

FEDERAL COURT
COUR FÉDÉRALE

MAR 17 2023

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YELLOWKNIFE, NT

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

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

Moving Party

and

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

Respondents

NOTICE OF MOTION FOR LEAVE TO APPEAL

MOTION under subsection 31(2) of the *Broadcasting Act*
and Rule 352 of the *Federal Courts Rules*

TAKE NOTICE THAT 506992 N.W.T. LTD. o/a Cabin Radio (“**Cabin Radio**”) will make a motion to the Federal Court of Appeal under Rule 352 of the *Federal Courts Rules*.

THE MOTION IS FOR:

1. An Order granting leave to appeal, pursuant to s. 31(2) of the *Broadcasting Act*, SC 1991, c 11, of the decision of the Canadian Radio-television and Telecommunications Commission (“**CRTC**”), dated February 15, 2023, Broadcasting Decision CRTC 2023-33 (“**Decision**”);
2. A direction under Rule 72(2) directing the Administrator to accept Cabin Radio’s Notice of Motion and accompanying motion record filed at this Court’s Yellowknife local office on March 14, 2023, subject to addition of the Attorney General of Canada as a Respondent pursuant to Rule 338, or the in the alternative an

order under Rule 8 and section 31(2) of the *Broadcasting Act* extending the time for Cabin Radio to make this application for leave to appeal; and

3. Such other relief as this Court deems fit.

THE GROUNDS FOR THE MOTION ARE:

4. In the Decision, the CRTC decided that the market cannot support an additional commercial radio station at this time, and returned Cabin Radio's application for a broadcasting licence to operate a commercial radio station in Yellowknife, Northwest Territories.

5. Cabin Radio made an application for a broadcasting (FM) licence under the *Broadcasting Act* over 42 months prior to the Decision. In the Decision, the CRTC said it had not formally opened Cabin Radio's application.

6. To obtain leave to appeal, Cabin Radio need only establish an "arguable" case that the CRTC erred in law or jurisdiction. There are ample reasons why this threshold is met here.

7. There is no statutory basis for the CRTC to refuse to consider an application for an FM licence. The Decision, which has two dissents, does not state by whom or how many people it was made.

8. The CRTC made serious errors of law and jurisdiction 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*; 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 and irrelevant considerations; and
- (f) disregarded or ignored relevant evidence, including extensive evidence submitted by Cabin Radio.

9. Further, the CRTC committed factual errors so manifest they render this decision unreasonable and unsupportable at law. ~~The Decision is not the product of rational or lawful administrative state action.~~

10. Cabin Radio brings this proceeding as a statutory appeal 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 judicial review, Cabin Radio has commenced a separate proceeding for judicial review of the Decision, and if granted leave to appeal will ask that all issues be merged into one proceeding.

11. If granted leave to appeal, Cabin Radio will ask this Court to set aside the Decision and order that the CRTC consider its application for an FM broadcast licence 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.

Notice of the Decision and adding the Attorney General of Canada as a Respondent

12. The Attorney General of Canada is named as a Respondent pursuant to Rule

338(1) of the *Federal Courts Rules*.

13. This Notice of Motion is identical in all material respects to the Notice of Motion for leave to appeal (and accompanying motion record) filed by Cabin Radio at the Yellowknife local office of this Court on March 14, 2023, except that this Notice of Motion adds the Attorney General of Canada as a Respondent. At the time of filing this Notice of Motion, Cabin Radio has not yet received stamped copies of its Notice of Motion submitted March 14, 2023 or a direction from the Administrator regarding adding the Attorney General of Canada as a Respondent.

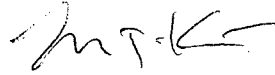
14. Further, even though the Decision was made on February 15, 2023, the first time the CRTC directly communicated to Cabin Radio that its application for a broadcasting licence “is now considered closed and that the Commission has disposed of all related documents” was on March 16, 2023.

15. This is an appropriate case for a direction under Rule 72 to add the Attorney General of Canada as a respondent to the existing Notice of Motion for leave to appeal submitted March 14, 2023, or in the alternative, a “special circumstance” within the meaning of section 31(2) of the *Broadcasting Act* and Rule 8 allowing Cabin Radio to make this application today as a new proceeding.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

16. Broadcasting Decision CRTC 2023-33 issued February 15, 2023;
17. The Affidavit of Oliver Williams, sworn March 13, 2023;
18. Supplemental Affidavit of Oliver Williams, sworn March 17, 2023;
19. Cabin Radio’s Memorandum of Fact and Law updated March 17, 2023; and
20. Such further and other material as counsel may advise and this Honourable Court may allow.

DATED at Yellowknife, Northwest Territories: March 17, 2023



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AND TO: The Administrator
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