting Act, S.C. 1991, c. 11, ss. 2(1) "broadcasting", (3), 3(1).

Telecommunications Act, S.C. 1993, c. 38, s. 2(1) "telecommunications common carrier".

APPEAL from a judgment of the Federal Court of Appeal (Noël, Nadon and Dawson JJ.A.), 2010 FCA 178, 322 D.L.R. (4th) 337, 404 N.R. 305, [2010] F.C.J. No. 849 (QL), 2010 CarswellNat 2092, in the matter of a reference brought by

the Canadian Radio-Television and Telecommunications Commission regarding the *Broadcasting Act*. Appeal dismissed.

Thomas G. Heintzman, Q.C., and *Bram Abramson,* for the appellants.

John B. Laskin, Yousuf Aftab and *Nicole Mantini*, for the respondents Bell Aliant Regional Communications *et al*.

Nicholas McHaffie and *Dean Shaikh*, for the respondent Shaw Communications Inc.

The following is the judgment delivered by

THE COURT —

[1] In a 1999 report, the Canadian Radio-television and Telecommunications Commission ("CRTC") concluded that the term "broadcasting" in s. 2(1) of the *Broadcasting Act*, S.C. 1991, c. 11, included programs transmitted to end-users over the Internet. At that time, the CRTC concluded that it was not necessary to regulate broadcasting undertakings that provided broadcasting services through the Internet. It exempted these "new media broadcasting undertakings" from the requirements of the

Broadcasting Act. In 2008, after public hearings, the CRTC revisited this exemption. One of the issues raised was whether Internet service providers – ISPs – were subject to the *Broadcasting Act* when they provided end-users with access to broadcasting through the Internet. The CRTC opted to send this issue to the Federal Court of Appeal for determination on a reference (2010 FCA 178, 322 D.L.R. (4th) 339). The specific reference question was:

> Do retail Internet service providers ("ISPs") carry on, in whole or in part, "broadcasting undertakings" subject to the *Broadcasting Act* when, in their role as ISPs, they provide access through the Internet to "broadcasting" requested by end-users?

[2] ISPs provide routers and other infrastructure that enable their subscribers to access content and services made available on the Internet. This includes access to audio and audiovisual programs developed by content providers. Content providers depend on the ISPs' services for Internet delivery of their content to end-users. The ISPs, acting solely in that capacity, do not select or originate programming or package programming services. Noël J.A. held that ISPs, acting solely in that capacity, do not carry on "broadcasting undertakings".

[3] We agree with Noël J.A., for the reasons he gave, that the terms "broadcasting" and "broadcasting undertaking", interpreted in the context of the language and purposes of the *Broadcasting Act*, are not meant to capture entities which merely provide the mode of transmission.

[4] Section 2 of the *Broadcasting Act* defines "broadcasting" as "any transmission of programs … by radio waves or other means of telecommunication for reception by the public". The Act makes it clear that "broadcasting undertakings" are assumed to have some measure of control over programming. Section 2(3) states that the *Act* "shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings". Further, the policy objectives listed under s. 3(1) of the *Act* focus on content, such as the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse.

[5] An ISP does not engage with these policy objectives when it is merely providing the mode of transmission. ISPs provide Internet access to end-users. When providing access to the Internet, which is the only function of ISPs placed in issue by the reference question, they take no part in the selection, origination, or packaging of content. We agree with Noël J.A. that the term "broadcasting undertaking" does not contemplate an entity with no role to play in contributing to the *Broadcasting Act*'s policy objectives.

[6] This interpretation of "broadcasting undertaking" is consistent with *Electric Despatch Co. of Toronto v. Bell Telephone Co. of Canada* (1891), 20 S.C.R. 83. In *Electric Despatch*, the Court had to interpret the term "transmit" in an exclusivity contract relating to messenger orders. Like the ISPs in this case, Bell

Telephone had no knowledge or control over the nature of the communication being passed over its wires. This Court had to determine whether the term “transmit” implicated an entity who merely provided the mode of transmission. The Court concluded that only the actual sender of the message could be said to “transmit” it, at p. 91:

> It is the person who breathes into the instrument the message which is transmitted along the wires who alone can be said to be the person who "transmits" the message. The owners of the telephone wires, who are utterly ignorant of the nature of the message intended to be sent, cannot be said ... to transmit a message of the purport of which they are ignorant. [Emphasis added]

[7] This Court relied on *Electric Despatch* in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427, a proceeding under the *Copyright Act*, R.S.C. 1985, c. C-42, to conclude that since ISPs merely act as a conduit for information provided by others, they could not themselves be held to communicate the information.

[8] The appellants in this case argued that we should instead follow *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141. In *Capital Cities*, decided under a 1968 version of the *Broadcasting Act*, the CRTC had amended Rogers Cable’s licence, allowing Rogers to delete and substitute the television advertisements in the American broadcasts it received before it distributed the broadcast to viewers. The American broadcasting stations argued that the *Broadcasting Act* was *ultra vires* Parliament since it purported to regulate

systems situated wholly within provincial boundaries. As part of this argument, the American stations attempted to sever the function of receiving television signals from the distribution or retransmission of those signals within a particular province. The Court rejected this severance of reception and distribution, stating that it was a "single system" coming under federal jurisdiction. The appellants argue before this Court that ISPs similarly form part of a single broadcasting system that is subject to regulation under the *Broadcasting Act*.

[9] Like Noël J.A., we are not convinced that *Capital Cities* assists the appellants. The case concerned Rogers Cable's ability to delete and substitute advertising from American television signals. There was no questioning in *Capital Cities* of the fact that the cable television companies had control over content. ISPs have no such ability to control the content of programming over the Internet.

[10] Contrary to the submissions of the appellants, we need not decide whether the fact that ISPs use "routers" prevents them from being characterized as telecommunications common carriers. Noël J.A. was not asked to decide whether ISPs are a "telecommunications common carrier" under the *Telecommunications Act*, S.C. 1993, c. 38. Nor, based on the record before us, do we feel it appropriate for us to do so.

[11] We therefore agree with Noël J.A.'s answer to the reference question, namely, that ISPs do not carry on "broadcasting undertakings" under the *Broadcasting Act* when, in their role as ISPs, they provide access through the Internet

to “broadcasting” requested by end-users. We would therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the appellants: McCarthy Tétrault, Toronto.

Solicitors for the respondents Bell Aliant Regional Communications et al.: Torys, Toronto.

Solicitors for the respondent Shaw Communications Inc.: Stikeman Elliott, Ottawa.