

## Broadcasting

# Decision 'highly consequential' for broadcasting regulation in Canada, legal scholar says

By **Ian Burns**

(June 16, 2023, 9:38 AM EDT) -- The Federal Court of Appeal has overturned a decision by the Canadian Radio-television and Telecommunications Commission (CRTC) to reprimand the French-language service of Canada's public broadcaster CBC/Radio-Canada for allowing a racial slur on-air.

The issue that gave rise to the dispute concerns the quotation on the airwaves of the Société Radio-Canada (SRC) of the title of a book by writer Pierre Vallières that contains what is described by the court as an "offensive and racist word beginning with the letter N." The SRC segment in question dealt with a petition demanding the dismissal of a Concordia University professor who had mentioned Vallières' book by its title in class.

In a split decision, the CRTC ruled the segment "goes against the Canadian broadcasting policy objectives and values" in the *Broadcasting Act*, while also saying the use of the "N-word" was not done in a discriminatory manner. It ordered the SRC to provide a public written apology to the person who complained about the segment, report on internal measures and programming best practices that it will put in place to ensure that it better addresses similar issues in the future and put in place measures to mitigate the impact of the broadcast of content that could be offensive.

But the Federal Court of Appeal has now set aside the CRTC's findings, with Chief Justice Marc Noël ruling the CRTC overstepped its jurisdiction by sanctioning the SRC on the sole basis that the content broadcast on the air was inconsistent with the Canadian broadcasting policy.

"As the Attorney General points out, the CRTC may amend the rules of conduct prospectively in order to adapt them to the new realities emerging from the changing social landscape, if it considers it necessary to do so. In addition, nothing prevents the CRTC from relying on the Canadian broadcasting policy in order to clarify the meaning and the scope of the existing rules of conduct," he wrote. "However, it remains that the CRTC cannot sanction licensees on the sole basis that what is said on the air is, in its opinion, inconsistent with the Canadian broadcasting policy, without more. As the Attorney General submits, to hold otherwise would be tantamount to conferring on the CRTC an unfettered discretion over what can and cannot be said on the air."

Chief Justice Noël also ruled the CRTC did not properly balance its statutory objectives with the SRC's freedom of expression, as guaranteed by both the *Broadcasting Act* and the Charter. He noted that, although two dissenting CRTC members brought up the freedom of expression issue, the decision itself makes no mention of it.

"Its structure revolves exclusively around the issue as to whether the broadcast of the 'N-word' on the air is consistent with the Canadian broadcasting policy," he wrote. "The fact that the dissenting members addressed the SRC's freedom of expression in detail makes the majority's silence on this issue even more difficult to explain. These opinions are more in line with the Attorney General's thesis that the majority was not alive to the issue pertaining to the SRC's freedom of expression, which explains why it did not conduct the balancing exercise mandated by the Charter."

As a result, Chief Justice Noël returned the matter to the CRTC so that it may redetermine the merits of the complaint. He was joined by Justices Richard Boivin and Nathalie Goyette in his decision, which was issued June 8 (*Société Radio-Canada v. Canada (Attorney General)*, 2023 FCA 131).

Paul Daly, chair in administrative law and governance at the University of Ottawa, was appointed by the court as an *amicus curiae* to ensure it had a comprehensive view of the legal arguments when the Attorney General's office said it could not defend the CRTC's decision. Daly, who argued the CRTC took into account the applicable legal framework and complied with the balancing exercise, said the decision was "highly consequential" for broadcasting regulation in Canada.



Paul Daly, University of Ottawa

"The CRTC has long taken the view that it can regulate the content of broadcasts by reference only to its objectives, and it doesn't need to identify a particular regulatory violation or license condition that has been breached," he said. "But as a result of this decision, that would now seem to be something that the CRTC is foreclosed from doing in the future."

Daly said the court's ruling is also significant in that it confirms when administrative decision-makers — and not just the CRTC — are faced with a decision that might infringe upon a Charter-protected right, have to openly engage with the issue and openly grapple with the balancing exercise between the Charter and their statutory objectives. He said that the balancing exercise may not have been done openly but had been done implicitly, which was enough.

"But now doing it implicitly is not enough. It should be explicit, and decision-makers should put their minds directly to the question of a balance between the Charter and their statutory objectives," he said. "I think this is a significant decision about the scope of the powers of a very important regulator whose powers in relation to content regulation have been the subject of very lively debate in recent years. It is a very significant decision for a very significant regulator."

A spokesperson for the Department of Canadian Heritage said in an email that the court "affirmed the role of the CRTC in setting and enforcing standards that implement the broadcasting and regulatory policy objectives of the *Broadcasting Act* — including that programming be of high standard — while taking account of the Charter and freedom of expression."

Counsel for the SRC did not respond to a request for comment.

*If you have any information, story ideas or news tips for Law360 Canada please contact Ian Burns at [Ian.Burns@lexisnexis.ca](mailto:Ian.Burns@lexisnexis.ca) or call 905-415-5906.*