

A-464-04

IN THE FEDERAL COURT OF APPEAL

(On Appeal from the Canadian Radio-Television and Telecommunications
Commission)

Between

GENEX COMMUNICATIONS INC.

Appellant

and

ATTORNEY GENERAL OF CANADA

and

**CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION (CRTC)**

Respondents

and

**COGECO DIFFUSION INC.,
CANADIAN ASSOCIATION OF BROADCASTERS,
L'ASSOCIATION QUÉBÉCOISE DE L'INDUSTRIE DU
DISQUE, DU SPECTACLE ET DE LA VIDÉO (ADISQ)**

and

CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

MEMORANDUM OF
CANADIAN CIVIL LIBERTIES ASSOCIATION

(Intervener)

Rules 70, 346

Federal Court Rules, 1998

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**PART I
FACTS**

- 1.- The relevant facts in this appeal are addressed by the parties.

**PART II
POINTS IN ISSUE**

- 2.- By order of this Court, dated 15 November 2004, the Canadian Civil Liberties Association (hereinafter “CCLA”) was granted leave to intervene on the following question:

whether the decision of the CRTC (Decision 2004-271) violates section 2(b) of the *Canadian Charter of Rights and Freedoms*.

**PART III
SUBMISSIONS**

- 3.- This case presents a fundamental test of the scope of freedom of expression in Canada. More specifically, this case will test the extent to which the Canadian Radio-Television and Telecommunications Commission (hereinafter “CRTC”) is competent to adjudicate upon an application for the renewal of a broadcasting licence in a manner that is inconsistent with freedom of expression.

- 4.- *Slaight Communications Inc. v. Davidson*¹ establishes the structure for analysis and resolution of cases such as the present appeal. Accordingly, the CCLA makes two submissions:

Section 3(b) of the *Radio Regulations, 1986* infringes section 2(b) of the Charter, cannot be justified under section 1 and must accordingly be declared inoperative.

If section 3(b) of the *Radio Regulations, 1986* is saved under section 1 the Decision itself cannot be saved under section 1 of the Charter and must be quashed because the CRTC has necessarily exceeded its jurisdiction.

¹ [1989] 1 S.C.R. 1038, 1079-1080.

5.- The argument supporting these submissions may be summarised, and will be developed, as follows:

A. Even if the speech was offensive to some, it was protected speech within freedom of expression guaranteed by section 2(b) of the Charter.

B. Section 3(b) of the *Radio Regulations, 1986* is inconsistent with section 2(b) of the Charter and cannot be saved by section 1.

C. If section 3(b) can be saved by section 1, the Decision is inconsistent with section 2(b) of the Charter and cannot be saved by section 1.

A. *Protected speech*

6.- The Decision² was made, at least in part, on the ground that the Appellant permitted the broadcast of offensive speech. Offensive speech is protected speech under section 2(b) of the *Canadian Charter of Rights and Freedoms*.³

7.- In *Sharpe* the Supreme Court of Canada made clear that freedom of expression is a broad right that allows only narrow exceptions.⁴ *Sharpe* reiterates views previously stated by the Court.⁵ The Court has held that any expression of meaning falls within the ambit of protected speech, *without regard for its content*, unless it promotes physical violence.⁶ Any other law or regulation that is a limitation on freedom of expression must be justified under section 1 of the Charter. Thus the CCLA submits that the offensive speech in this case is protected speech under section 2(b) of the Charter.

² CRTC, Decision 2004-271, 13 July 2004, hereinafter “the Decision”.

³ Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982, c. 11 (U.K.), hereinafter “the Charter”.

⁴ *R. v. Sharpe* [2001] 1 S.C.R. 45, 70. The restatement of this principle in *Sharpe* was affirmed by the Court in *R. v. Guignard* [2002] 1 S.C.R. 472, 483.

⁵ See, e.g., *Irvin Toy v. Quebec (Attorney General)* [1989] 1 S.C.R. 927, 967, 971; *R. v. Keegstra* [1990] 3 S.C.R. 697, 842; *R. v. Butler* [1992] 1 S.C.R. 452; *R. v. Zundel* [1992] 2 S.C.R. 731; *R. v. Lucas* [1998] 1 S.C.R. 439.

⁶ *Sharpe, supra*, note 4, 70-71 (*per* McLachlin C.J.C. for the majority), 124 (*per* L’Heureux-Dubé, Gonthier & Bastarache JJ., dissenting, but not on this point).

B. Section 3(b), Radio Regulations, 1986 cannot be saved by section 1

8.- Section 10 of the *Broadcasting Act*⁷ confers upon the CRTC the power to promulgate regulations to advance the policy stated in section 3 of the Act. Section 9 of the Act confers authority to issue, amend, renew, suspend or revoke a broadcasting licence, subject to such conditions “as the Commission deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1)” of the Act. Section 3(b) of the *Radio Regulations, 1986*⁸ prohibits the broadcast of “any abusive comment that, when taken in context, tends or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability.” The CCLA submits that section 3(b) of the Regulations is inconsistent with section 2(b) of the Charter and, according to the jurisprudence of the Supreme Court,⁹ cannot be saved under section 1.

9.- Section 1 is concerned with justified violations of an enumerated right guaranteed by the Charter. It does not confer upon the state – and certainly not upon a regulatory body enabled by delegated authority – a discretion to violate protected rights in favour of other rights or interests. It recognises that protected rights, to the extent that they cannot tolerably be absolute, may give way to demonstrably necessary violations that serve a pressing and substantial objective. To be demonstrably necessary they must be *reasonably necessary* in the sense that no other alternative is reasonably viable in view of the interests involved.¹⁰

⁷ S.C. 1991, c. 11, hereinafter “the Act”.

⁸ S.O.R./86-982, hereinafter “the Regulations”. Section 3(b) of the Regulations reproduces in the main a predecessor provision, promulgated before the Charter came into force: see CRC 1978, c. 379, s.4. The same provision prohibited the broadcast of “any false or misleading news”.

⁹ *Sharpe, supra*, note 4, 94 (*per* McLachlin C.J.C. for the majority), 133 (*per* L’Heureux-Dubé, Gonthier & Bastarache JJ., dissenting, but not on this point).

¹⁰ *Sharpe, supra*, note 4, 101-102.

1. Objective

10.- In considering whether a provision serves a pressing and substantial purpose, “the objective that is relevant to the s. 1 analysis is *the objective of the infringing measure*”.¹¹

11.- The CCLA respectfully submits that the Respondents cannot establish that section 3(b) of the *Radio Regulations, 1986* reflects a reasoned apprehension of harm that presents a pressing and substantial objective.¹² It is inadequate for the CRTC to assert only that the prohibition contained in that section would aid the CRTC in fulfilling its mandate to promote a high standard of broadcasting under the *Broadcasting Act*. The Respondents must prove a specific harm, in Canadian radio broadcasting or more generally in Canadian society, to which section 3(b) is addressed, and that this targeted mischief is the limited objective of the section.

12.- In the Decision the Respondent CRTC justifies section 3(b) on a broad basis: that it is necessary to prevent harm to individual persons, to protect the Canadian public at large, to uphold the standards and objectives of the *Broadcasting Act* and to promote in a balanced fashion values that are protected by the Charter.¹³ The Decision asserts that freedom of expression enjoyed by broadcasters is “counterbalanced by the right of listeners to programming that complies with the Act and associated regulatory requirements” and that what it calls “abusive comment” within the meaning of section 3(b) of the Regulations contravenes Canadian broadcasting policy as set out in the Act.¹⁴ The CRTC says in its Decision that the prohibition of “abusive comment” in section 3(b) is designed to promote the interests of “all Canadians”.¹⁵

¹¹ *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199, 205 (emphasis in original).

¹² *Thomson Newspapers Co. v. Canada (Attorney General)* [1998] 1 S.C.R. 877, 958; *Butler, supra*, note 5, 467 and 504.

¹³ Decision, *supra*, note 2, paras. 27-39.

¹⁴ *Ibid.*, para. 35.

¹⁵ *Ibid.*

13.- The CCLA respectfully submits that the CRTC's stated objectives with regard to section 3(b) of the Regulations do not warrant a violation of freedom of expression. Further, the CCLA submits that section 3(b) of the Regulations does not comply with Parliament's stipulation in section 2(3) of the Act that the Act shall be construed and applied in a manner that is consistent with freedom of expression. The speech in this case might have been denigrating and insulting to others, whether identified persons or not, but this is not a sufficient harm to justify this violation of freedom of expression.¹⁶

14.- Section 3(b) prohibits precisely the kind of speech that the Supreme Court of Canada has said is protected under section 2(b) of the Charter, subject only to narrow exceptions.¹⁷ Although the Court acknowledged certain exceptions that are considered particularly harmful, the kind of "offensive" speech involved here is not one of them. Section 3(b) does not distinguish among types of offensive speech and affords no basis on which to infer that it is restricted to the exceptional types of offensive speech that the Supreme Court has said may be limited under section 1 of the Charter. In short, in the absence of a more focused limitation, the prohibition of speech that is merely offensive or abusive is not a pressing or substantial objective in the regulation of radio broadcasting.

2. Proportionality

15.- If section 3(b) of the Regulations serves no pressing objective, it follows that it cannot be proportionate within the meaning of section 1 of the Charter. The CCLA submits further that, even if section 3(b) serves a valid objective, it remains a disproportionate measure. Three criteria are relevant to a consideration of proportionality: rational connection, minimal impairment, and effects. These factors allow some overlap in determining whether the benefit

¹⁶ *Irwin Toy, supra*, note 5, 968; *Zundel, supra*, note 5, 770; *Sharpe, supra*, note 4, 70.

¹⁷ See, e.g., *Canada (Human Rights Commission) v. Taylor* [1990] 3 S.C.R. 892; *Keegstra, supra*, note 5; *Zundel, supra*, note 5; *Ross v. New Brunswick School Board No. 15* [1996] 1 S.C.R. 825.

that flows from an infringement of the Charter meets a valid objective and exceeds the value of the right.¹⁸

16.- To justify a breach of the right, the state must demonstrate a sufficiently compelling harm that is independent and distinct from an objection that the content of speech is offensive or valueless. This is not a hypothetical inquiry; nor is it an inquiry that is concerned with subjective opinions about the relative value of offensive speech. The Court must determine the *actual* purpose of the impugned provision, the *actual* connection between the provision and its purpose, the *actual* degree to which the provision infringes the right and whether the *actual* benefit of the provision outweighs the *actual* seriousness of the violation.¹⁹

a. *Rational connection*

17.- To whatever extent a rational connection can be found, constitutionality would require a finding that the restriction at issue was addressed to speech that is considered especially harmful. There is some indication that the troublesome concepts of hate speech and obscene speech, for example, might fit into this category. In any event, no speech deemed *less* injurious could rescue the constitutionality of the prohibition at issue.

18.- In *Edwards Books* the Supreme Court stipulated that “[t]he requirement of rational connection calls for an assessment of how well the legislative garment has been tailored to suit its purpose.”²⁰ In the present case the “garment” is a regulation that is not carefully tailored and thus cannot meet the requirement of a rational connection to a pressing and substantial objective for breaching freedom of expression.

¹⁸ *Thomson Newspapers Co.*, *supra*, note 12, 103.

¹⁹ *RJR- MacDonald Inc.*, *supra*, note 11, 331.

²⁰ *R. v. Edwards Books and Art* [1986] 2 S.C.R. 713, 770.

b. *Minimal impairment*

19.- The CCLA submits that section 3(b) of the Regulations does not minimally impair freedom of expression. The Supreme Court has held that the requirement of careful tailoring is especially important as regards freedom of expression in section 2(b) of the Charter and, to this end, it has made clear that the requirement of minimal impairment will allow infringements of freedom of expression only to the extent that is reasonably necessary.²¹

20.- The state's burden and standard of persuasion is great in cases concerning freedom of expression.²² In the present case there is no evidence to establish that Canadian radio listeners are a particularly vulnerable group that cannot tolerate offensive speech or that state censorship of offensive speech is necessary to prevent a demonstrable harm. To whatever extent such sanctions are constitutionally permissible, more limited remedies may be found in the law relating to prosecution for hate speech, obscene speech or criminal defamation, or in civil suits. Such conduct might also be addressed in human rights legislation.²³

21.- Moreover, a contextual approach to violations of section 2(b) does not permit, let alone require, courts to decide whether a particular form of expression merits approval or disapproval. It is not for the Appellant to justify an exercise of freedom of expression and it is not for the Court to judge the relative value of protected speech. If the Appellant had to justify the speech, or if the state could succeed merely by showing that the speech is valueless, the interests protected by section 2(b) would be lost.

22.- The Supreme Court has repeatedly asserted that the content of speech does not determine whether it is protected under section 2(b) or whether a violation is justified under section 1. The content of the speech is relevant only in so far as it permits the court to place the speech in one of the limited classes

²¹ E.g., *Sharpe, supra*, note 4, 94, 101-102.

²² *Sharpe, supra*, note 4, 102.

²³ *Thomson Newspapers Co., supra*, note 12, 955.

that have been held to be especially harmful and therefore permissibly limited by section 1. In any event, there is no constitutional authority that could justify prohibiting the kind of speech at issue in this Decision.

23.- It is the value of the right that is at issue and not the value of the speech. Freedom of expression extends to speech that is unpopular, offensive, distasteful, vulgar, or contrary to the mainstream.²⁴ It cannot be argued that section 2(b) protects only speech that lies at the core of positive values shared by Canadians or speech that is consistent with other public values such as equality and tolerance.²⁵ It protects *all* speech unless prohibition is necessary to prevent a demonstrable and pressing harm.

24.- The CCLA respectfully submits that the CRTC is entitled to little or no deference with regard to its objectives in violating the freedom of expression by its promulgation of section 3(b) of the Regulations.²⁶ Two reasons may be given for this submission. First, contextual factors do not compel deference to the rule-making function of the CRTC. There is no empirical evidence of widespread or significant harm.²⁷ Moreover, in its Decision the CRTC refers to section 3(b) as a prohibition that gives rise to a “violation” or an “offence”. The state has thus set itself up as the “singular antagonist” of anyone who is subject to its jurisdiction.²⁸ Second, an administrative body that exercises an authority that is delegated by Parliament is entitled to little or no deference where it asserts a jurisdiction to make a regulation that breaches a protected right.²⁹

²⁴ *Irwin Toy, supra*, note 5, 968.

²⁵ *Zundel, supra*, note 5, 774-775.

²⁶ *RJR-MacDonald, supra*, note 11, 330, 331-333, 342-343; *Thomson Newspapers Co., supra*, note 12, 955.

²⁷ *Thomson Newspapers Co., supra*, note 12, 962-963.

²⁸ See *Irwin Toy, supra*, note 5, 994.

²⁹ *Zundel, supra*, note 5, 773.

c. *Effects*

25.- The CCLA submits that section 3(b) of the Regulations is a disproportionate infringement of freedom of expression in the sense that the deleterious effects of infringement greatly exceed any salutary benefits that might arise from it.³⁰ The effect of this section is to impose a sweeping chill on that freedom because its scope is so broad and its meaning so imprecise.³¹

26.- This issue is brought directly to the fore in the Decision: “The Commission is of the view that freedom of expression does not justify the broadcast of abusive comment that is in violation of section 3(b) of the Regulations.”³² The CRTC also asserts that the broadcast of abusive comment is inconsistent with “the values in the Charter”.³³ These are express declarations by the CRTC that the values affirmed in the Regulations should prevail over the constitutional guarantee of freedom of expression. Among concerns identified in the CRTC the Decision are the following: emotional damage, reputation, inherent dignity, respect, discord, privacy, multiculturalism and multiracialism, and the cultural, political and social fabric of Canada. The CRTC asserts further that considerations such as these must be counterbalanced against freedom of expression so as to ensure the right of listeners to programming that complies with the Act and associated regulatory requirements.³⁴

27.- The CCLA does not claim that there can be no restrictions on broadcasters. The CCLA submits that, far from striking an appropriate balance, section 3(b) cuts deeply and widely through the range of free speech so as to impose a chill upon freedom of expression that is disproportionate to any cogent objective and to the importance of the right.

³⁰ *Dagenais v. Canadian Broadcasting Corporation* [1994] 3 S.C.R. 835, 887.

³¹ *Zundel, supra*, note 5, 754-755; *Sharpe, supra*, note 4, 106.

³² Decision, *supra*, note 2, para. 38.

³³ *Ibid.*, para. 34.

³⁴ *Ibid.*, para. 31.

28.- Section 3(b) affects the interests of speakers and listeners alike.³⁵ As the Supreme Court has noted, listeners who do not wish to hear such speech have an immediate remedy: turn it off.³⁶ It is not for the CRTC to use its regulatory powers to censor freedom of expression in favour of other values. The total ban on “abusive speech” in section 3(b) of the Regulations far exceeds any valid objective that might be identified.³⁷

29.- It is inevitable that where freedom of expression is in issue other protected rights may be affected. Unless it can be demonstrated that these competing interests are more compelling than observance of freedom of expression, it cannot be argued that a breach of the Charter is proportionate in the given context or circumstances.

30.- The language of section 3(b) suffers from overbreadth. The words “likely to expose to hatred or contempt” capture a wide range of innocent and legitimate speech. It might be argued that newscasts disclosing the truth about situations in Kosovo, Northern Ireland, or the Middle East would be “likely to expose” Serbians, Croatians, Muslims, Protestants, Catholics, Arabs, and Israelis to “hatred or contempt”. The requirement that the language must be “abusive” is a mandate for censorship by subjective opinion. The word “abusive” is subject to abuse.

31.- In *Taylor*³⁸ the Supreme Court upheld the validity of section 13(1) of the *Canadian Human Rights Act*, which prohibits a “discriminatory practice” in language that is similar to that in section 3(b) of the *Radio Regulations, 1986*. That case, however, is distinguishable from the present appeal. **First**, a critical distinction lies in the nature of applicable sanctions. The *Canadian Human Rights Act* is not primarily concerned with punishing offenders; its thrust is the removal of offending material. Under that statute the primary method of

³⁵ *Rocket v. Royal College of Dental Surgeons (Ontario)* [1990] 2 S.C.R. 232.

³⁶ *Sharpe, supra*, note 4, 70.

³⁷ *Rocket, supra*, note 35; *Thomson Newspapers Co., supra*, note 12.

³⁸ *Supra*, note 17.

enforcement is conciliation. Under the CRTC regime, the primary sanction is the punishment of offenders. And the method of punishment is the power to license. Unlike the narrower focus in the *Human Rights Act*, the CRTC punishes by destroying the offender's ability to communicate by broadcasting, now and hereafter. Justifications for the narrower remedial powers under the *Canadian Human Rights Act* would not apply to the punitive encroachments on expression that can be imposed by the CRTC. **Second**, the measure at issue in *Taylor* was enacted by Parliament and not by a subordinate agency. As a body democratically elected by the people, Parliament is entitled to a greater level of deference than is an appointed agency. **Third**, although the language in section 13(1) of the *Human Rights Act* was upheld in *Taylor*, in relation to that specific context, the same or similar language is not necessarily valid in every other context.

32.- In *Dagenais* the Supreme Court held that where competing constitutional rights are equally engaged "Charter principles require a balance to be achieved that fully respects the importance of both sets of rights."³⁹ In that instance a conflict arose between the freedom of expression and the right of an accused to a fair trial. In the present appeal, however, there is no conflict in which competing rights are equally engaged. Freedom of expression is directly engaged but the CRTC errs in its claim that collective interests in its broadcasting policy engage concerns relating to expression and equality that are of equal or superior force. Accordingly, it errs in seeking to strike a balance between interests that are not equally engaged.

33.- The CCLA respectfully submits that section 3(b) of the *Radio Regulations, 1986* is an infringement of section 2(b) of the Charter that can not be saved under section 1. Accordingly, the CCLA requests that this Court declare section 3(b) invalid and quash the Decision made by the Respondent CRTC.

³⁹ *Supra*, note 30, 877.

C. *The Decision cannot be justified by section 1 of the Charter*

34.- Even if this Court were to find that section 3(b) is justified, the Decision is not. As the prohibition in *Taylor* was limited to “hatred or contempt”, this regulation and what it purports to authorize must also be so limited. This decision, extending as it does to offensive speech, is not properly authorized – by the regulation or by the *Charter of Rights and Freedoms*.

35.- The Supreme Court of Canada has held that for an individual administrative *decision*, as opposed to a law or regulation, to be saved under section 1, it must be made within the strict constraints of the limitation; otherwise it would constitute an excess of jurisdiction by the decision-maker.⁴⁰ The Decision in this case applies to a category of speech (“offensive speech”) that is not prohibited by the Regulation’s limit on “hate speech.” Accordingly, it should be quashed for excess of jurisdiction.

36.- Even assuming a rational connection, state action that infringes a constitutional right cannot be justified if its breadth is such that it goes much further than is necessary to achieve that aim.⁴¹ The greatest danger in the CRTC’s order is that it is premised upon a category of “abusive speech,” which is a phrase of undefined and virtually unlimited reach.⁴² In the present case the CRTC in effect asserts that this sweeping prohibition is justified in the public interest. A claim such as this was rejected in *Zundel* as being an inadequate basis for infringement of freedom of expression.⁴³

37.- This argument is especially compelling where the Court is concerned with a decision by an administrative board. In *Zundel* McLachlin J. (as she then was) stated for the majority:

The whole purpose of enshrining rights in the Charter is to afford the individual protection against even the well-intentioned majority. To justify

⁴⁰ *Ross, supra*, note 17, 851.

⁴¹ *Zundel, supra*, note 5, 768.

⁴² *Ibid.*, 700.

⁴³ *Ibid.*, 770.

an invasion of a constitutional right on the ground that the public authorities can be trusted not to violate it unduly is to undermine the very premise on which the Charter is predicated.⁴⁴

This observation was made with regard to prosecutors exercising their discretion about charging decisions under the *Criminal Code*. It applies with even greater force to regulatory bodies that make regulations and adjudicate upon applications made to them. McLachlin J. emphasised further that it matters little that the speech in question lies beyond core interests protected by freedom of expression. That protection extends to all speech that conveys meaning and any infringement thereof must be narrowly defined and justified.

38.- In short, the CCLA respectfully submits that the Decision of the CRTC is not a reasonable limitation of section 2(b) of the Charter and, accordingly, it must be quashed by order of this Court as an excess of jurisdiction.

PART IV ORDER SOUGHT

39.- The CCLA respectfully requests that this Court declare that section 3(b) of the *Radio Regulations, 1986* be declared invalid and that it quash the Decision of the CRTC, Decision 2004-271, dated 13 July 2004.

40.- The CCLA seeks no costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

AS FILED

Patrick Healy
Counsel for the CCLA

⁴⁴ *Supra*, note 5, 773.

PART V
AUTHORITIES

- Canada (Human Rights Commission) v. Taylor* [1990] 3 S.C.R. 892.
Dagenais v. Canadian Broadcasting Corporation [1994] 3 S.C.R. 835, 887.
Gilles E. Néron Communication Marketing Inc. v. Chambre des Notaires du Québec 2004 SCC 53
Hill v. Church of Scientology of Toronto [1995] 2 S.C.R. 1130.
Irwin Toy v. Quebec (Attorney General) [1989] 1 S.C.R. 927.
RJR-MacDonald Inc. v. Canada (Attorney General) [1995] 3 S.C.R. 199.
R. v. Butler [1992] 1 S.C.R. 452.
R. v. Edwards Books and Art [1986] 2 S.C.R. 713.
R. v. Guignard [2002] 1 S.C.R. 472.
R. v. Keegstra [1990] 3 S.C.R. 697.
R. v. Lucas [1998] 1 S.C.R. 439.
R. v. Sharpe [2001] 1 S.C.R. 45.
R. v. Zundel [1992] 2 S.C.R. 731.
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Ross v. New Brunswick School Board No. 15 [1996] 1 S.C.R. 825.
Slaight Communications Inc. v. Davidson [1989] 1 S.C.R. 1038.
Thomson Newspapers Co. v. Canada (Attorney General) [1998] 1 S.C.R. 877.