

FEDERAL COURT  
COUR FÉDÉRALE

MAR 17 2023

RECEIVED / REÇU  
YELLOWKNIFE, NT

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

506992 N.W.T. LTD. O/A CABIN RADIO

Applicant

and

THE ATTORNEY GENERAL OF CANADA and CANADIAN RADIO-  
TELEVISION AND TELECOMMUNICATIONS COMMISSION

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Respondent<sup>5</sup>

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NOTICE OF APPLICATION

APPLICATION UNDER sections 18.1 and 28 of the *Federal Courts Act*  
and Rule 301 of the *Federal Courts Rules*

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TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears below.

**THIS APPLICATION** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Yellowknife, Northwest Territories.

**IF YOU WISH TO OPPOSE THIS APPLICATION**, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

**IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

Dated at Yellowknife Northwest Territories: March 17, 2023

Issued by: \_\_\_\_\_  
*Local Registry Officer*

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The Administrator  
**Federal Court of Appeal**  
The Court House  
4903, 49<sup>th</sup> Street  
P.O. Box 1320  
Yellowknife, Northwest Territories  
X1A 2L9

TO: **Attorney General of Canada**  
The Honourable David Lametti  
284 Wellington Street  
Ottawa, ON K1A 0H8

AND TO: **Canadian Radio-Television and Telecommunications Commission**  
Les Terrasses de la Chaudière  
Central Building  
1 Promenade du Portage  
Gatineau PQ J8X 4B1

AND TO: The Administrator  
**Federal Court of Appeal**  
Thomas D'Arcy McGee Building  
90 Sparks Street, Main Floor  
Ottawa, Ontario  
K1A 0H9

## APPLICATION

### **THIS IS AN APPLICATION for judicial review in respect of:**

1. Broadcasting Decision CRTC 2023-33 of the Canadian Radio-television and Telecommunications Commission (the “**CRTC**”) made on February 15, 2023 denying 506992 N.W.T. LTD. O/A Cabin Radio (“**Cabin Radio**”) the opportunity to have its application for a commercial radio licence considered on the basis that the Yellowknife market cannot support an additional commercial radio station (the “**Decision**”).

### **THE APPLICANT makes application for:**

2. A declaration that the Decision was unreasonable, or both unreasonable and unlawful.
3. A declaration that the Decision was made in a manner contrary to the principles of natural justice and procedural fairness.

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4. An order quashing or setting aside the Decision
5. An order directing the CRTC to consider Cabin Radio’s application for a commercial radio licence forthwith in accordance with this Court’s reasons.
6. Costs; and
7. Such other and further relief as this Honourable Court may deem just.

### **THE GROUNDS for the application are:**

8. Cabin Radio is an independent internet radio station and online newsroom based in Yellowknife, owned and operated by five Yellowknife residents.
9. The Attorney General of Canada is named as a Respondent pursuant to Rule 303(2) of the *Federal Courts Rules*.
10. On August 30, 2019, Cabin Radio submitted to the CRTC an “Application to obtain a broadcasting licence to operate a commercial FM Radio station in Yellowknife NT” (the “**FM Licence Application**”). It took the CRTC forty-two months from the submission of the FM

Licence Application to issue the Decision, saying it would not consider the application.

11. On November 12, 2021 the CRTC issued a *Call for comments on market capacity to serve Yellowknife, Northwest Territories, and call for applications to serve Yellowknife, Northwest Territories*, Broadcasting Notice of Consultation CRTC 2021-374 (“**Notice of Consultation 2021-374**”). In Notice of Consultation 2021-374, the CRTC stated that “the Commission will expedite the treatment” of Cabin Radio’s FM Licence Application—which by this point had been outstanding for twenty-seven months. The CRTC simultaneously called for comments on the capacity of Yellowknife’s market to support a new radio station and called for radio applications to serve the Yellowknife market.

12. On January 27, 2022, Cabin Radio filed with the CRTC a full response to the Notice of Consultation 2021-374 including a cover letter and six supporting documents, addressing questions regarding market capacity, responding to intervener comments, and providing an updated application per the terms of the Notice of Consultation 2021-374.

13. On February 15, 2023 the CRTC finally issued the Decision. The CRTC found that the market of Yellowknife cannot support an additional commercial radio station at this time.

14. The CRTC did not consider the FM Licence Application, updated application, or any of the materials provided by Cabin Radio addressing the CRTC’s questions regarding market capacity.

15. The CRTC stated in the Decision that it would not be inclined to accept applications for a commercial radio station in Yellowknife for another two years from the date of the Decision. This effectively bars Cabin Radio from re-applying for a commercial radio licence until 2025, after having already waited four and a half years for its FM Licence Application to be processed by the CRTC.

16. The CRTC made serious errors of law, jurisdiction, and fact when it decided the market in Yellowknife, Northwest Territories, cannot support an additional commercial radio station. Among other things, the Decision:

- (a) exceeds the jurisdiction of the CRTC;

- (b) fails to fulfil the CRTC's statutory mandate as set out in:
    - (i) the Broadcasting Policy for Canada set by Parliament in section 3 of the *Broadcasting Act*, SC 1991, c 11; and
    - (ii) the CRTC's regulatory policy set by Parliament in section 5(2) of the *Broadcasting Act*;
  - (c) breached Cabin Radio's legitimate expectation that the CRTC would consider the application and supporting evidence in a reasonable amount of time, or at all;
  - (d) was procedurally unfair and breached the requirements of natural justice;
  - (e) was based on erroneous findings of fact and on irrelevant considerations made without regard to the material before it.
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17. In addition to this proceeding, Cabin Radio has sought leave to appeal the Decision pursuant to section 31(2) of the *Broadcasting Act*. Cabin Radio notes that the case law interpreting section 18.5 of the *Federal Courts Act*, RSC 1985, c F-7 as to the overlap between judicial review and statutory appeals is unsettled. To the extent that, after *Vavilov*, 2019 SCC 65, the reviewable issues with the Decision raise separate issues for appeal, if granted leave to appeal, Cabin Radio will ask that all issues be merged into one proceeding.

18. The Decision is unreasonable, incorrect, and arbitrary due to errors of law, jurisdiction, and fact. Furthermore, the Decision and the process leading to the Decision involved profound breaches of natural justice and procedural fairness. Cabin Radio asks this Court to set aside the Decision and order that the CRTC consider its application for an FM broadcast licence forthwith in accordance with this Court's reasons for judgment. Cabin Radio's application promotes the objectives of the Broadcasting Policy for Canada set out in section 3 of the *Broadcasting Act*, and at the very least, deserves to be heard.

**This application will be supported by the following material:**

- 19. Broadcasting Decision CRTC 2023-33 issued February 15, 2023;
- 20. Material requested pursuant to Rule 317 of the *Federal Courts Rules* and produced to the Applicant pursuant to Rule 318;

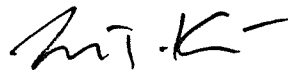
21. Affidavit(s) to be filed; and
22. Such further and other material as counsel may advise and this Honourable Court may allow.

**REQUEST PURSUANT TO RULE 317(2):**

**THE APPLICANT REQUESTS** the CRTC to send a certified copy of the following material to the applicant and to the Registry: All materials that were placed before and considered by the CRTC in making the Decision or that are in the CRTC's possession and otherwise related to the Decision and Cabin Radio's FM Licence Application including but not limited to submissions, memoranda, briefing notes, correspondence or other documents or notes of conversation.

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**DATED** at Yellowknife, Northwest Territories: March 17, 2023



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Toby Kruger  
Catherine Haid (Articled Student)  
*Lawyers for Cabin Radio*

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