

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

CANADIAN ASSOCIATION OF BROADCASTERS (THE APPELLANT ASSOCIATION), GROUP
TVA INC., CTV TELEVISION INC., THE SPORTS NETWORK INC., 2953285 CANADA INC.
(FORMERLY 2953285 INC.) (o.b.a. DISCOVERY CHANNEL CANADA), LE RÉSEAU DES
SPORTS (RDS) INC., THE COMEDY NETWORK, A DIVISION OF CTV TELEVISION INC.
(FORMERLY THE COMEDY NETWORK INC.), 1163031 ONTARIO INC., (o.b.a. OUTDOOR LIFE
NETWORK), CANWEST MEDIA INC. (FORMERLY CANWEST MEDIAWORKS INC.), GLOBAL
TELEVISION NETWORK QUEBEC LIMITED PARTNERSHIP, TVTROPOLIS GENERAL
PARTNERSHIP (FORMERLY PRIME TV, GENERAL PARTNERSHIP), CTV LIMITED
(FORMERLY CHUM LIMITED), CHUM (OTTAWA) INC., ROGERS BROADCASTING LIMITED
(FORMERLY CHUM TELEVISION VANCOUVER INC.), and PULSE24, A GENERAL
PARTNERSHIP (FORMERLY PULSE24 GENERAL PARTNERSHIP)
(THE CORPORATE APPELLANTS)

Applicants

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

BELL EXPRESSVU INC., ROGERS CABLE COMMUNICATIONS INC., COGECO CABLE
CANADA INC., AND COGECO CABLE QUEBEC INC. and SHAW COMMUNICATIONS INC.,
STAR CHOICE TELEVISION NETWORKS INC. AND SHAW SATELLITE SERVICES INC.

Interveners

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that the Applicants hereby apply for leave to appeal to the Court, pursuant to section 40 of the *Supreme Court Act*, from the judgment of the Federal Court of Appeal in Court Files No. A-591-06 and A-17-07 made on April 28, 2008, and, if leave is granted, the Applicants will seek 1) an order declaring that Part II Licence Fees levied by the Canadian Radio television and Telecommunications Commission (CRTC) pursuant to section 11 of the *Broadcasting Licence Fee Regulations* are taxes and therefore *ultra vires* the power to

levy fees found in section 11 of the *Broadcasting Act*; and 2) an Order declaring that the Corporate Applicants and the fee paying members of the Applicant Association are entitled to the return of all Part II fees paid by them for the period November 30, 1998 to November 30, 2006, inclusive, and any further or other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. This decision of the Federal Court of Appeal raises issues of public importance and an important question of constitutional law that ought to be decided by this Court. Specifically, this case raises the issue of how to distinguish a fee, that is allegedly levied to extract the value of a privilege granted by a licence, often referred to as “economic rent”, from a tax – an issue this Court declined to address, because it had not been raised by the government, in *620 Connaught Ltd. v. Canada (Attorney General)* 2008 S.C.C. 7 (*620 Connaught*).
2. The Federal Court of Appeal issued three separate judgments which, it is respectfully submitted, take opposing approaches to the determination of whether a charge levied to extract economic rent for a privilege is properly a fee or whether it is a tax. The judgments create confusion. This confusion, if left unaddressed by this Court, will affect the assessment of fees charged by every level of government in every province and territory of Canada. The important principle of accountability for taxation that is enshrined in s. 53 of the *Constitution Act, 1867* will be either abandoned completely, or drastically eroded, by the approaches found in the Federal Court of Appeal’s decisions.
3. Section 53 of the *Constitution Act, 1867* provides that taxes may only be levied by the legislature and this Court has ruled in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357 (*Lawson*), *Eurig Estate (Re)*, [1998] 2 S.C.R. 565 (*Eurig*),

Westbank First Nation v. British Columbia Hydro and Power Authority, [1999] 3 S.C.R. 134 (*Westbank*), and *620 Connaught* that the taxing power cannot be exercised by a subordinate body in the guise of a fee. In deciding these cases, this Court has not, however, had an opportunity to look at this important issue in the context of a fee that is purportedly levied to extract the value of a right or privilege.

4. In this case, the government specifically sought to justify the levy in question as a fee, rather than a tax, on the basis that it is charged in respect of the privilege of holding a broadcasting licence or using broadcasting spectrum for commercial benefit, and for the purpose of extracting economic rent for the benefits allegedly conferred by these privileges.

5. In *620 Connaught*, this Court has just confirmed that regulatory charges (as opposed to user fees) can be used either to finance regulatory schemes or to alter individual behaviour. The fees charged in this case do neither. Rather, they are ostensibly charged by the government for the privilege of being able to broadcast legally in Canada. This is a new purpose behind regulatory charges that this Court has never considered, let alone approved.

6. This Court should use the opportunity afforded by this case to establish whether economic rent of this nature can properly be extracted by way of a regulatory charge.

7. If a fee or regulatory charge can be used for this purpose, this Court needs to establish the framework for distinguishing between such fees or regulatory charges and taxes.

8. Guidance is needed because the Federal Court of Appeal has fundamentally misunderstood the issue and has articulated differing and unworkable frameworks for making the distinction. The frameworks that it has articulated negate the important constitutional distinction

between fees and taxes in the context of a levy charged for the purpose of extracting payment for the value of a privilege granted by a licence. The frameworks are also inconsistent with both the government's own policies and the framework applied by the Auditor General of Canada in her recent review of fees charged by the government.

9. In this case, the issue is whether levies charged to broadcasters for licences by the CRTC, pursuant to section 11 of the *Broadcasting Licence Fee Regulations*, are properly fees or whether they are a tax.

10. These levies, known as Part II licence fees, are charged in addition to the licence fees charged for, and allocated to, the operational costs of the CRTC's regulatory activities with respect to broadcasting. Part II licence fees are calculated on the basis of 1.365% of gross revenues from broadcasting activities and are paid into the Consolidated Revenue Fund.

11. If they are a tax, the Federal Court of Appeal has already ruled that they would be *ultra vires* the power to levy fees found in section 11 of the *Broadcasting Act*.

12. The government's justification for these fees has varied, but it ultimately sought to justify these Part II licence fees, which had amounted to \$679.6 million as of 2005, with a three prong justification:

- the costs incurred by Industry Canada to manage the broadcasting spectrum;
- the privilege of using the broadcasting spectrum; and
- the privilege of holding a broadcasting licence for commercial benefit.

13. The costs of Industry Canada related to management of the broadcasting spectrum were only \$10 million in 2005 but the Part II fees collected were \$107.2 million. The Part II licence fees are charged to broadcasters whether they utilize broadcasting spectrum or not.

14. The government conceded that it had no evidence, and had conducted no studies, as to what the value of the privilege of using broadcasting spectrum might be or what the value of the privilege of holding a broadcasting licence for commercial benefit might be. It argued that, to the extent the purpose of these fees is to extract economic rent in respect of these privileges, there is no need to do so.

15. Justices Letourneau and Pelletier found, contrary to what this Court has said in cases such as *Lawson*, *Eurig*, *Westbank* and *620 Connaught* that there is no requirement to link fees to a regulatory scheme if they are charged in respect of the value of a privilege. They also found that it is not necessary to consider the relative value of the alleged privilege or any of the objective criteria which this Court has previously discussed when distinguishing a fee from a tax. This approach is at odds with the jurisprudence of this Court and the government's own fee charging policies in which the government itself has consistently insisted that there must be a relationship between the fee charged and the value of the privilege provided.

16. This approach is also at odds with the principles applied by the Auditor General in her May, 2008 "Report on Management of Fees in Selected Departments and Agencies", that fees for privileges should be related to the regulatory scheme and value of the privilege.

17. Justice Ryer decided the matter differently. He agreed that there must be a link to a regulatory scheme. He sought out his own evidence and found that these levies are proper regulatory charges on the basis that they are somehow levied to fund the CBC and other elements

of Canada's broadcasting policy objectives - which is a justification that was never advanced by the government when the fees were introduced or during any of the several debates over their constitutionality which have occurred over the years.

18. In doing so, he was obliged to develop a new concept of "soft linkage" between a regulatory charge and the infinitely expansive regulatory scheme to which it is allegedly tied. The result of this expansive view of what constitutes the regulatory scheme, i.e. the entire Canadian broadcasting system, renders meaningless the important constitutional distinction between a tax and a fee, which this Court has carefully crafted in *Lawson*, *Westbank*, *Eurig* and, most recently, in *620 Connaught*.

19. He confused the policy objectives of the *Broadcasting Act* as set out in section 3 with the regulatory framework and responsibilities assigned to the CRTC as set out in Part II of the *Act*.

20. His identification of the regulatory scheme as including all of the policy objectives found in section 3 of the *Broadcasting Act* is at odds with the earlier decision of the Federal Court of Appeal in this case which identified the relevant regulatory scheme as being limited to the regulation of broadcasting.

21. It is also at odds with the careful and contained approach to identification of the regulatory scheme reiterated by this Court in *620 Connaught*.

22. All of the judges specifically stated that it is not incumbent upon government to establish the value of the privilege or benefit that flows from the grant of a licence. They simply accepted that a regulatory charge to extract this economic rent which is set as a percentage of gross revenues, presumably any percentage, may be seen as a reasonable proxy for the value of the

privilege or benefit. According to the Federal Court of Appeal, the government does not have to justify the percentage.

23. The Federal Court of Appeal determined that a fee which is imposed to extract economic rent in respect of a privilege can be distinguished from a tax on the basis of the application of market forces. If the fee is too high, the regulated entity will stop engaging in the regulated activity. This analysis ignores all previous jurisprudence and is of no legal or practical assistance in distinguishing between a fee and a tax.

24. The analysis also ignores the government's own evidence that economic rents, i.e. charges for a privilege, are frequently extracted through the imposition of a tax.

25. The intervention of this Court is necessary to bring clarity to this important constitutional issue.

Dated at Ottawa, in the Province of Ontario, this 27th day of June, 2008.



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NOTICE TO THE RESPONDENT: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days after service of the application. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 43 of the *Supreme Court Act*.