

Federal Court of Appeal



Cour d'appel fédérale

Date: 20161110

Docket: A-457-15

Citation: 2016 FCA 275

**CORAM: DAWSON J.A.
NEAR J.A.
WOODS J.A.**

BETWEEN:

ABORIGINAL VOICES RADIO INC.

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on November 8, 2016.

Judgment delivered at Toronto, Ontario, on November 10, 2016.

**REASONS FOR JUDGMENT BY:
CONCURRED IN BY:**

**DAWSON J.A.
NEAR J.A.
WOODS J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20161110

Docket: A-457-15

Citation: 2016 FCA 275

**CORAM: DAWSON J.A.
NEAR J.A.
WOODS J.A.**

BETWEEN:

ABORIGINAL VOICES RADIO INC.

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

DAWSON J.A.

[1] In Broadcasting Decision CRTC 2015-282 the Canadian Radio-television and Telecommunications Commission revoked the broadcasting licenses for the Type B Native radio stations CKAV-FM Toronto, CKAV-FM-2 Vancouver, CKAV-FM-3 Calgary, CKAV-FM-4 Edmonton and CKAV-FM-9 Ottawa held by Aboriginal Voices Radio Inc. This is an appeal

from the decision of the Commission. This appeal proceeds pursuant to the Court's order of August 21, 2015 granting leave to appeal the decision.

[2] The appeal was set for hearing on November 8, 2016, by order dated August 16, 2016. Thereafter, by order dated October 3, 2016, counsel for Aboriginal Voices was permitted to withdraw. On November 4, 2016, the Chairman of Aboriginal Voices wrote to the Court asking for an adjournment of the hearing. The letter advised that counsel for Aboriginal Voices had resigned due to its "inability to fully pay their fees at this time." The adjournment was requested on the basis that Aboriginal Voices "is currently underway with a fundraising effort for legal fees, which we feel will be successful given more time."

[3] At the commencement of the hearing on November 8, 2016, the Chairman of Aboriginal Voices made oral submissions in support of the requested adjournment. The Attorney General opposed this request and filed affidavit evidence. After hearing counsel for the Attorney General and the Chairman of Aboriginal Voices in reply, we briefly reserved our decision. After considering the request for an adjournment, we advised the parties that the adjournment was denied for reasons to be delivered later. Those reasons follow.

[4] First, the jurisprudence is to the effect that parties with a fixed hearing date will receive an adjournment only in exceptional circumstances.

[5] Second, the adjournment was sought for an unlimited period on the basis of an unspecified fundraising effort to raise funds for legal fees. This is of particular concern in

circumstances when the Commission in the decision under review noted that Aboriginal Voices' financial viability had been of recurring concern to the Commission (reasons, at paragraph 63) and found a new business plan submitted by Aboriginal Voices "does not include the type and level of detail necessary to convince the Commission of its viability" (reasons, at paragraph 67).

[6] Most importantly, in the decision under review, the Commission noted the "pressing need to serve the Aboriginal community as a whole given that issues vitally important to Aboriginal Canadians are not fully covered or addressed at all in non-Native media." Thus, the Commission indicated that as a matter of priority it intended to "issue a call for applications and hold a hearing to license new services that would fulfill this mandate" (reasons, at paragraph 86).

[7] Thereafter, by order dated August 21, 2015, this Court stayed the decision of the Commission revoking the licenses on terms that the parties strictly adhere to the timelines set out in the *Federal Courts Rules*.

[8] The evidence tendered by the Attorney General is not challenged by Aboriginal Voices. It is to the effect that:

- i. Aboriginal Voices' radio stations in Ottawa, Calgary and Edmonton are not currently broadcasting.
- ii. While Aboriginal Voices' station in Toronto is operational, the station in Vancouver is only intermittently active.
- iii. While acknowledging this Court's order staying its decision, the Commission has issued a call for applications for services.

- iv. The Commission has received twelve proposals from five organizations to operate radio stations serving indigenous communities in Vancouver, Calgary, Edmonton, Toronto and Ottawa.
- v. These applications will not be considered until this Court makes a final determination of this appeal.

[9] In these circumstances, we were satisfied the interests of justice did not favour granting the requested adjournment.

[10] After advising the parties that the adjournment would not be granted, we offered Aboriginal Voices the opportunity to address oral submissions to us, or the opportunity to have the appeal decided on the basis of the memoranda of fact and law filed by counsel for the parties. Aboriginal Voices selected the second alternative.

[11] I therefore turn to the merits of the appeal on the basis of the written record.

[12] On this appeal Aboriginal Voices asserts a number of errors on the part of the Commission. For the following reasons I am of the view that the Commission did not err as alleged.

[13] To begin, contrary to the submission of Aboriginal Voices, the Commission adequately considered the extent to which the Commission's Native Radio Policy affected Aboriginal Voices. Thus, at paragraph 58 of its reasons, the Commission acknowledged the licensee's

argument based on “the constraints associated with having to operate as a not-for-profit organization pursuant to the Native Radio Policy”. After acknowledging this argument the Commission went on to reject it, noting that Aboriginal Voices Radio “was not allocating sufficient resources to vital elements such as programming and sales and marketing”:

59. Similar explanations were provided by the licensee at each of the previous three renewal hearings. In the last renewal decision, the Commission specifically stated that it was concerned that AVR was not allocating sufficient resources to vital elements such as programming and sales and marketing, adding that it considered that an effective allocation of AVR’s limited resources would be critical if it was to overcome its financial challenges.

60. Notwithstanding these admonitions, in the current licence term AVR laid off almost all of its sales and programming staff in 2014. Of the remaining five staff members, four were executives. By its own admission, these remaining staff members were focused on larger questions of financial viability rather than ensuring regulatory compliance. As a case in point, in explaining how AVR could be unaware that its stations in Edmonton and Calgary had gone off-air, the licensee stated: “We weren’t necessarily focused on, you know, monitoring the station every day simply because we did not have the personnel to do that and we were trying to reinvigorate AVR as an operation.”

[14] Moreover, the Commission was not required to deal more comprehensively with this submission because during the hearing Aboriginal Voices abandoned its request to be exempted from the Native Radio Policy. Aboriginal Voices clarified to the Commission that its business plan was not contingent on receiving such an exemption (see paragraph 93 of the CRTC hearing transcript).

[15] Next, Aboriginal Voices argues that the Commission failed to fairly and adequately consider the proposed business plan it presented.

[16] This submission is without merit. At paragraph 15 of its decision the Commission noted that at the outset of the hearing it had stated its intent to consider, among other things, “the viability of [Aboriginal Voices Radio’s] business plan”. Thereafter at paragraphs 66 to 68 and at paragraph 73 the Commission wrote:

66. It is only at the end of the day on 8 May 2015, five days before the hearing, that AVR detailed its strategy to increase revenues in the event of a renewal. The business plan stated that all funding for AVR’s operations would come from advertising revenues. The necessary increase in advertising revenues was predicated on an increase in tuning, which the licensee submitted would be made possible through the implementation of two strategies to improve its position in the radio markets it serves, namely converting to the soft adult contemporary format and offering “advertiser-oriented-content, i.e. content that stands on its own as compelling content and also serves the marketing needs of the clients.”

67. While supported by a consulting group with extensive experience, this plan did not include the type and level of detail necessary to convince the Commission of its viability. In particular, the Commission finds that the financial projections filed as part of AVR’s business plan are untenable given AVR’s historical financial performance. Moreover, the projected increase in revenues is dependent on an increase in tuning, but little market research or quantitative evidence was provided to substantiate the projected increase in tuning.

68. More fundamentally, however, the plan was still a plan. At the hearing, AVR spoke of the types of advertisers it planned to approach, as well as the type of advertising spots (primarily advertiser-oriented content) that it intended to pursue. However, AVR could not provide concrete examples of advertisers who had agreed to purchase advertising time on the stations. In fact, AVR stated that it had not yet put together presentations to approach advertisers because of the uncertainty surrounding its licensing status. In its description of its business plan, AVR consistently used expressions such as “developing”, “being put into place”, “relatively new” and “putting together.”

...

73. Moreover, AVR’s attitude during this renewal process does not provide the Commission with confidence that the licensee understands or can deliver on its mandate as a Native Type B radio station with a focus on serving the Aboriginal communities in its urban markets. For example, Bray’s business plan proposed to remove the word Aboriginal from the branding of the stations and to focus on a soft adult contemporary music format with a target audience aged 35-64 and a female skew. While AVR argued that this format works well with the

Aboriginal music and cultural programming it broadcasts, it is telling that its stated target audience is female rather than Aboriginal.

[17] Aboriginal Voices next argues that the Commission considered an irrelevant factor in reaching its decision: the Commission's interpretation of what constitutes programming of "direct and particular relevance to the Aboriginal community".

[18] Again, I respectfully disagree. At paragraph 42 of its decision the Commission made reference to evidence from a representative of the Canadian Association of Aboriginal Broadcasters as to what constitutes content "of direct and particular relevance" to urban Aboriginal communities. This evidence is consistent with Aboriginal Voices' license application in respect of its Edmonton station in which it stated that "[n]ews stories selection will focus on events which impact Canada's urban Aboriginal communities that have been overlooked and under reported by other news sources". Implicit in the reasons of the Commission is the acceptance of this evidence.

[19] In any event, at paragraph 43 of its reasons, the Commission noted that even if one accepted the position of Aboriginal Voices with respect to what constitutes a news story of direct and particular relevance to the Aboriginal community, Aboriginal Voices did not air five distinct local news stories on May 29, 2014 as required by a condition of its license. At the end of the day the Commission was not satisfied that Aboriginal Voices had demonstrated that it provided a uniquely Aboriginal viewpoint and reported stories of direct and particular relevance to Aboriginal Canadians (reasons, at paragraph 44).

[20] Aboriginal Voices also argues that the Commission breached its duty of procedural fairness by departing from Aboriginal Voices' legitimate expectation that the Commission would follow its practice of graduated escalation of regulatory measures. However, the doctrine of legitimate expectations relates to procedural entitlements in administrative decision-making. It does not provide substantive relief.

[21] Paragraph 9(1)(e) of the *Broadcasting Act*, S.C. 1991, c. 11 grants broad authority to the Commission to "suspend or revoke any license". The doctrine of legitimate expectations cannot act to fetter or restrict the power conferred on the Commission to revoke a broadcasting license.

[22] Finally, Aboriginal Voices submits that the Commission failed to provide adequate reasons why all five licenses were revoked. Again, I reject this contention. Each of the radio stations operated by Aboriginal Voices were found to be noncompliant with the following license conditions:

- i. The obligation to file program logs and logger tapes pursuant to subsections 8(4) and 8(6) of the *Radio Regulations, 1986* (Regulations) (reasons, at paragraphs 22-26);
- ii. The obligation to file annual returns pursuant to subsection 9(2) of the Regulations (reasons, at paragraphs 27-30);
- iii. The obligation to respond to requests for information from the Commission regarding Aboriginal Voices' adherence to the conditions of its license, the *Broadcasting Act*, and the Regulations as required by paragraph 9(4)(b) of the Regulations (reasons, at paragraphs 31-35);
- iv. The obligation to file annual updates setting out how Aboriginal Voices was achieving its business objectives for each market as required by condition of license 9 (reasons, at paragraphs 46-50); and,
- v. The obligation to file audited financial statements for each of the five radio stations operated by Aboriginal Voices as required by condition of license 10 (reasons, at paragraph 51-57).

[23] It follows that I would dismiss the appeal with costs.

“Eleanor R. Dawson”

J.A.

“I agree

D.G. Near J.A.”

“I agree

Judith M. Woods J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-457-15

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

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 8, 2016

REASONS FOR JUDGMENT BY: DAWSON J.A.

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

DATED: NOVEMBER 10, 2016

APPEARANCES:

Wil Campbell FOR THE APPELLANT

Sean Gaudet FOR THE RESPONDENT
Jon Bricker

SOLICITORS OF RECORD:

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario