Federal Court  Cour fédérale

Date: 20210914

Docket: T-1480-19

Citation: 2021 FC 942

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 14, 2021

PRESENT: The Honourable Mr. Justice McHaffie

BETWEEN:

ALLIANCE NATIONALE DE L'INDUSTRIE MUSICALE

Applicant

and

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Respondent

ORDER AND REASONS

I. Overview

[1] The Canadian Radio-television and Telecommunications Commission (CRTC) is seeking to have struck three aspects of the Notice of Application filed by the Alliance nationale de l'industrie musicale (ANIM). In the Notice of Application, ANIM alleges that the CRTC did not

respect its language obligations under the *Official Languages Act*, RSC 1985, c 31 (4th Suppl) [OLA], and the *Canadian Charter of Rights and Freedoms*, and is seeking several orders as a remedy. In this motion, the CRTC is seeking to have struck (i) ANIM's claim for damages, (ii) the request for an order requiring the CRTC to impose conditions of licence in future, and (iii) several paragraphs of the grounds presented by ANIM in its Notice of Application. The CRTC motion raises the interaction between the remedial provisions of the OLA and the *Charter* on one hand, and the immunity of administrative tribunals and the jurisdiction of this court pursuant to the *Federal Courts Act*, RSC 1985, c F-7 [FC Act], on the other.

[2] I find that ANIM's claim for damages must be struck. The Supreme Court of Canada decision in *Ernst v Alberta Energy Regulator*, 2017 SCC 1, establishes that it is plain and obvious that such a remedy, whether under the *Charter* or the OLA, would not be "appropriate and just" considering the CRTC's immunity with respect to its adjudicative function.

[3] I also find that ANIM's request for an order requiring the CRTC to impose conditions of licence must be struck, to the extent that it is based on the *Charter*. It is plain and obvious that such an order targeting the CRTC could only be issued by the Federal Court of Appeal under sections 18, 18.1 and 28 of the FC Act. As a result, this Court is not a "court of competent jurisdiction" for the purposes of subsection 24(1) of the *Charter* in regard to this order. However, the same request based on the alleged breach of obligations under the OLA is not struck. In light of the legislative provisions and the case law, it is not plain and obvious that the powers conferred on this Court by section 77 of the OLA are limited or precluded by the provisions in the FC Act.

[4] Lastly, I dismiss the CRTC's ancillary request to strike certain paragraphs of the grounds raised by ANIM in the Notice of Application. These paragraphs contain allegations of fact that are relevant to the alleged breach of the OLA, even if certain aspects of the application are struck.

[5] The CRTC's motion is therefore allowed in part. I will leave the question of costs to the Court that will rule on the merits of ANIM's application.

II. Issues and analysis framework

[6] I will address the issues raised in the CRTC motion in the following order:

A. Should ANIM's claim for damages under subsection 77(4) of the OLA and subsection 24(1) of the *Charter* be struck from the Notice of Application?

B. Should ANIM's request for an order under subsection 77(4) of the OLA and subsection 24(1) of the *Charter* requiring the CRTC to impose conditions of licence in future be struck from the Notice of Application?

C. Should paragraphs 36 to 58 of the Notice of Application be struck?

D. Should costs be awarded to ANIM, regardless of the outcome?

[7] The parties generally agree on the analytical framework applicable in a motion to strike. Even though this application is not an application for judicial review, the parties agree that the principles that apply are those stated in *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paras 47–53, and *David Bull Laboratories*

(Canada) Inc v Pharmacia Inc, [1995] 1 FC 588 (CA) at 596–600. Briefly, these are the principles:

(a) Generally speaking, the direct and proper way to contest a notice of motion is to appear and argue at the hearing of the motion: *David Bull* at 596–97.

(b) Nonetheless, the Court has the power, under its plenary jurisdiction to restrain the misuse or abuse of courts' processes, to strike a notice of application in whole or in part: *David Bull* at 600; *JP Morgan* at para 48; *Fono v Canada Mortgage and Housing Corporation*, 2019 FC 1190 at paras 17–18, 37, 48, aff'd 2021 FCA 125.

(c) This power must only be exercised in exceptional cases where the notice is "so clearly improper as to be bereft of any possibility of success" meaning that it is "plain and obvious" that the application cannot succeed: *David Bull* at 600; *JP Morgan* at para 47; *Ernst* at paras 15, 68–69.

(d) These exceptional cases can include applications that have an "obvious, fatal flaw" striking at the root of the jurisdiction of the Court to hear the case: *JP Morgan* at para 47; *Chrysler Canada Inc v Canada*, 2008 FC 727 at para 20, aff'd 2008 FC 1049.

(e) For the purposes of the motion to strike, the allegations in the Notice of Application must be accepted as true: *Chrysler* at para 20; *JP Morgan* at para 52.

III. Analysis

A. *The claim for damages*

(1) Background: the claim for damages and its basis

[8] In its Notice of Application, ANIM is seeking an order:

> [TRANSLATION]
> **ORDERING THAT** the CRTC pay damages to ANIM, the quantum of which shall be determined prior to the hearing, for the funding of its members' initiatives that are eligible for Canadian Content Development ("**CCD**") funding pursuant to the *Radio Regulations, 1986*, SOR/86-982 ("**Radio Regulations**"), as an appropriate and just remedy, under subsection 77(4) of the OLA and subsection 24(1) of the *Charter*, for the harm caused to ANIM members by [the CRTC's] breaches of the OLA and the *Charter*[.]

[9] The ANIM application springs from the 2012 CRTC renewal of the satellite subscription radio licence for Sirius XM Canada Inc: *Broadcasting Decision CRTC 2012-629*. In the renewed licence, the CRTC imposed as conditions that Sirius XM make certain contributions to Canadian Content Development (CCD) initiatives. In particular, the CRTC required Sirius XM to contribute at least 4% of its gross income to CCD initiatives, allocating its contribution in the following manner: (a) no less than 20% of the total to the Foundation Assisting Canadian Talent on Recordings (FACTOR); (b) no less than 10% of the total to the Fondation Musicaction (MUSICACTION); (c) no less than 5% to the Community Radio Fund of Canada (CRFC); and (d) of the remainder (the "discretionary contribution"), no less than 45% to Canadian French-language content initiatives and 45% to Canadian English-language content initiatives: Appendix to *Broadcasting Decision CRTC 2012-629*, "Conditions of licence" at paras 13(b), (d).

[10] FACTOR supports Anglophone initiatives while MUSICACTION supports Francophone initiatives. MUSICACTION makes significant contributions to initiatives in Francophone and Acadian minority communities (FMCs). ANIM represents the Francophone and Acadian musical industry in communities outside Quebec, and ANIM members represent all FMC artists and professionals in the song and music sector.

[11] The allocation of contributions between FACTOR and MUSICACTION in *Broadcasting Decision CRTC 2012-629* modified the previous distribution, where FACTOR and MUSICACTION received an equal minimum allocation. ANIM alleges that this change caused a significant negative impact on the funding of Francophone initiatives for CCD, especially since Sirius XM is the main audio entertainment company in the country. It claims that the CRTC did not provide FMCs with sufficient notice of this change and did not keep them informed about a process that concerns them. ANIM alleges that this is a violation of the CRTC's obligations under sections 16 and 20 of the *Charter* and parts IV (particularly sections 21, 22, 27, 28 and 30) and VII (particularly section 41) of the OLA.

[12] In 2013, ANIM filed a complaint with the Commissioner of Official Languages (COL) under section 58 of the OLA. Such a complaint is required for a remedy before this Court under sections 76 and 77 of the OLA. These sections are in Part X of the OLA, "Court Remedy", and state the following:

Definition of *Court*	**Définition de *tribunal***
76 In this Part, ***Court*** means the Federal Court.	**76** Le tribunal visé à la présente partie est la Cour fédérale.

Application for remedy	**Recours**
77 (1) Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV, V or VII, or in respect of section 91, may apply to the Court for a remedy under this Part.	**77 (1)** Quiconque a saisi le commissaire d'une plainte visant une obligation ou un droit prévus aux articles 4 à 7 et 10 à 13 ou aux parties IV, V, ou VII, ou fondée sur l'article 91, peut former un recours devant le tribunal sous le régime de la présente partie.
Limitation period	**Délai**
(2) An application may be made under subsection (1) within sixty days after (a) the results of an investigation of the complaint by the Commissioner are reported to the complainant under subsection 64(1), (b) the complainant is informed of the recommendations of the Commissioner under subsection 64(2), or (c) the complainant is informed of the Commissioner's decision to refuse or cease to investigate the complaint under subsection 58(5), or within such further time as the Court may, either before or after the expiration of those sixty days, fix or allow.	**(2)** Sauf délai supérieur accordé par le tribunal sur demande présentée ou non avant l'expiration du délai normal, le recours est formé dans les soixante jours qui suivent la communication au plaignant des conclusions de l'enquête, des recommandations visées au paragraphe 64(2) ou de l'avis de refus d'ouverture ou de poursuite d'une enquête donné au titre du paragraphe 58(5).
[Emphasis added.]	[Je souligne.]

[13] The COL released his final report in July 2019, six years after the complaint had been filed and one year after the licence awarded in *Broadcasting Decision CRTC 2012-629* had

expired. The Court does not have the COL report in the motion records but according to the CRTC, the COL concluded that the ANIM complaint was not founded. ANIM filed its Notice of Application on September 9, 2019, within sixty days after the COL's findings were reported to ANIM.

[14] Because this is a motion to strike, the Court must accept the allegations of fact as they appear in ANIM's Notice of Application as true. Therefore, for the purposes of this motion, I accept that the change in the way in which contributions were allocated in *Broadcasting Decision 2012-629* caused financial harm to FMCs. Moreover, the CRTC is not disputing that the question of whether it breached its obligations under the OLA or the *Charter* must be resolved in the determination of the merits of the application. Therefore, for the purposes of this motion, I accept that ANIM may establish that the CRTC breached its language obligations. The only issue raised in this motion is that of the remedy.

[15] As a remedy for the alleged breach, ANIM is seeking damages under subsection 24(1) of the *Charter* and subsection 77(4) of the OLA. It argues that the scope of these two remedial provisions is wide enough to include an order for damages against the CRTC. Let's look at these provisions therefore.

(2) Subsection 24(1) of the *Charter* and subsection 77(4) of the OLA

[16] Subsection 24(1) of the *Charter* and subsection 77(4) of the OLA use similar language:

Canadian Charter of Rights and Freedoms	***Charte canadienne des droits et libertés***
Enforcement of guaranteed rights and freedoms	**Recours en cas d'atteinte aux droits et libertés**
24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	**24 (1)** Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.
Official Languages Act	***Loi sur les langues officielles***
Order of Court	**Ordonnance**
77 (4) Where, in proceedings under subsection (1), the Court concludes that a federal institution has failed to comply with this Act, the Court may grant such remedy as it considers appropriate and just in the circumstances.	**77 (4)** Le tribunal peut, s'il estime qu'une institution fédérale ne s'est pas conformée à la présente loi, accorder la réparation qu'il estime convenable et juste eu égard aux circonstances.
[Emphasis added.]	[Je souligne.]

[17] Given their identical scope, "the principles of interpretation applying to subsection 24(1) of the Charter may be usefully followed with regard to the scope of the Court's power to grant a remedy under subsection 77(4) of the OLA": *Thibodeau v Air Canada*, 2011 FC 876 at para 36, var'd 2012 FCA 246, aff'd 2014 SCC 67; *Canadian Food Inspection Agency v Forum des maires de la péninsule acadienne*, 2004 FCA 263 at para 56. The Supreme Court confirmed that "[l]ike s. 24(1) of the *Charter*, s. 77(4) of the OLA confers a wide remedial authority and should be interpreted generously to achieve its purpose" [emphasis added]:

Thibodeau (SCC) at para 112. As noted by Justice McIntyre in *Mills* in a discussion of subsection 24(1) of the *Charter*, "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion": *Mills v The Queen*, [1986] 1 SCR 863 at 965; see also *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras 24, 50, 52.

[18] Like the *Charter*, the purpose of the OLA is to protect fundamental rights, and it must be interpreted with this important purpose in mind. In particular, the OLA aims to "ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions" and "support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society": OLA, s. 2. The language rights protected by the OLA "must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada" [emphasis in original]: *R v Beaulac*, [1999] 1 SCR 768 at para 25.

(3) Damages as a remedy under subsection 24(1) of the *Charter* and subsection 77(4) of the OLA

[19] There is no doubt that the remedies available under subsection 24(1) of the *Charter* and/or subsection 77(4) of the OLA include an order for damages when such an order is "appropriate and just": *Vancouver (City) v Ward*, 2010 SCC 27 at paras 4, 16–22; *Thibodeau (SCC)* at para 98; R Soublière, "*Les « dents » de la Loi sur les langues officielles : le recours judiciaire sous la partie X*" (2016) 47:1 Ottawa LR 251 at pp 270–271. The court's jurisdiction

to order damages under these provisions is not in question. Rather, at issue is whether it is plain and obvious that the remedy of damages against the CRTC is not “appropriate and just”.

[20] According to *Ward*, a court that rules on an application for damages under the *Charter* must perform a four-step analysis, namely: (i) establish that a *Charter* right has been breached; (ii) provide a functional justification of damages to show why damages are a just and appropriate remedy; (iii) give the state an opportunity to demonstrate countervailing factors that render damages inappropriate or unjust; and (iv) assess the quantum of the damages: *Ward* at para 4. In this case, at issue is whether the remedy of damages is potentially available when an administrative tribunal allegedly violated the *Charter* or the OLA or whether the application for damages is “bereft of any possibility” of being allowed as an “appropriate and just” remedy.

[21] In *Thibodeau*, the majority of the Supreme Court found that the power under subsection 77(4) of the OLA to award appropriate and just remedies should not be read as authorizing the courts to depart from Canada’s international obligations, in particular under the *Montreal Convention*, which restricts the damages that can be claimed from airlines: *Thibodeau (SCC)* at paras 1, 6, 59, 73, 88–90, 113–18. The CRTC claims that, similarly, subsection 77(4) cannot be interpreted as authorizing the courts to depart from the principles of immunity of administrative tribunals. The assessment of this argument requires a review of the state of the law on the immunity of tribunals.

(4) Immunity of administrative tribunals: *Ernst v Alberta Energy Regulator*

[22] The CRTC's argument is that as an administrative tribunal and court of record, it has absolute immunity against claims for damages and that this immunity is not overridden by the OLA or the *Charter*. ANIM submits that the CRTC is not immune to damages for violations of the OLA and the *Charter* that are not within its quasi-judicial functions.

[23] The Supreme Court ruled on the immunity of administrative tribunals in *Ernst*. The case involved a claim by Ms. Ernst against the Alberta Energy Regulator (AER) for breaching her right to freedom of expression under paragraph 2(b) of the *Charter*. Ms. Ernst alleged that AER prevented her from communicating with AER for 16 months to punish her for having publicly criticized AER: *Ernst* at paras 6, 136–43. She claimed damages of $50,000, relying on subsection 24(1) of the *Charter*: *Ernst* at para 1, 144.

[24] The AER sought to strike this claim on the ground that it was protected by an immunity clause against any action or proceeding "in respect of any act or thing done purportedly in pursuance of this Act or any Act that the [AER] administers, the regulations under any of those Acts or a decision, order or direction of the [AER]": *Ernst* at paras 1, 9; *Energy Resources Conservation Act*, RSA 2000, c E-10 [ERCA], s 43. Ms. Ernst challenged the constitutionality of this provision, but she did not give the required notice to this effect to the attorneys general of Canada and Alberta: *Ernst* at paras 13, 64–65.

[25] The Supreme Court, in three judgments, and split five to four, confirmed that the claim should be struck. Cromwell J., on behalf of four justices including himself, found that *Charter* damages would never be an appropriate remedy against the AER. Applying *Ward*, he found that the availability of judicial review and the importance of immunity for quasi-judicial decision makers demonstrate that damages are never an appropriate and just remedy: *Ernst* at paras 26–31, 50–55; *Ward* at paras 32–45. Cromwell J. noted that a "case-by-case" review largely undermines the purpose of conferring immunity: *Ernst* at paras 56–57. Because damages are never an appropriate and just remedy under subsection 24(1) of the *Charter*, a clause that bars such claims cannot be unconstitutional: *Ernst* at para 58.

[26] The minority of the Supreme Court was also represented by four justices, in a judgment written by McLachlin C.J. and Moldaver and Brown JJ.: *Ernst* at para 131. The minority concluded that it was not plain and obvious that damages could not be an appropriate and just remedy, that the AER could benefit from absolute immunity only with regard to its adjudicative role and that it was not plain and obvious that section 43 of the ERCA barred the claim: *Ernst* at paras 171–80. In particular, the minority found that it was not plain that the so-called "punitive" conduct on which the claim was based was part of the AER's adjudicative role and that there was no reason to apply immunity in all cases: *Ernst* au para 172. The minority reached the same conclusion regarding statutory immunity noting that this applied only to acts done purportedly in pursuance of the ERCA: *Ernst* at para 179. For these reasons, the minority did not answer the question as to whether section 43 of the *ERCA* was unconstitutional: *Ernst* at paras 187–91.

[27] Only Abella J. did not rule on the issue of whether damages could be an appropriate and just remedy under subsection 24(1) of the *Charter*. She instead found that the ERCA immunity provision was clear and absolute and that Ms. Ernst did not properly raise its constitutionality: *Ernst* at paras 65–72. As for immunity in common law, Abella J. acknowledged its existence but only indicated that an analysis pursuant to *Ward* "likely leads to the conclusion that *Charter* damages are not an 'appropriate and just' remedy in the circumstances" [emphasis added]: *Ernst* at paras 115–23. She therefore reached the same conclusion as Cromwell J., but for different reasons.

[28] The result of these judgments is that four justices found that the AER benefitted from absolute (and statutory) common law immunity, meaning that damages under the *Charter* would never be appropriate; four justices found that the AER was not necessarily immune with regard to their non-adjudicative acts and that damages under the *Charter* could be appropriate depending on the case; and one justice made her finding based solely on the statutory immunity provision.

[29] However, although they differed on the scope of the immunity, eight of the justices concluded that tribunals at least have the kind of immunity that protects them from claims for damages, including *Charter* claims, based on the exercise of a tribunal's adjudicative functions: *Ernst* at paras 50–57, 171–76; *Ali v Attorney General*, 2019 ONSC 807 at paras 33–34.

[30] ANIM accepts that *Ernst* confirms that the CRTC's quasi-judicial obligations (meaning its adjudicative functions) are at least protected by an immunity and that the OLA does not

preclude this immunity. I agree. If *Charter* obligations and remedial provisions don't preclude immunity, as the majority of the justices concluded in *Ernst*, the OLA cannot preclude immunity either.

[31] On the issue of the scope of the immunity, ANIM argues that even Cromwell J. limited the immunity to the exercise of quasi-judicial duties, citing paragraph 47 of *Ernst*. However, in the next paragraph, Cromwell J. states that the jurisprudence "also cautions against attempting to segment the functions of a quasi-judicial regulatory board such as this one into adjudicative and regulatory activity for the purposes of considering whether its actions should give rise to liability" [emphasis added]: *Ernst* at para 48.

[32] At any rate, I agree that on the basis of *Ernst*, it cannot be stated that it is plain and obvious that quasi-judicial tribunals have immunity for all their acts. The decision of Cromwell J. and that of the minority each represent the opinion of four justices, and Abella J., did not answer this particular question. This creates uncertainty on the issue of whether immunity extends beyond judicial functions. However, the immunity of these tribunals against claims for damages resulting from a tribunal's exercise of its adjudicative functions is clear based on *Ernst*. ANIM's main argument is that the CRTC's acts and omissions on which the claim is based do not fall within its adjudicative functions, but rather within its obligations under the OLA and in particular, its alleged obligations to inform FMCs about public hearings that could affect them.

[33] To clarify, the immunity at issue in *Ernst* is clearly not an immunity that applies to all state actors or to all government decision makers. It is a judicial immunity extended by common law to regulatory bodies and quasi-judicial administrative tribunals, such as the AER (and the CRTC): *Ernst* at paras 40–41, 50–51. *Ernst* does not suggest that the mere fact that decisions of a government decision maker can be subject to judicial review means that immunity applies or that a claim for damages is unavailable.

(5) Application in this case

(a) *Statutory or common law immunity?*

[34] The CRTC relies on the immunity extended by common law, as discussed in *Ernst*. It also relies on section 16 of the *Broadcasting Act*, SC 1991, c 11, which states the following:

Powers respecting hearings	**Attributions**
16 The Commission has, in respect of any hearing under this Part, with regard to the attendance, swearing and examination of witnesses at the hearing, the production and inspection of documents, the enforcement of its orders, the entry and inspection of property and other matters necessary or proper in relation to the hearing, all such powers, rights and privileges as are vested in a superior court of record.	**16** Le Conseil a, pour la comparution, la prestation de serment et l'interrogatoire des témoins aux audiences tenues en application de la présente partie, ainsi que pour la production et l'examen des pièces, l'exécution de ses ordonnances, la visite des lieux ou l'examen des biens et toutes autres questions concernant ces audiences, les attributions d'une cour supérieure d'archives.
[Emphasis added.]	[Je souligne.]

[35] The CRTC submits that a superior court of record's "powers respecting hearings" include judicial immunity and that section 16 functions as a statutory immunity provision. ANIM claims that this provision cannot be interpreted as supporting the common law immunity and that this section is very different from section 43 of the former ERCA at issue in *Ernst*.

[36] In a way, section 16 can simply be seen as a provision that gives the CRTC the powers required to hold hearings: requiring witnesses to appear, swearing them, ordering the production of evidence, etc. However, the provision does not speak solely of the CRTC's powers, but also of its rights and privileges (the French version of the provision refers only to "*attributions*"). As noted by the CRTC, in *R c Québec (Société des Alcools)*, 1998 CanLII 13129 (QC CA) at p 24, the Court of Appeal of Quebec found that section 16 includes common law immunity:

> [TRANSLATION]
> In short, the appellants' application for monetary relief relies on a collateral attack of the motivation behind and conclusions of the Commission's decisions. In my opinion, this is erroneous because on the one hand, the Commission, as an administrative tribunal, is protected by the Common Law immunity granted to Courts of Record, which it is by operation of section 16 of the *Broadcasting Act*—an immunity that is also extended to lower courts—and because, on the other, the appellants' action is a deviation from the judicial review procedure chosen by parliament.
> [Emphasis added; citations omitted.]

[37] I note that the Supreme Court of British Columbia also seems to have found that section 17 of the *Canadian International Trade Tribunal Act*, RSC 1985, c 47 (4th Supp), a provision that is very similar to section 16 of the *Broadcasting Act* in terms of powers, gives that tribunal judicial immunity: *Pacific Shower Doors (1995) Ltd v Osler, Hoskin & Harcourt, LLP*, 2011 BCSC 1370 at paras 65, 109, 115–16; see also *Canada (Procureur général) c Alex Couture*

Inc, 1991 CanLII 3120 (QC CA), regarding section 9 of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp).

[38] That said, even if section 16 of the *Broadcasting Act* confirms that the common law privileges and immunities apply to the CRTC, I accept the ANIM claim that it does not expand the scope of the immunity. If the common law immunity applies in accordance with the analysis in *Ernst*, its effect is to protect the CRTC. If it does not apply, the protection is not a power, right and privilege as are vested in a superior court of record, and section 16 has no effect.

(b) *The immunity regarding adjudicative functions applies, thereby making damages inappropriate and unjust*

[39] As I indicated, in *Ernst* eight justices of the Supreme Court concluded that the immunity applies at least to adjudicative functions, and ANIM is not claiming that the OLA precludes this immunity. The issue is therefore whether it is "plain and obvious" that this immunity applies to the ANIM allegations, namely, whether it is "plain and obvious" that ANIM's claim involves the CRTC's adjudicative functions. If so, according to my understanding of the eight justices' analysis, awarding damages cannot be an appropriate and just remedy and the request for this remedy must be struck. If not, the fact the Supreme Court was equally divided on the availability of damages tells me that it is not plain and obvious that awarding damages under the *Charter* or the OLA cannot be considered to be an appropriate remedy.

[40] For the following reasons, I find that it is plain and obvious that immunity applies. As indicated in *Ernst*, the fact that the immunity applies means that it cannot be "appropriate and just" to award damages as a remedy.

[41] To begin with, I note that Stratas J.A. for the Court of Appeal, in *JP Morgan*, noted that in a motion to strike, the Court must examine the notice of application thoroughly in order to understand the "real essence" or the "essential character" of the application: *JP Morgan* at paras 49–50. In my opinion, a thorough examination of ANIM's Notice of Application shows that the claim for damages is based on the CRTC's exercise of its adjudicative functions.

[42] The core of the allegations in the Notice of Application is found in paragraphs 36 to 79 of the Notice. These paragraphs are grouped under two headings, namely, [TRANSLATION] "*H. Decision 2012-629 and the harm caused to FMCs"* (paragraphs 36 to 58) and [TRANSLATION] "*I. Legal Foundations*" (paragraphs 59 to 79).

[43] Under the first heading, the Notice of Application describes *Broadcasting Decision CRTC 2012-629*, the effect of the decision on Sirius XM's annual contributions to MUSICACTION and the effect of this [TRANSLATION] "unequal allocation." It alleges that the CRTC [TRANSLATION] "did not give any special notice" regarding the decision and its effects "to FMC representatives", despite the significant changes to Sirius XM's conditions of licence. Then it describes the [TRANSLATION] "harm caused to FMCs by Decision 2012-629". At paragraphs 50 to 58, the Notice of Application alleges a financial impact [TRANSLATION] "as a result of

Decision 2012-629" and states the differences between the contributions received by MUSICACTION and those received by FACTOR for each year between 2013 and 2019.

[44] Under the second heading, the Notice of Application presents the "legal foundations" of the application. This consists mainly of a reproduction of sections of the *Charter* and the OLA, but also contains some paragraphs going to the substance of the issue, in particular paragraphs 65, 67, 72 and 73. These paragraphs address the notice given by the CRTC of the hearing held for the renewal of Sirius XM's licence. They allege that the notice is a public service that must be of equal quality in both official languages, that CRTC notices must be adapted to the needs of minority language communities to respect the standard of substantive equality, that FMC representatives must be kept informed of the process of public hearings affecting them, and that the CRTC must advise FMC representatives when an application for a new licence or a renewal involves the broadcaster's contribution to MUSICACTION and must keep them informed if such an issue is raised at a hearing.

[45] Essentially, the claim for damages relies on allegations that the CRTC did not properly notify FMC representatives, nor did it keep them informed of the issues surrounding the renewal of Sirius XM's licence. ANIM alleges that this failure constitutes a breach of the CRTC's obligations under the OLA and the *Charter* and that this breach caused economic harm to the FMCs because of the decrease in contributions from Sirius XM to MUSICACTION stipulated by the CRTC. In other words, the claim is based on (i) notice from the CRTC (or lack thereof) before and during the hearing; and (ii) the resulting CRTC decision and its impact.

[46] In my opinion, it is plain and obvious that such allegations are directly related to the CRTC's adjudicative functions. CRTC decisions and the process that leads to its decisions are at the heart of this tribunal's quasi-judicial obligations and therefore at the heart of the immunity that renders a remedy of damages "inappropriate and unjust" according to the *Ernst* analysis.

[47] ANIM claims that its application does not concern the CRTC's quasi-judicial activities and does not target any CRTC decision. I accept that the Notice of Application does not seek to have the CRTC decision overturned, but this does not mean that it does not concern the CRTC's quasi-judicial activities. Notices are a fundamental aspect of the decision-making process. Because of this, a failure to give proper notice could lead to a decision being set aside and procedural issues, including those surrounding the notice, being raised as a basis for judicial review or appeal of the decision of an administrative tribunal: *Confederation Broadcasting (Ottawa) Ltd v Canadian Radio-Television Commission*, [1971] SCR 906 at 925–26; FC Act, para 18.1(4)(b). ANIM alleges that the notice the CRTC gave did not comply with its obligations under the OLA and the *Charter*. But this does not affect the fact that the claim is a claim for monetary relief for the *manner* in which the CRTC made its decision and the *effect* the resulting decision had on the FMCs.

[48] ANIM claims that it did not simply seek to recover the amounts it would otherwise have obtained if *Broadcasting Decision CRTC 2012-629* included an equal allocation of income between MUSICACTION and FACTOR. However, the harm identified in the Notice of Application by ANIM itself is the financial impact of the decision.

[49] I cannot therefore accept ANIM's argument that it [TRANSLATION] "is not concerned with the fairness or the relevance of the decision rendered by the CRTC" but only [TRANSLATION] "the fact the CRTC did not properly inform the FMCs that a public hearing was being held". The Notice of Application clearly challenges the fairness of the decision, even though it does not seek to have it set aside. The "unequal allocation" in the decision is at the very root of the financial impact that justifies the claim for damages. It is ANIM that is connecting the failure to give notice with the claim for damages, asking the CRTC to pay it damages [TRANSLATION] "for the harm the CRTC's breaches of the OLA and the *Charter* caused to ANIM's members" [emphasis added]. The "harm" in question is clearly revealed in paragraphs 50 to 58, namely, the money that was not paid to MUSICACTION because of the allocation. ANIM cannot say both that the decision caused significant harm for which it must be compensated and that it is not challenging the fairness of the decision. At any rate, whether it disputes the fairness of the decision or not, ANIM is clearly challenging the procedures that led to this decision, which are at the core of the CRTC's adjudicative functions.

[50] The substance of the allegations in this case is therefore different from that in *Ernst*. The allegations in *Ernst* involved so-called "punitive" conduct that allegedly prevented Ms. Ernst from writing to the tribunal until she stopped publicly criticizing it. These allegations did not involve a decision by the AER in a case before the tribunal or the process that led to such a decision. This is the difference that led the minority to conclude that it was not plain and obvious that the AER had been acting in its adjudicative capacity, thereby triggering immunity: *Ernst* at paras 144, 172. In this case, it is not alleged that the CRTC's conduct was motivated by bad

faith, ill-will or abuse of power, assuming that such allegations can frustrate immunity: *Ernst* at paras 57, 173.

[51] ANIM also notes that in *Ernst*, the availability of another remedy, specifically judicial review, was a countervailing factor against the awarding of damages: *Ernst* at paras 33–35. ANIM alleges that in this case, neither an appeal under section 31 of the *Broadcasting Act* nor an application for judicial review would give them damages or uphold their language rights. ANIM alleges that, at any rate, it is not seeking to challenge *Broadcasting Decision CRTC 2012-629*.

[52] This argument cannot succeed because it was specifically rejected by the majority of the Supreme Court in *Ernst*. Ms. Ernst was not seeking to have her exclusion, which the AER had already ended, set aside, and damages were not available through judicial review. Cromwell J. concluded that this did not affect the analysis of the other remedies:

> [W]here another remedy is available to effectively address a *Charter* breach, damages may be precluded by virtue of this countervailing factor. In my view, the availability of judicial review to address alleged *Charter* breaches by the Board is a strong countervailing factor
>
> I have no doubt, as my colleague Justice Abella notes, that judicial review is available to address the Board's alleged *Charter* breaches. . . .
>
> . . .
>
> Thus, judicial review of the Board's decisions and directives has the potential to provide prompt vindication of *Charter* rights, to provide effective relief in relation to the Board's conduct in the future, to reduce the extent of any damage flowing from the breach, and to provide legal clarity to help prevent any future breach of a similar nature. While the remedies available under judicial review do not include *Charter* damages, *Ward* directs us to consider the existence of alternative remedies, not identical ones.

[Emphasis added; citations omitted; *Ernst* at paras 32, 33, 37.]

[53] As noted by Cromwell J. in this passage, Abella J. was in agreement: *Ernst* at paras 127–29. Therefore, the majority of the Supreme Court rejected the argument that the unavailability of damages through judicial review affects immunity or the availability of this remedy against a tribunal under subsection 24(1) of the *Charter*: *Ernst* at paras 166–67. The Supreme Court's majority decision binds the Court and, in my opinion, it is plain and obvious that the same analysis must apply to the remedial provisions of the OLA.

[54] Contrary to ANIM's arguments, the fact ANIM is not seeking to have the CRTC decision set aside does not mean that judicial review is not available. The quashing of a decision, the equivalent of a writ of *certiorari*, is not the only remedy available in a judicial review: FC Act, ss 18(1), 18.1(3). Indeed, a judicial review is not necessarily tied to a decision at all: *May v CBC/Radio Canada*, 2011 FCA 130 at para 10. As discussed in greater detail below, an alleged breach of obligations under the OLA or the *Charter* can be raised on judicial review or on appeal under section 31 of the *Broadcasting Act*. This does not distinguish this case from *Ernst*. At any rate, according to my interpretation of *Ernst*, the important factor was the availability of other remedies instead of damages, and not the procedure followed to obtain the remedy: *Ernst* at paras 32–37.

[55] As a final observation, I would note that I dismiss ANIM's argument that the CRTC's alleged obligations under the OLA to inform FMCs about public hearings that might affect them are analogous to the Crown obligation to consult First Nations. The obligation to consult has both a constitutional dimension grounded in the honour of the Crown and a legal dimension that

recognizes and affirms existing Aboriginal and treaty rights: *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 19; *Constitution Act, 1982*, ss 35(1). Given the different sources, scope and effect, I do not see how attempting to draw a comparison with the obligation to consult would be useful in analyzing the questions before this Court.

[56] I conclude that it is plain and obvious that the ANIM claim for damages against the CRTC cannot succeed. Such a remedy would never be "appropriate and just" considering the CRTC's immunity with regard to its adjudicative functions and the nature of ANIM's allegations that touch on these functions. In *Ernst*, the Supreme Court came to the same conclusion in the context of a motion to strike, and I find that this conclusion actually disposed of this issue.

B. *The request for an order that the CRTC impose conditions of licence*

(1) Background: the request and its merits

[57] The CRTC is seeking to have struck ANIM's request for an order in its Notice of Application:

> [TRANSLATION]
> **ORDERING THAT** the CRTC, in its broadcasting decisions, impose for a period of time to be determined before the hearing the conditions of licence necessary to increase licensees' annual contributions to MUSICACTION, up to a quantum that will be specified prior to the hearing, for the funding of FMC initiatives that are eligible for CCD funding pursuant to the Radio Regulations, as an appropriate and just remedy under subsection 77(4) of the OLA and subsection 24(1) of the *Charter*, for the harm caused to FMCs by the [CRTC's] breaches of the OLA and the *Charter*.

[58] This order is based on the same allegations summarized above. The "harm caused to FMCs by the [CRTC's] breaches of the OLA and the *Charter*" is the same harm, namely insufficient contributions to MUSICACTION as a result of the allocation set out in *Broadcast Decision CRTC 2012-629*.

[59] The CRTC argues that, under the *Broadcasting Act*, it has the exclusive jurisdiction to impose conditions of licence, that this court has no jurisdiction in this matter and that according to paragraph 28(1)(*c*) of the FC Act, only the Federal Court of Appeal may review licences approved by the CRTC on judicial review. Essentially, it argues that ANIM is seeking an order in the nature of a writ of *mandamus* that can only be issued by the Court of Appeal under sections 18, 18.1 and 28 of the FC Act and that ANIM cannot indirectly do what it cannot do directly [TRANSLATION] "under the guise of" the OLA or the *Charter*.

[60] On the contrary, ANIM argues that subsection 77(4) of the OLA and subsection 24(1) of the *Charter* confer on this Court broad remedial powers and that, like constitutional and quasi-constitutional provisions, these provisions take precedence over all other legislative provisions. It notes that injunction and supervision orders have been issued in the past as remedies for language rights under these provisions: see *Doucet-Boudreau* at paras 70, 72, 83, 87–88. It argues that ANIM is not asking this Court to set conditions of licence itself but to direct the CRTC to impose them, which essentially constitutes a type of injunction that can be ordered under subsection 77(4) of the OLA and/or subsection 24(1) of the *Charter*.

(2) Nature of the order being sought

[61] The CRTC argues that the order being sought is an order that can only be obtained through judicial review. The remedies available in a judicial review are described in subsections 18(1) and 18.1(3) of the FC Act:

Extraordinary remedies, federal tribunals	**Recours extraordinaires : offices fédéraux**
18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	**18 (1)** Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and	**a)** décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;
(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	**b)** connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.
. . .	. . .
Remedies to be obtained on application	**Exercice des recours**

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.	**(3)** Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.
Powers of Federal Court	**Pouvoirs de la Cour fédérale**
18.1 (3) On an application for judicial review, the Federal Court may	**18.1 (3)** Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	**a)** ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	**b)** déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.
[Emphasis added.]	[Je souligne.]

[62] For ease of reference, I will refer to remedies or orders contemplated by subsections 18(1) and 18.1(3) of the FC Act as "extraordinary remedies".

[63] Basically the order sought by ANIM is an order that would require the CRTC to do something specific in the context of its adjudicative functions, specifically to impose certain conditions of licence. In the language of paragraph 18.1(3)(a) of the FC Act, it would order the

CRTC “to do any act or thing it has unlawfully failed . . . to do”. Whether we call this a writ of *mandamus*, an injunction or any other name is not important. It is simply an order of the nature contemplated by subsections 18(1) and 18.1(3) of the FC Act, namely an extraordinary remedy.

[64] Subsection 18(3) states that extraordinary remedies are obtained on an application for judicial review, and subsections 28(1) and (3) state that the Court of Appeal, not this Court, has jurisdiction to hear and determine applications made in respect of the CRTC:

Judicial review	**Contrôle judiciaire**
28 (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:	**28 (1)** La Cour d’appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :
. . .	. . .
(c) the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*;	**c)** le Conseil de la radiodiffusion et des télécommunications canadiennes constitué par la *Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes*;
. . .	. . .

Federal Court deprived of jurisdiction	**Incompétence de la Cour fédérale**
(3) If the Federal Court of Appeal has jurisdiction to hear and determine a matter, the Federal Court has no jurisdiction to entertain any proceeding in respect of that matter	**(3)** La Cour fédérale ne peut être saisie des questions qui relèvent de la Cour d'appel fédérale.
[Emphasis added.]	[Je souligne.]

[65] The issue before the Court is therefore whether it is plain and obvious that an extraordinary remedy, based on an alleged violation of obligations under the OLA and/or the *Charter*, cannot be granted by this Court in the context of this application, which is not an application for judicial review: *Forum des maires* at paras 15, 18; *Marchessault v Canada Post Corporation*, 2003 FCA 436 at para 10. For the following reasons, I find that it is plain and obvious that this Court cannot grant such an order under the *Charter*, but it is not plain and obvious that it cannot grant it under the OLA.

[66] Before continuing, I would note that a CRTC decision can be appealed to the Federal Court of Appeal if the court grants leave to appeal: *Broadcasting Act*, subsection 31(2). When an appeal is available, an application for judicial review is not: FC Act, section 18.5. Procedural issues such as a lack of notice can be raised in a CRTC appeal: *Arthur v Canada (Attorney General)*, 1999 CanLII 9243 (FCA) at paras 20, 28. However, an appeal is generally available only to the parties before the CRTC: *Telecommunications Workers Union v Canada (Radio-television and Telecommunications Commission)*, [1993] 1 FC 231 at 234–35; *Arthur* at paras 25–26. Whether the alternative procedure is an appeal or application for judicial review

affects neither the analysis nor the outcome, because both fall within the jurisdiction of the Court of Appeal. Since ANIM was not a party before the CRTC, I will refer to applications for judicial review.

(3) Subsection 24(1) of the *Charter*

[67] In my opinion, the determination of the *Charter* issue is fairly simple. ANIM's *Charter*-based request is a request for a remedy under subsection 24(1) to justify a violation or denial of rights guaranteed under the *Charter*. To make an order under subsection 24(1) of the *Charter*, this Court must be a "court of competent jurisdiction". Subsection 24(1) does not create courts of competent jurisdiction but merely vests powers in courts which are already found to be competent independently of the *Charter*: *Mills* at p 960, citing *R v Morgentaler, Smoling and Scott*, 1984 CanLII 55 (ON CA), Brooke J.A. A court is competent if it has jurisdiction over the parties, the subject matter and the remedy sought: *R v Conway*, 2010 SCC 22 at para 24, citing *Mills*.

[68] In this case, as I have noted, the sought-after remedy is one of the extraordinary remedy identified in subsections 18(1) and 18.1(3) of the FC Act. The FC Act is clear that extraordinary remedies may be obtained only on application for judicial review if they are not available on appeal: FC Act, sections 18(3), 18.5. Paragraph 28(1)(c) of the FC Act confers on the Federal Court of Appeal the jurisdiction to grant these remedies in respect of the CRTC. A *Charter* violation can be raised as a ground for judicial review and a remedy under subsection 24(1) can be awarded: *Ernst* at paras 33, 41, 49; *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 27–32, 48; FC Act, paragraphs 18.1(4)(c),(f). The Court of Appeal therefore has

jurisdiction to hear ANIM's allegations about a *Charter* violation and to grant the order sought, namely to order the CRTC to impose conditions of licence.

[69] If the Court of Appeal has jurisdiction, this Court does not: FC Act, subsection 28(3). Without jurisdiction over the remedy, this Court is not the "court of competent jurisdiction" to grant a remedy under subsection 24(1) of the *Charter*.

[70] This finding does not change because the Court has jurisdiction under subsection 77(4) of the OLA. Contrary to the jurisdiction conferred on the Federal Courts by the FC Act that can be exercised when a federal board, commission or other tribunal has acted in a way that was "contrary to law", including the *Charter,* the remedial jurisdiction conferred by the OLA can only be exercised if the Court feels that a federal board, commission or other tribunal did not comply with the OLA. The jurisdiction conferred by subsection 77(4) does not give this Court jurisdiction over the remedy requested by ANIM for the purposes of subsection 24(1) of the *Charter*.

[71] This result would be even more obvious if we imagined a situation in which ANIM based its application solely on an alleged *Charter* violation. Such an application should clearly have been filed before the Court of Appeal and not before this Court. The fact that here, ANIM is also seeking remedies under the OLA does not confer *Charter* jurisdiction on this Court.

[72] I therefore conclude that it is plain and obvious that this Court does not have jurisdiction to hear ANIM's request for an order ordering the CRTC to impose conditions of licence as a remedy under subsection 24(1) of the *Charter*.

(4) Subsection 77(4) of the OLA

[73] The situation is different with regard to subsection 77(4) of the OLA. The remedies under this provision are not available from a "court of competent jurisdiction" but from this Court in particular: OLA, s 76. Contrary to the *Charter*, which indicates that recourse may be sought from a tribunal that already has jurisdiction, the OLA confers jurisdiction specifically on this Court.

[74] The CRTC's argument is, in effect, that even if this Court has jurisdiction under subsection 77(4) to grant the remedy it "considers appropriate and just in the circumstances", it cannot grant an extraordinary remedy because such a remedy is only available for the Court of Appeal on judicial review: FC Act, subsections 28(1)(c), (3). The CRTC notes that the Supreme Court confirmed that the general discretionary remedial power set out in subsection 77(4) is restricted by the specific limitations of other legislation: *Thibodeau (SCC)* at paras 109–18.

[75] The CRTC's argument assumes that an order such as the one sought by ANIM, based on a violation of parts IV or VII of the OLA, may be granted by the Court of Appeal in the context of judicial review; ANIM challenges this assumption. For the following reasons, I accept that such a violation may be considered and may be the basis of a judicial review, but I conclude that it is not plain and obvious that this Court cannot also grant such a remedy.

[76] In *Devinat*, the Court of Appeal confirmed that a breach of section 20 of the OLA may be raised as a basis for judicial review: *Devinat v Canada (Immigration and Refugee Board*), [2000] 2 FC 212 at paras 22–38. If such a violation can be raised on judicial review before this Court, it

can necessarily also be raised on judicial review before the Court of Appeal when it involves a federal board, commission or other tribunal listed in subsection 28(1) of the FC Act.

[77] ANIM notes that since section 20 of the OLA, which was at issue in *Devinat*, is in Part III of the OLA, which is not identified in subsection 77(1) of the OLA, this section is not subject to section 77 proceedings. It argues that it is less clear that a breach of one of the provisions set out in subsection 77(1) may be raised in an application for judicial review.

[78] Even though *Devinat* involves a provision of the OLA that is not listed in subsection 77(1), the Court of Appeal's reasoning indicates that it is not limited to these provisions. The Court of Appeal began its analysis by noting that the tribunal in question, the Immigration and Refugee Board, is a "federal board, commission or other tribunal" within the meaning of subsection 2(1) of the FC Act and that it is also subject to the OLA. As a result, at issue was whether Part X of the OLA *excluded* the application for judicial review brought by Mr. Devinat under the FC Act: *Devinat* at para 22.

[79] The Court of Appeal concluded that Part X of the OLA did not exclude judicial review. The tribunal argued that Part X contains a "complete code" and that in the cases mentioned in section 77, a complainant may bring an action in the courts, but that no court action was available for the other provisions: *Devinat* at paras 25–26. The Court of Appeal rejected this "strict interpretation" because such an exclusion would have to be made expressly, which is not the case in the OLA: *Devinat* at para 28. The Court concluded that it could not, "in the absence of any such express provision, exclude a 'federal board, commission or other tribunal' such as

the Board from the application of the general system of the law, such as section 18.1 of the [FC Act]" [emphasis added]: *Devinat* at para 35.

[80] This analysis by the Court of Appeal also applies to Parts IV and VII of the OLA that are listed in subsection 77(1). Part X does not include an express exclusion of the general system of the law of the FC Act in respect of parts IV and VII. On the contrary, the only indication in the OLA is subsection 77(5), which states that nothing in section 77 "abrogates or derogates from any right of action". The Court of Appeal also relied on the rule that if there is a right, there must be a means to maintain it. This rule is less important in the case of the provisions listed in subsection 77(1), which can be maintained in an application under section 77. But the Court of Appeal's central analysis, that a federal board, commission or other tribunal is subject to the general system of law of section 18.1 in the absence of a clear exclusion, still applies. Lemieux J. of this Court came to the same general conclusion in *Lavoie*, a case that also involved a provision of the OLA that is not listed in subsection 77(1): *Lavoie v Canada (Attorney General)*, 2007 FC 1251 at paras 39–42.

[81] This conclusion is in complete agreement with the FC Act. Section 18.1 of the FC Act states that an application for judicial review may be made if the federal board, commission or other tribunal has failed to observe a procedure that it was "required by law to observe" or acted in a way that was "contrary to law":

Grounds of review	**Motifs**
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	**(4)** Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	**a)** a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	**b)** n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	**c)** a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	**d)** a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or	**e)** a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(f) acted in any other way that was contrary to law.	**f)** a agi de toute autre façon contraire à la loi.
[Emphasis added.]	[Je souligne.]

[82] This provision does not limit the legal source of the procedural obligations or the "law" that must be respected. ANIM essentially alleges that the CRTC failed to observe a procedure it

was legally required to respect under the OLA and that it acted in a way that was contrary to this law.

[83] Without specifically ruling on its jurisdiction, this Court has ruled on the merits of an alleged breach of an OLA provision that is not listed in subsection 77(1) in several applications for judicial review: *Kaudjhis v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 567 at paras 14–21 (ss 22 and 27 of Part IV of the OLA); *Musa v Canada (Citizenship and Immigration)*, 2012 FC 298 at paras 11–15 (ss 21 and 22 of Part IV of the OLA); *Moore v Canada (Attorney General)*, 2007 FC 1127 at paras 6, 9 (ss 21, 24, 25 of Part IV of the OLA).

[84] However, even if the Court has jurisdiction to hear and determine applications for judicial review, it can exercise its discretion to dismiss applications because there is an "adequate alternative remedy": *Strickland v Canada (Attorney General*), 2015 SCC 37 at paras 40–42. In *Vicrossano*, Gibson J. found that in light of the complaint process to the Commissioner of Official Languages and the application process to the Court under section 77 of the OLA, the applicant could not raise an alleged breach of the OLA in her application for judicial review: *Vicrossano Inc v Canada (Attorney General)*, 2002 FCT 1999 at paras 2, 20–22. Beaudry J. also rejected an argument based on the OLA when a complaint was filed with the Commissioner and the applicant had not filed an application under section 77: *Poulin v Canada (Attorney General)*, 2004 FC 1132 at paras 16–19. However, neither Gibson J. nor Beaudry J. relied on *Devinat* or subsection 77(5) of the OLA in making these findings.

[85] I am not to decide whether a remedy under section 77 is an adequate remedy, or whether it can be in certain cases. Faced with an application for judicial review based wholly or partially on a breach of an obligation under a provision listed in subsection 77(1) of the OLA, the Court must consider that question. It must, among other things, consider whether a remedy that requires waiting for a report that could take six years to obtain, or at least waiting six months after filing a complaint, is adequate in the circumstances.

[86] The reason why I do not feel required to rule on this issue here is that I conclude that it is not plain and obvious that subsections 18(3) and 28(3) of the FC Act remove the power to grant an extraordinary remedy from the jurisdiction conferred by subsection 77(4).

[87] In *Forum des maires*, the Court of Appeal held that "[t]he relief the applicant may be seeking [under subsection 77(4)] is not limited to the remedies prescribed in subsection 18.1(3) of the *Federal Courts Act*" [emphasis added]: *Forum des maires* at para 18. This indicates that an extraordinary remedy prescribed in subsection 18.1(3) may also be granted under subsection 77(4).

[88] This Court therefore has jurisdiction to grant an extraordinary remedy under subsection 77(4) of the OLA even if the FC Act states that such a remedy may be obtained only on an application for judicial review. Does this mean that this Court always has the jurisdiction to grant an extraordinary remedy under subsection 77(4) when the FC Act states that it may be obtained only on an application for judicial review *to the Federal Court of Appeal*? In my

opinion, the answer to this question is not so plain and obvious that it can justify the preliminary striking of the request for the order in ANIM's Notice of Application.

[89] Indeed, there is a law, the OLA, that states that the Federal Court in particular may grant an order, and another law, the FC Act, that states that only the Federal Court of Appeal may grant this order. The case law does not give a clear answer on how these two laws intersect on this issue.

[90] The most relevant decision the parties were able to cite was *Centre québécois du droit de l'environnement v National Energy Board*, 2015 FC 192. In that case, de Montigny J., then of this Court, found that he could not grant an injunction against the National Energy Board (NEB) for an alleged violation of the OLA. He decided that the injunction power against the NEB had been granted to the Federal Court of Appeal by paragraph 28(1)(f) of the FC Act and that the applicants should have challenged the NEB decision before the Court of Appeal. However, on examining section 77 of the OLA, de Montigny J. noted only that the conditions authorizing the exercise of the remedy, namely making a complaint with the COL, had not yet been met. As a result, he did not conclude that such a remedy could never be granted by this Court, but simply that "the remedy under the OLA is not yet appropriate".

[91] The principles of statutory interpretation do not give a clear answer either. The quasi-constitutional status of the OLA suggests that these provisions should have primacy. However, the OLA expressly states that in the event of any inconsistency between parts I to V and any other Act of Parliament, parts I to V "prevail to the extent of the inconsistency", but it does not

grant the same privilege to Part X: OLA, section 82. There is no express indication in the OLA that Parliament wanted to effectively remove or duplicate the Court of Appeal's general supervisory power over the federal boards, commissions or other tribunals listed in section 28 of the FC Act in cases involving a violation of the OLA. On the other hand, there is no express indication that Parliament wanted the "wide remedial authority" conferred on this Court to be limited in cases involving a federal board, commission or other tribunal listed in section 28.

[92] I would also note that regardless, there is a risk of multiple proceedings. If the remedies under subsections 18(1) and 18.1(3) are only available before the Federal Court of Appeal in applications for judicial review (as for *Charter* violations), as the CRTC submits, applicants would be required to commence an application before this Court for some remedies and another application before the Court of Appeal for other remedies, with both applications being based on the same facts and perhaps the same alleged OLA violation. If, however, this type of remedy is available before this Court for an OLA violation, as ANIM alleges, applicants alleging violations of the OLA, the *Charter* and principles such as procedural fairness, would always be required to commence several applications before both courts, especially if, like ANIM, they are seeking various orders including those covered by the FC Act and those that are not. Such an outcome is perhaps necessary in the fairly rare context of alleged violations of the OLA by a federal board, commission or other tribunal identified in section 28 of the FC Act. However, this outcome points to the fact that the interaction of these two laws in such a case is not the proper foundation for striking the request.

[93] I therefore conclude that it is not plain and obvious, in light of the relevant provisions of the OLA and the FC Act and the case law dealing with them, that this Court does not have jurisdiction to award an extraordinary remedy against the CRTC under subsection 77(4) of the OLA if it finds that the CRTC did not respect its obligations under the OLA. This Court must determine that issue when it decides the application on its merits.

[94] ANIM's request for an order that the CRTC impose conditions of licence in its future broadcasting decisions will therefore not be struck to the extent that it is based on an alleged violation of the OLA.

C. *Paragraphs 36 to 58 should not be struck*

[95] The CRTC's final request is to strike paragraphs 36 to 58 of ANIM's Notice of Application, which supposedly "correspond" to the two requests for orders dealt with above. The CRTC did not make detailed arguments on this aspect of its motion, be it in its written submissions or at the hearing; in fact, it candidly acknowledged that this request was [TRANSLATION] "ancillary" to the requests to strike the two orders.

[96] As indicated above, the paragraphs refer to *Broadcast Decision CRTC 2012-629*, describe the CRTC's alleged failure to give proper notice to the FMCs, and present the harm caused to the FMCs as a result of this decision in the shape of unequal amounts received by MUSICACTION and FACTOR.

[97] In my opinion, these paragraphs are relevant to ANIM's allegations of harm and the CRTC's alleged breach of its obligations under the OLA, even if they cannot justify a claim for damages. I accept ANIM's argument that even if the claim for damages is struck, and even if I were to strike the entire second request for an order, these facts are relevant to the context and to the allegations of a systematic problem. I therefore reject this aspect of the CRTC's motion.

D. *Costs*

[98] The CRTC is seeking costs in the event that its motion is allowed and has conceded that ANIM is entitled to costs if its motion is dismissed. In turn, ANIM is seeking costs regardless of the outcome on the motion. It submits that it has raised important new principles in relation to the OLA and that section 81 of the OLA states that in this case, the Court shall order that costs be awarded to it:

Costs	**Frais et dépens**
81 (1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.	**81 (1)** Les frais et dépens sont laissés à l'appréciation du tribunal et suivent, sauf ordonnance contraire de celui-ci, le sort du principal.
Idem	**Idem**
(2) Where the Court is of the opinion that an application under section 77 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.	**(2)** Cependant, dans les cas où il estime que l'objet du recours a soulevé un principe important et nouveau quant à la présente loi, le tribunal accorde les frais et dépens à l'auteur du recours, même s'il est débouté.

[Emphasis added.] [Je souligne.]

[99] The issue of the availability of damages under subsection 77(4) of the OLA against a quasi-judicial tribunal has not previously been addressed in the case law. As I noted above, the question of this Court's power to issue an order of the nature described in subsections 18(1) and 18.1(3) of the FC Act remains uncertain. At the same time, the relevance of these questions in this case has not yet been determined, since the merits of ANIM's application, and in particular, the existence of an OLA violation, remain to be determined.

[100] In my opinion, in the current circumstances, where the CRTC's motion has been allowed in part only and where ANIM's application remains to be ruled on, it is appropriate for the question of the costs of this motion to be referred to the judge who will examine the merits of the main application.

IV. Conclusion

[101] For these reasons, the CRTC's motion is allowed in part. The claim for damages is struck. The request for an order that the CRTC impose conditions of licence in future is struck only to the extent that it is based on the *Charter*.

ORDER in docket T-1480-19

THE COURT ORDERS that

1. The Canadian Radio-television and Telecommunications Commission's motion is allowed in part.

2. The following request is struck from the Notice of Application, namely the request for an order:

> [TRANSLATION]
> **ORDERING THAT** the CRTC pay damages to ANIM, the quantum of which shall be determined prior to the hearing, for the funding of its members' initiatives that are eligible for Canadian Content Development ("**CCD**") funding pursuant to the *Radio Regulations, 1986*, SOR/86-982 ("**Radio Regulations**"), as an appropriate and just remedy, under subsection 77(4) of the OLA and subsection 24(1) of the *Charter*, for the harm caused to ANIM members by [the CRTC's] breaches of the OLA and the *Charter*[.]

3. The words "and subsection 24(1) of the *Charter*" and "and the *Charter*" are struck from the following request in the Notice of Application, namely the request for an order:

> [TRANSLATION]
>
> **ORDERING THAT** the CRTC, in its broadcasting decisions, impose for a period of time to be determined before the hearing the conditions of licence necessary to increase licensees' annual contributions to MUSICACTION, up to a quantum that will be specified prior to the hearing, for the funding of FMC initiatives that are eligible for CCD funding pursuant to the Radio Regulations, as an appropriate and just remedy under subsection 77(4) of the OLA and subsection 24(1) of the *Charter*, for the harm caused to FMCs by the [CRTC's] breaches of the OLA and the *Charter*.

4. The request to strike paragraphs 36 to 58 of the Notice of Application is rejected.

5. Costs for this motion are referred to the judge who will rule on the merits of the application.

"Nicholas McHaffie"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1480-19
STYLE OF CAUSE:	ALLIANCE NATIONALE DE L'INDUSTRIE MUSICALE v CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 11, 2021
ORDER AND REASONS BY:	MCHAFFIE J.
DATE OF REASONS:	SEPTEMBER 14, 2021

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