Federal Court Cour fédérale

Date: 20140117

Docket: T-1057-12

Citation: 2014 FC 61

Ottawa, Ontario, January 17, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

MTS INC.

Applicant

and

ROSS EADIE

Respondent

and

CANADIAN HUMAN RIGHTS COMMISSION,

SHAW COMMUNICATIONS INC., COGECO CABLE INC., ROGERS COMMUNICATIONS PARTNERSHIP, BCE INC., TELUS COMMUNICATIONS COMPANY, AND QUEBECOR MEDIA INC.

Interveners

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision made by the Canadian Human Rights Commission [CHRC] on April 25, 2012 referring a complaint brought before it, *Eadie v Manitoba Telecom Services Inc*, CHRC File 20071547, to the Canadian Human Rights Tribunal [CHRT].

[2] The applicant, Manitoba Telecom Services, Inc [MTS], is a Broadcasting Distribution Undertaking [BDU] licensed by the Canadian Radio-television and Telecommunications Commission [CRTC] to provide services to the public. The respondent, Mr Eadie, is one of its television customers, a subscriber to the "Ultimate TV" service.

[3] The CHRC, Shaw Communications, Inc [Shaw], Cogeco Cable Inc [Cogeco], Rogers Communications Partnership [Rogers], BCE Inc [BCE], Telus Communications Company [Telus], and Quebecor Media Inc [Quebecor], requested and were granted status as interveners on the issue of jurisdiction, with the telecommunications interveners filing their submissions jointly.

[4] For the reasons which follow, the application is allowed.

II. Background facts

[5] Mr Eadie filed a complaint with the CHRC on October 22, 2007, alleging discrimination contrary to section 5 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA] in respect to the availability of services, equipment, and software which would increase accessibility for individuals with a vision disability.

[6] He explained that MTS provided to him, for a fee regulated by the Canadian Radio-television and Telecommunications Commission, a digital television broadcasting service. He complained that: (i) MTS was not passing through descriptive video services [DVS] to customers; (ii) that MTS equipment and software used to provide services (i.e. the set-top box or "STB") did not include a "one-button" means of turning descriptive video on or off which a non-sighted person could use; and (iii) that the STB did not provide audible cues permitting a non-sighted person to use the menus for the interactive programming guide (also referred to as an electronic programming guide [EPG]). Only the last item remains in dispute between the parties, the other two having been resolved during procedures before the CRTC.

[7] MTS replied that its equipment and software were manufactured by Motorola and it was not possible to upgrade this technology to provide audible cues for blind people. Mr Eadie alleged that this constituted discrimination, as visually handicapped customers were denied services that could be made available.

[8] The CHRC investigated this complaint. The applicant argued during the investigation that the CHRC should decline jurisdiction, because, as provided for in section 41(1)(*b*) of the CHRA, the complaint would be more appropriately addressed by means of a procedure provided for under another Act.

[9] Specifically, MTS argued that the complaint fell more properly under the jurisdiction of the CRTC, pursuant to the *Broadcasting Act*, SC 1991, c 11 [*Broadcasting Act*], and the *Canadian*

Radio-television and Telecommunications Commission Rules of Practice and Procedure, SOR/2010-277 [*CRTC Rules of Practice and Procedure*]. The CRTC's mandate includes ensuring programming accessibility for disabled persons, and procedures are provided for making rules and policies and for dealing with customer complaints. .

[10] Furthermore, the MTS Director of Broadband Product Marketing provided an affidavit demonstrating that the CHRC received a virtually identical subscriber complaint [the "DE Complaint"] two weeks later, on November 2, 2007, which it declined to pursue on the grounds that there was a suitable complaints process available through the CRTC. In addition, the intervening party Rogers provided an affidavit enclosing another very similar complaint filed in December 2007 [the "Rogers Complaint] relating to access to a digital pay-for-view service for a visually disabled person, which the CHRC had also declined to deal with, pursuant to paragraph 41(1)(*b*) of the CHRA.

[11] On June 10, 2008, the CRTC issued Notice of Public Hearing 2008-8, "Notice of Consultation – Unresolved issues related to the accessibility of telecommunications and broadcasting services to persons with disabilities". Included in the Notice of Consultation were the following paragraphs:

> 5. The Canadian broadcasting policy objectives include the development and safeguarding of a Canadian broadcasting system that serves the needs and interests and reflects the circumstances and aspirations of Canadian men, women, and children, including equal rights, as well as providing programming accessible by persons with disabilities, as resources become available for that purpose.
>
> 6. The Commission has issued many determinations with the goal of reducing the obstacles to the delivery and receipt of communication

> services and improving the accessibility of these services to persons with disabilities.
>
> [. . .]
>
> 15. To assist in increasing the awareness of the issues faced by persons with disabilities with respect to telecommunications and broadcasting services, the Commission hired an independent consultant to produce a report on these issues. The report, *Stakeholder Consultations on Accessibility Issues for Persons with Disabilities*, dated April 2008, represents the views of the consultant, not the Commission, and does not dictate the outcome of this proceeding.
>
> 16. The Commission notes that it does not regulate terminal equipment or the design and manufacture of communications devices intended for accessing telecommunication or broadcasting services. Accordingly, the Commission invites comments on which measures, short of regulating terminal equipment, would improve the accessibility of telecommunications and broadcasting services to persons with disabilities.

[12] The BDUs were directed by the CRTC to identify for persons who are blind and visually impaired all of the fully accessible devices (and where applicable, the software that would make the devices fully accessible) which could provide access to broadcasting and telecommunications services and would not require prohibitive network modifications. This included, at a minimum, set-top boxes and wireless devices. For each device or software, they were to provide a detailed description of its functionalities, the manufacturer and where it could be obtained.

[13] The CRTC invited participation by the public through written submissions and oral presentations at hearings on access issues. Mr Eadie provided both written and oral representations. He indicated at that time that he was not familiar with any accessible software or hardware for set-top terminals on digital broadcast systems. He requested that the CRTC adopt policies directing the

BDUs and broadcast system to "pay some intelligent programmers to invent the voice output for the broadcast system, similar to the voice output now available for cell phones."

[14] At no time did Mr Eadie file a complaint with the CRTC, although a complaint procedure is available under Part 2 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, SOR/2010-277.

[15] Despite the ongoing CRTC inquiry, in November 2008 the CHRC decided that it would proceed with Mr Eadie's complaint, on the basis that the CRTC procedure was "not reasonably available to him in that he did not have full access to it". On December 4, 2008, the applicant wrote to the Commission asking it to reconsider its decision on the basis that the initial CHRC decision on jurisdiction was incorrect, in that the CRTC proceedings were available to the respondent who had in fact actively participated in the CRTC public hearing proceedings both orally and in writing. The Commission received submissions on this point from Mr Eadie and from MTS. On June 17, 2009, it upheld its decision to deal with the complaint, this time providing as the reason its view that any CRTC proceedings "will not be able to deal with all of the human rights issues that are in dispute."

[16] On July 21, 2009, as a result of the public hearing and consultations, the CHRT issued *Broadcasting and Telecom Regulatory Policy CRTC 2009-430* [the Accessibility Policy]. In developing this policy the CRTC indicated that it had "utilized leading Canadian human rights principles that recognize that equality is a fundamental value and central component of the public interest." The policy required all BDUs, as a condition of licence renewal, to pass through the described video of all programming services and to provide a means of turning the described video

programming on or off that did not require visual acuity – a "one-button" solution. The Accessibility Policy therefore resolved the first two allegations of discrimination. The only issue remaining to be heard was the third one; the lack of audible cues to permit blind subscribers to access and use the interactive programming guide.

[17] The CRTC did not include any licensing conditions related to the issue of audible cues in the Accessibility Policy. With respect to this issue the CRTC stated at para 120 of its report that it: "further encourages BDUs to continue to work with vendors to develop set-top box software that provides increased font sizes, audio prompts or other audio information." It described its expectations regarding further developments of electronic program guides [EPG] at para 122 as follows:

> Accordingly, the commission expects:
>
> [. . .]
>
> licensees of BDUs to develop one or more means of identifying programming with described video in their electronic program guides. This could include an audio tone, a visual indicator, or the offer of an audio electronic program guide.

[18] The CRTC also established the Described Video Working Group [DV Working Group] to work on issues related to subscriber access by the vision disability community to described video. The DV Working Group included representatives both from the broadcasting and distribution sectors and from organizations which provide services to the blind, such as the Canadian National Institute for the Blind, the Canadian Council for the Blind, the Alliance for Equality of Blind Canadians, the Council of Canadians with Disabilities, and Accessible Media, Inc. Its mandate was to develop common practices and solutions that will improve the accessibility of described

programming. This included ensuring that information regarding described programming was made available in online programming listing and electronic programming guides, i.e. the outstanding issue. The applicant claims that the DV Working Group is "the continuing manifestation of the CRTC Accessibility Proceedings."

[19] MTS submitted that it did not have a technological solution for the problem of audible cues which was compatible with industry equipment and infrastructure. It stated that no BDU operating in Canada is able to provide the remedies requested by the respondent, given that the BDUs use third-party American equipment and software which is largely proprietary and which they cannot modify. MTS delivers its services from Microsoft Mediaroom, a proprietary platform, and cannot modify this to provide additional functionality. It argued that it was not discriminating and had provided the same service to Mr Eadie as to any other customer, and that what he was seeking was a substantially, functionally, and operationally different service.

[20] In respect of the explanatory note of the CRTC announcing its public hearing into accessibility issues which states that the CRTC "does not regulate terminal equipment or the design and manufacture of communications devices intended for accessing telecommunication or broadcasting services", MTS further explained that the CRTC cannot regulate equipment to require manufacturers to add functionality. It only regulates the functionality once it is provided by the equipment.

[21] MTS also submitted that it advised the Commission that the DV Working Group was about to release its report addressing the issue of audible cues prior to the Commission deciding on April

25, 2012 to refer the matter. This report was subsequently released, and in it the Working Group confirmed that the US *Twenty-First Century Communications and Video Accessibility Act of 2010*, Pub L No 111-260, 124 STAT 2751 had brought the issue before the US Federal Communications Commission. The US Commission created a Video Programming Accessibility Advisory Committee [VPAAC] which is currently working on the issue, and this may eventually result in American manufacturers being required to provide the requested functionality.

III. Final Investigation Report

[22] The CHRC Investigator's report was concluded and released to the parties in September 2011. It recommended that the Commission deal with the complaint on the grounds that it was not satisfied that the CRTC procedures would address the allegation of discrimination and that those CRTC procedures were not likely to be completed within a reasonable time.

[23] More specifically, the report arrived at the following conclusions:

a. It does not appear that the CRTC can make any orders regarding digital set-top boxes and related software regarding accessibility because this seems to be beyond the CRTC's jurisdiction. It appears that the CRTC can only encourage broadcast entities in this regard.

b. The DV Working Group report mentioned the inaccessibility of the menus on set-top boxes, but the working group appeared to be awaiting developments in the United States based on legislative enactments in this regard.

c. It was not clear whether the required technology existed to provide a solution to Mr Eadie's needs. Mr Eadie claimed that a solution existed in the "after-market" (TV Speak from Code Factory, an American company); MTS denied that it could integrate this technology into its network because it was substantially, functionally and operationally different from the TV service which MTS provides to its customers.

d. Despite MTS claiming that it cannot integrate the technology into its networks, MTS had not provided evidence that it has evaluated the cost of aftermarket solutions and determined them to be prohibitive. MTS did not appear to consider the accessibility needs of people with visual impairments adequately, attributing to subscribers who are vision impaired the responsibility to purchase, install, and otherwise support assistive software devices in order to access services in their homes.

e. It is in the public interest for BDUs to proactively consider the accessibility requirements of people who are visually impaired when issuing requests for information and purchasing terminal equipment and software for the delivery of service to subscribers with these needs.

[24] Based on the foregoing the investigation report recommended that an inquiry before the CHRT was warranted on the following grounds:

a. Because it was not satisfied that the other procedure (CRTC) would address the allegation of discrimination; and

b. Because the other procedure was not likely to be completed within a reasonable time.

[25] The CHRC considered the report and further submissions by the parties, and issued its decision on April 25, 2012 to refer the complaint to the CHRT on the following bases:

a. The complaint raised the challenge faced by many service providers to ensure that technologies remain barrier free to Canadians with disabilities.

b. Despite MTS's multiple submissions indicating that it is willing to find a workable solution through the DV Working Group, it had not demonstrated that providing the functionality required to enable complainants to have full access to electronic menus would cause undue hardship.

c. The complaint process to the CRTC could not more appropriately deal with the matter because that body had refused to exercise its jurisdiction over STBs.

d. The DV Working Group was not "a procedure provided for under an Act of Parliament" as contemplated by paragraph 44(2)(*b*) of the CHRA.

e. With respect to a potential re-litigation of a previously decided issue, because the CRTC did not exercise jurisdiction over the STBs, it cannot be said that re-litigation would occur.

f. While the equipment itself and the manufacturer of equipment may be beyond the jurisdiction of the Commission, it was the respondent's selection and use of this equipment "in the provision of its service" [section 5 of the CHRA] that concerned the Commission.

IV. Relevant legislation

Canadian Human Rights Act, RSC, 1985, c H-6	*Loi canadienne sur les droits de la personne* LRC (1985), ch H-6
5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	a) d'en priver un individu;
(b) to differentiate adversely in relation to any individual,	b) de le défavoriser à l'occasion de leur fourniture.
on a prohibited ground of discrimination.	
[…]	[…]
41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
[. . .]	[. . .]
(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;	b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;

(c) the complaint is beyond the jurisdiction of the Commission;

c) la plainte n'est pas de sa compétence;

[. . .]

[. . .]

44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

44. (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act, it shall refer the complainant to the appropriate authority.

b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.

(3) On receipt of a report referred to in subsection (1), the Commission

(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :

(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or

(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e);

(b) shall dismiss the complaint to which the report relates if it is satisfied

b) rejette la plainte, si elle est convaincue :

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

[Emphasis added]

[Je souligne]

Broadcasting Act, SC 1991, c 11

Loi sur la radiodiffusion LC 1991, ch. 11

3. (1) It is hereby declared as the broadcasting policy for Canada that

3. (1) Il est déclaré que, dans le cadre de la politique canadienne de radiodiffusion :

(a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;

a) le système canadien de radiodiffusion doit être, effectivement, la propriété des Canadiens et sous leur contrôle;

[. . .]

[. . .]

(p) programming accessible by disabled persons should be provided within the Canadian broadcasting system as resources become available for the purpose;

p) le système devrait offrir une programmation adaptée aux besoins des personnes atteintes d'une déficience, au fur et à mesure de la disponibilité des moyens;

[. . .]

[. . .]

(2) It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

(2) Il est déclaré en outre que le système canadien de radiodiffusion constitue un système unique et que la meilleure façon d'atteindre les objectifs de la politique canadienne de radiodiffusion consiste à confier la réglementation et la surveillance du système canadien de radiodiffusion à un seul organisme public autonome.

5. (1) Subject to this Act and the *Radiocommunication Act* and to any directions to the Commission issued by the Governor in Council under this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2).

5. (1) Sous réserve des autres dispositions de la présente loi, ainsi que de la *Loi sur la radiocommunication* et des instructions qui lui sont données par le gouverneur en conseil sous le régime de la présente loi, le Conseil réglemente et surveille tous les aspects du système canadien de radiodiffusion en vue de mettre en oeuvre la politique canadienne de radiodiffusion.

(2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that

(2) La réglementation et la surveillance du système devraient être souples et à la fois :

[. . .]

[. . .]

(g) is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings.

g) tenir compte du fardeau administratif qu'elles sont susceptibles d'imposer aux exploitants d'entreprises de radiodiffusion.

(3) The Commission shall give primary consideration to the objectives of the broadcasting policy set out in subsection 3(1) if, in any particular matter before the Commission, a conflict arises between those objectives and the objectives of the regulatory policy set out in subsection (2).

(3) Le Conseil privilégie, dans les affaires dont il connaît, les objectifs de la politique canadienne de radiodiffusion en cas de conflit avec ceux prévus au paragraphe (2).

Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure, SOR/2010-277

Règles de pratique et de procédure du Conseil de la radiodiffusion et des télécommunications canadiennes, DORS/2010-277

45. A consumer complaint that is not related to an application must

45. Toute plainte d'un consommateur qui ne se rapporte à aucune demande :

(*a*) be filed with the Commission;

a) est déposée auprès du Conseil;

(*b*) set out the name and address of the complainant and any designated representative and the email address of each, if any;

b) indique les nom et adresse du plaignant et de tout représentant autorisé, et leur adresse électronique, s'ils en possèdent une;

(*c*) set out the name of the person against whom it is made;

c) indique le nom de la personne visée;

(*d*) contain a clear and concise statement of the relevant facts, the grounds of the complaint

d) renferme un énoncé clair et concis des faits pertinents, de ses motifs et de la nature de la

and the nature of the decision sought; and	décision recherchée;
(*e*) state whether the complainant wishes to receive documents related to the complaint in an alternative format.	*e*) indique si le plaignant souhaite recevoir les documents relatifs à la plainte dans un média substitut.

V. Issues

[26] The applicant submits that there are four issues to be reviewed:

a. What are the principles governing Commission decisions pursuant to section 41(1)(*b*) and what are the appropriate standards of review**?**

b. Did the investigation and the Commission decision lack thoroughness due to a misapprehension of the object and purpose of section 41(1)(*b*)?

c. Was the Commission's decision that the CRTC declined to exercise jurisdiction over the subject matter unreasonable?

d. Can the Court determine at this stage whether the CRTC has exclusive jurisdiction over the subject matter?

A. *What are the principles governing Commission decisions pursuant to section 41(1)(b) and what are the appropriate standards of review*?

(1) *General Principles Governing Commission Investigations*

[27] Justice Mactavish recently restated in a comprehensive fashion in *Canadian Union of Public Employees (Airline Division) v Air Canada*, 2013 FC 184 the general principles governing Commission investigations, which I adopt and reproduce below from paras 60 to 74 of her decision:

General Principles Governing Commission Investigations

[60] The role of the Canadian Human Rights Commission was considered by the Supreme Court of Canada in *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] S.C.J. No. 115, [1996] 3 S.C.R. 854. There the Court observed that the Commission is not an adjudicative body, and that the adjudication of human rights complaints is reserved to the Canadian Human Rights Tribunal.

[61] Rather, the role of the Commission is to carry out an administrative and screening function. It is the duty of the Commission "to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it": *Cooper*, above, at para. 53; see also *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] S.C.J. No. 103, [1989] 2 S.C.R. 879 [*SEPQA*].

[62] The Commission has a broad discretion to determine whether "having regard to all of the circumstances" further inquiry is warranted: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 at paras. 26 and 46; *Mercier v. Canada (Human Rights Commission)*, [1994] 3 F.C. 3, [1994] F.C.J. No. 361 (F.C.A.).

[63] Indeed, in *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113, [1998] F.C.J. No. 1609 [*Bell Canada*], the Federal Court of Appeal noted that "[t]he Act grants the Commission a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report": at para. 38.

[64] In *Slattery v. Canada (Canadian Human Rights Commission)*, [1994] 2 F.C. 574, [1994] F.C.J. No. 181, aff'd [1996] F.C.J. No. 385, 205 N.R. 383 (F.C.A.), this Court discussed the content of the duty of procedural fairness required in Commission investigations. The Court observed that in fulfilling its statutory responsibility to investigate complaints of discrimination, investigations carried out by the Commission had to be both neutral and thorough.

[65] Insofar as the requirement of thoroughness is concerned, the Federal Court observed in *Slattery* that "deference must be given to administrative decision-makers to assess the probative value of evidence and to decide to further investigate or not to further

investigate accordingly". As a consequence, "[i]t should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted": at para 56.

[66] As to what will constitute "obviously crucial evidence", this Court has stated that "the 'obviously crucial test' requires that it should have been obvious to a reasonable person that the evidence an applicant argues should have been investigated was crucial given the allegations in the complaint": *Gosal v. Canada (Attorney General)*, 2011 FC 570, [2011] F.C.J. No. 1147 at para. 54; *Beauregard v. Canada Post*, 2005 FC 1383, [2005] F.C.J. No. 1676 at para. 21.

[67] The requirement for thoroughness in investigations must also be considered in light of the Commission's administrative and financial realities, and the Commission's interest in "maintaining a workable and administratively effective system": *Boahene-Agbo v. Canada (Canadian Human Rights Commission)*, [1994] F.C.J. No. 1611, 86 F.T.R. 101 at para. 79, citing *Slattery*, above, at para. 55.

[68] With this in mind, the jurisprudence has established that the Commission investigations do not have to be perfect. As the Federal Court of Appeal observed in *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113, [2005] F.C.J. No. 543 at para. 39:

> Any judicial review of the Commission's procedure must recognize that the agency is master of its own process and must be afforded considerable latitude in the way that it conducts its investigations. An investigation into a human rights complaint cannot be held to a standard of perfection; it is not required to turn every stone. The Commission's resources are limited and its case load is heavy. It must therefore balance the interests of complainants in the fullest possible investigation and the demands of administrative efficacy" [Citations omitted]

[69] The jurisprudence has also established that some defects in an investigation may be overcome by providing the parties with the right to make submissions with respect to the investigation report.

[70] For example, in *Slattery*, the Court observed that where, as here, the parties have an opportunity to make submissions in response to an investigator's report, it may be possible to compensate for more minor omissions in the investigation by bringing the

> omissions to the Commission's attention. As a result, "it should be only where complainants are unable to rectify such omissions that judicial review would be warranted". This would include situations "where the omission is of such a fundamental nature that merely drawing the decision-maker's attention to the omission cannot compensate for it". Judicial intervention may also be warranted where the Commission "explicitly disregards" the fundamental evidence: all quotes from Slattery, above at para. 57
>
> [71] Similarly, in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056, the Federal Court of Appeal observed that the only errors that will justify the intervention of a court on review are "investigative flaws that are so fundamental that they cannot be remedied by the parties' further responding submissions": at para. 38.
>
> [72] Where, as here, the Commission adopts the recommendations of an investigation report and provides limited reasons for its decision, the investigation report will be viewed as constituting the Commission's reasoning for the purpose of a decision under section 44(3) of the Act: see *SEPQA*, above at para. 35; *Bell Canada* above at para. 30.
>
> [73] However, a decision to dismiss a complaint made by the Commission in reliance upon a deficient investigation will itself be deficient because "[i]f the reports were defective, it follows that the Commission was not in possession of sufficient relevant information upon which it could properly exercise its discretion": see *Grover v. Canada (National Research Council)*, 2001 FCT 687, [2001] F.C.J. No. 1012 at para. 70; see also *Sketchley*, above, at para. 112.
>
> [74] With this understanding of the role and responsibilities of the Canadian Human Rights Commission in dealing with the investigation of complaints of discrimination, I turn now to consider the arguments advanced by CUPE as to the inadequacy of the investigation in this case.

(2) *Jurisdiction and Correctness*

[28] The applicant argues that the standard of review on a question of jurisdiction, particularly between competing specialized tribunals, is correctness. It urges this Court to distinguish recent decisions of the Federal Court of Appeal that suggested that the standard of reasonableness applies

in situations where the Commission dismisses the complaint without referring it to the Tribunal. The applicant respectfully submits that these decisions failed to note the exception in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], at paragraph 61, where the Supreme Court found that questions regarding jurisdictional lines between two or more competing specialized tribunals are subject to review on a correctness standard.

[29] I disagree on the first premise - that the Federal Court of Appeal was not cognizant that correctness normally applies to review of issues concerning jurisdictional lines between competing specialized tribunals. In fact, in one of the decisions cited by the applicant, *Keith v Correctional Service of Canada*, 2012 FCA 117, [*Keith*] the Court of Appeal upheld this Court on the point that where the Commission dismisses a complaint under section 44(3)(*b*) on grounds of jurisdiction, the standard of review is correctness.

[30] However in *Keith* the Court also recognized that when the Commission refers the complaint to the CHRT, the standard of reasonableness should be applied in accordance with the Supreme Court of Canada decision in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 [*Halifax*], which came after *Dunsmuir*. The Court of Appeal commented on this issue at paragraph 46 of its reasons as follows:

> [44] It is well settled that a decision of the Commission to refer a complaint to the Tribunal is subject to judicial review on a reasonableness standard: *Halifax* at paras. 27, 40 and 44 to 53; *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, 1998 CanLII 8700 (FCA), [1999] 1 F.C. 113 (C.A.) at para. 38. In *Halifax*, Cromwell J. recently considered the standard of review which applies in such circumstances, and he concluded that "the reviewing court should ask itself whether there is any reasonable basis in law or on the evidence to support that decision": *Halifax* at para. 53. Though *Halifax* dealt with the screening functions of the

> Nova Scotia Human Rights Commission, its conclusions also apply to the screening functions of the Commission: *Halifax* at para. 52.
>
> [. . .]
>
> [46] Cromwell J. was careful to point out that the conclusion reached in *Halifax* only extends to cases where the complaint is referred for further inquiry. In such cases, any interested party may raise any arguments and submit any appropriate evidence at the second stage of the process; consequently, no final determination of the complaint is reached by referring it to further inquiry. As noted at paragraph 15 of *Halifax*, "[a]ll the Commission had done was to refer the complaint to a board of inquiry; the Commission had not decided any issue on its merits" (see also paras 23 and 50 of *Halifax*). In the case of a dismissal under paragraph 44 (3) (b) of the Act, however, any further investigation or inquiry into the complaint by the Commission or the Tribunal is precluded.
>
> [Emphasis added]

[31] Admittedly, in *Keith*, where the complaint was dismissed, the Court distinguished between decisions to dismiss on grounds of jurisdiction and on other bases; jurisdictional questions being subject to a reviewing standard of correctness, while non-jurisdictional issues were reviewed against a standard of reasonableness. But there is no suggestion that decisions on jurisdictional issues when referred to the CHRT are subject to a different standard than that of reasonableness. If exclusive jurisdictional issues on a referral are not subject to a standard of reasonableness, then those under section 41(1)(*b*) concerning overlapping jurisdiction are also subject to a reasonableness standard. For these reasons, I reject the applicant's submission that the standard of review of correctness should be applied to review the Commission's decision to refer a matter to the CHRT under section 41(1)(*b*), or had exclusive jurisdiction been argued, section 41(1)(*c*) of the Act.

[32] The latter point is relevant because the BDUs submit that I should review the jurisdictional issue under section 41(1)(*c*), even though this was not raised before the Commission. They argue

that true issues of jurisdiction can be brought forward at any point in the legal chain of proceedings. One of the reasons that I reject this argument is because had the issue of exclusive jurisdiction been raised before the Commission and the matter been referred to the CHRT, I would only be able to review it on a standard of reasonableness. It would be illogical to consider the issue of absolute jurisdiction on a correctness basis if raised for the first time at the reviewing stage, but on a reasonableness standard if it came before me after the Commission refused to dismiss the complaint.

[33] I also point out the obvious that the foregoing conclusions are premised on the rights of the applicant and intervening BDUs to fully argue the jurisdictional issues raised in sections 41(1)(*b*) and (*c*) once before the CHRT. This is clearly the case for issues of exclusive jurisdiction which can be raised at any point of the adjudicative process, but also for section 41(1)(*b*) concerning overlapping jurisdiction. The basis of *Halifax* is that the decision to refer is not a decision on jurisdiction, but simply a decision that there exist sufficient grounds to refer the decision for determination by the Tribunal. This is important because the tests that the Tribunal will have to follow to sort out the more appropriate overlapping jurisdiction also set out the path the investigation and Commission must follow for a thorough and legal screening process.

(3) *Thoroughness and Fairness*

[34] The applicant also argues that because thoroughness is an aspect of the duty to conduct a fair investigation that it comports a standard of review of correctness, relying on the oft-cited decision of *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 (TD) [*Slattery*] to that effect. The case appears to stand for the proposition that thoroughness as an aspect of fairness

should be reviewed against a standard of correctness, while at the same time pointing out the need to show deference to the manner in which the investigation is carried out as noted in Justice Mactavish's summary above. I cite paragraphs 49, 55 and 56 of *Slattery* that best describe this apparent tension in the standard of review:

> 49 In order for a fair basis to exist for the CHRC to evaluate whether a tribunal should be appointed pursuant to paragraph 44(3)(a) of the Act, I believe that the investigation conducted prior to this decision must satisfy at least two conditions: neutrality and thoroughness.
>
> [. . .]
>
> 55 In determining the degree of thoroughness of an investigation required to be in accordance with the rules of procedural fairness, one must be mindful of the interests that are being *balanced*: the complainant's and respondent's interests in procedural fairness and the CHRC's interests in maintaining a workable and administratively effective system. Indeed, the following words from Mr. Justice Tarnopolsky's treatise Discrimination and the Law (Don Mills: De Boo, 1985), at page 131 seem to be equally applicable with regard to the determination of the requisite thoroughness of investigation:
>
> > With the crushing case loads facing Commissions, and with the increasing complexity of the legal and factual issues involved in many of the complaints, it would be an administrative nightmare to hold a full oral hearing before dismissing any complaint which the investigation has indicated is unfounded. On the other hand, Commission should not be assessing credibility in making these decisions, and they must be conscious of the simple fact that the dismissal of most complaints cuts off all avenues of legal redress for the harm which the person alleges.
>
> 56 Deference must be given to administrative decision-makers to assess the probative value of evidence and to decide to further investigate or not to further investigate accordingly. It should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted. Such an approach is consistent with the deference allotted to fact-finding activities of the Canadian Human

> Rights Tribunal by the Supreme Court in the case of Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554.
>
> [Emphasis added]

[35] As I understand the passages quoted from *Slattery*, it would appear that thoroughness measured by a fairness standard arises in highly unusual situations such as when the investigator exceeds his or her jurisdiction. This was the example cited from Justice Tarnopolsky's treatise where the unfair decision was one made on a credibility finding. Even then, it is noted that the reference is not to a referral decision but to a dismissal where "a more probing review should be carried out" [*Keith*, para 45]. Moreover, the problem described is that of being unfairly "overly" thorough as opposed to not going far enough in the investigation.

[36] Thoroughness, on the other hand, relates to failing to investigate obviously crucial evidence either from not considering important factors at all or not going far enough in the investigation of a factor when common sense indicates an obvious further consideration. Given the administrative nature of the investigation and the large discretion accorded the investigator, it would not be appropriate to apply a correctness standard to thoroughness of an investigation where the outcome is to refer the complaint to the CHRC. For a decision to dismiss the complaint at the screening stage suggests a higher degree of thoroughness in a more probing investigation, but the decision remains one that attracts deference to the investigator's determination of the nature and scope of the investigation.

[37] I am of the view therefore, that it is incorrect to cite *Slattery* for the proposition that the Court should apply a standard of correctness as a factor in the investigator's duty of fairness when

reviewing the thoroughness of an investigation. The approach of Justice Mactavish in setting out the requirements of the investigation described in paras 65 to 71 of her decision referred to above is the correct statement of the law on thoroughness of an investigation. Taken as a whole, they demonstrate that a standard of review of reasonableness must be followed in determining the thoroughness of an investigation and decision by the Commission under section 41(1) of the CHRA.

VI. Analysis

B. *Did the investigation and the Commission decision lack thoroughness due to a misapprehension of the object and purpose of section 41(1)(b)?*

(4) *Thoroughness and Section 41(1)(b)*

[38] As noted in *Halifax* at paragraph 53, a court may only set aside a decision of the Commission to refer a complaint to the CHRT if satisfied that there is no reasonable basis in law or on the evidence to support that decision. The task is largely one of determining the reasonableness of the sufficiency of the evidence in a non-adjudicative administrative screening procedure, which in turn relates largely to the thoroughness of the investigation. In addition, clearly unreasonable conclusions drawn on the evidence or in law also can affect the legality of the decision if the circumstances warrant.

[39] The Supreme Court has pointed out that reasonableness is highly contextual and that the governing legislation is the fundamental contextual factor by its definition of the scope of the decision-making power. For example, in *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paragraph 18, the Court stated as follows:

> The answer lies in *Dunsmuir's* recognition that reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual

> inquiry (*Dunsmuir*, at para. 64). As stated in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59, per Binnie J., "[r]easonableness is a single standard that takes its colour from the context." The fundamental question is the scope of decision-making power conferred on the decision-maker by the governing legislation. The scope of a body's decision-making power is determined by the type of case at hand.
>
> [Emphasis added]

[40] The legislative context of an inquiry under section 41(1)(*b*) to determine whether a complaint could be more appropriately dealt with by another procedure under an Act of Parliament informs both the investigation and the Commission's decision. It also takes this matter outside of the more common variety of investigations and decisions by the Commission by imposing certain strictures in the issues that must be considered.

[41] Reference to the legislation is not intended to vicariously impose a degree of correctness to the investigation or decision. Rather, the simple fact is that the statutory context defines the issues that must be considered by the Tribunal if the matter is referred to it. The investigation and Commission decision must also focus on those issues, but as a screening process that determines the sufficiency of the evidence pertaining to them in order to decide whether the matter should be referred to the Tribunal. If the legislative contextual path of issues is not followed, a lack of thoroughness and insufficiency of evidence results, such that a court is likely to conclude that there is no reasonable basis for the decision on the evidence or in law.

[42] The phrase "more appropriately" used in section 41(1)(*b*) connotes that the focus of the investigation and decision must be comparative in nature. Reference to procedures under another

Act of Parliament entails a comparison of the appropriateness of the procedure to hear the complaint under the CHRA to the procedure or procedures under another Act, in this case the *Broadcasting Act* and procedures available before the CRTC. Both the CHRT and the CRTC are specialized tribunals. Inasmuch as the Commission investigator already well knows the procedures under the CHRA, a fundamental focus of the investigation must be to delineate with sufficient thoroughness the appropriateness (or otherwise) of the CRTC to determine the complaint under the *Broadcasting Act*.

[43] This requires matching the complaint to the more appropriate specialized tribunal. But before being able to do so, the investigation must determine the essential character of the dispute in its factual context. I ascribe this task to the commission based on a line of cases commencing with *Weber v Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929 [*Weber*] where the Supreme Court described a two-step process to determine whether one of two specialized tribunals has exclusive jurisdiction over a matter, i.e. the question at section 41(1)(*c*) of the CHRA. The first step is to determine the essential character of the dispute in its factual context. Thereafter, the court must take stock of the nature of the legislative schemes in place that would afford a specialized tribunal exclusive jurisdiction over the dispute. See for example *Regina Police Assn Inc v Regina (City) Board of Police Commissioners*, 2000 SCC 14 [*Regina Police Association*]; *Québec (Attorney General) v Québec (Human Rights Tribunal)*, 2004 SCC 40 [*Québec*]. The decision in *Québec* bears considerable similarity to this matter in the delineation of a jurisdictional boundary between a human rights tribunal and a specialized social services tribunal.

[44] This Court's attention was not drawn to any decisions regarding a test which the Tribunal would be required to adopt to determine the most "appropriate" of two overlapping specialized tribunals to determine a complaint under section 41(1)(*b*) of the CHRA. I would describe the test under section 41(1)(*b*) as a "hybrid" of that required to determine exclusive jurisdiction, applying where the jurisdictions overlap. Parliament has directed the Commission to ensure that there is not a more appropriate procedure to deal with the complaint in the overlapping jurisdiction.

[45] In that respect, I conclude that the test under section 41(1)(*b*) should share many of the same factors used to determine exclusivity, with additional consideration of other factors due to the overlapping jurisdiction. The test may comprise such other factors such as the nature of the proceedings before the other tribunal, and how it has exercised its discretion in the past both generally and in the specific circumstances of the case in question where the complainant was before it on a similar matter. The tribunal could also properly give consideration to whether the alternate tribunal has refused jurisdiction, as was the Commission' conclusion in the decision in question.

[46] But as a starting point, I conclude that the tribunal making a section 41(1)(*b*) determination would be required to adopt the two-step process to some extent. The test adopted by the Supreme Court is generic to the issue of delineating jurisdictional boundaries and moreover is based on common sense. Where else to start the analysis of the more appropriate procedure to resolve a dispute but with the characterization of the dispute in its factual context? Similarly, the determination of the appropriateness of a specialized jurisdiction is obviously dependant in large measure on the statutory schemes devised by Parliament to ascribe its powers to resolve such

disputes. The legislative direction can moreover be supplemented by the practice of the second tribunal, in this case the CRTC, to determine what jurisdiction and expertise it has exercised and developed over the years in relation to the character of the dispute in question.

[47] If the CHRT is required to consider these issues, the investigator and Commission in conducting a screening procedure to refer the matter to the Tribunal must also consider evidence pertaining to the essential character of the dispute and the legislative and historical mandate of the other tribunal in arriving at a conclusion. By this is meant that the Commission must turn its attention to the nature of the dispute – its main issues and the nature of the evidence that will be led on these issues – and the appropriateness of the specialized jurisdiction of the alternative tribunal mandated by Parliament to better determine the dispute.

[48] The requirement that the investigator and Commission consider the statutory parameters of competing jurisdictions under section 41(1)(*b*) cannot be denied as an essential component of the investigation and Commission decision. The highly legal and interpretive context of a screening determination under section 41(1)(*b*) approximates closely that under section 41(1)(*c*) regarding exclusive jurisdiction. This latter issue must be determined with little or no consideration to the facts beyond establishing the essential character of the dispute. The Commission has at its disposal expert legal advice which it can and frankly ought to have relied upon in this matter. Given the statutory requirement to screen out complaints pursuant to sections 41(1)(*b*) or (*c*), a thorough consideration of the legislative schemes is required by the Commission as part of its process in deciding to refer the matter, or not, to the Tribunal.

[49] In a generalized fashion therefore, the Commission in its screening process for this matter must consider on the basis of a thorough, but not exhaustive, investigation whether the dispute essentially bears a human rights character relating to discrimination or hardship issues that would appear to suit the legislative mandate and specialized human rights experience of the Tribunal, or whether the essential character of the subject matter is clearly and convincingly more appropriately related to broadcasting matters where the human rights issues that arise can be more appropriately considered by the CRTC. For example, is there really any issue concerning discrimination? If not, do the core issues and evidence turn around hardship related to feasibility, timing and costs of adopting policies to implement new technologies to provide broadcast programming accessibility to visually disabled persons throughout Canada? If this is the case, is there any reason not to conclude that Parliament has strongly, but not exclusively, mandated the CRTC to determine the dispute under its legislative scheme in accordance with its specialized practices and experience regarding the subject matter?

[50] The foregoing test remains based on the sufficiency of the evidence to refer the dispute to the Tribunal. The lower threshold required to refer the matter to the Tribunal is reflected in the higher onus on the respondent to clearly and convincingly demonstrate to the Commission that the alternate statutory procedure would more appropriately determine the dispute. This contrasts with the Tribunal's responsibility, which is to conclusively determine on the basis of the balance of probabilities the more appropriate jurisdiction to hear the matter.

[51] In my view, had the Commission carried out a thorough investigation on appropriateness of jurisdiction, it would have concluded that the CRTC was prima facie the more appropriate forum to

deal with this complaint. Moving forward from this perspective, it is also my view that the Commission would not have come to the unreasonable conclusion that the CRTC had declined jurisdiction, as anything but the most superficial consideration of this issue would have confirmed this not to be the case.

(5) *Essential Character of the Dispute and Nature of the Procedure to Deal with it*

[52] The essential character of the dispute in its factual context turns around technical solutions to provide accessibility and thereafter their feasibility and hardship in implementation. First, there is the primary question as to whether the "aftermarket" technical solution proposed by Mr Edie would work at all. Second, if there is a technical solution, it remains to be determined whether the alleged solution can practically be integrated into the MTS network. Third, if a technical solution appears feasible and integratable, the question remains whether it will entail undue hardship on MTS, and inferentially the other BDUs across Canada, who have intervened and will be impacted by the decision.

[53] In addressing the essential character of the dispute, the Commission spoke generally without precision about the issue of hardship and accommodation, pinpointing somewhat the nature of the dispute, but concluding only that MTS provided no *bona fide* justification for its claims that no technical solution was available. However, the technical broadcasting character of the dispute was confirmed by the investigation report, which followed over several pages of its report the debate between the parties as to whether a technical solution was available and could be integrated into the broadcasting system. In this regard, the investigator only acknowledged in her conclusion that although it was not clear that a technical solution was available to provide the accessibility

demanded by Mr Eadie, there was sufficient evidence for an inquiry into that issue and the hardship that it was argued that implementing this solution would create.

[54] This is not the determination required of the Commission by section 41(1)(*b*). The issue was not of the sufficiency of the evidence to send the matter to the CHRT, which normally is all that is required of a screening investigation into a complaint. The question that the investigation never addressed was whether the CRTC was the more appropriate tribunal to determine the dispute. This required setting out the dispute's essential character and a thorough consideration of the CRTC's jurisdiction and procedures, at which point the sufficiency of the evidence would be considered.

[55] The investigator and Commission could not arrive at a conclusion that the CRTC had refused to exercise its jurisdiction without first determining whether it was the most appropriate tribunal to resolve the dispute. If it had carried out a thorough investigation on the appropriateness it would then have been in a position to investigate if and why it had refused jurisdiction. It never did either task. Instead, the Commission accepted the complainant's contention that the CRTC had declined jurisdiction over the matter. It never considered the legislative mandate of the CRTC or spoke to the CRTC to ascertain precisely to what extent the issues had been considered by it and its conclusions on the state of the technology. In the result as shall be seen in the following section it arrived at a clearly incorrect decision, in which it implicitly admitted that the subject matter fell squarely within the CRTC's statutory and long-exercised jurisdiction.

[56] There is no evidence that the TV Speak solution had ever been proposed to the CRTC. Accordingly, it is difficult to understand how it could be concluded that the CRTC declined jurisdiction over a technology not referred to it by the complainant.

[57] There is no reference in the investigation report or Commission's decision to the fact that section 3(1)(*p*) of the *Broadcasting Act* imposes on the CRTC a mandatory duty to enact policies to provide programming accessible by disabled persons within the Canadian broadcasting system as resources became available. This omission appears to have been a significant factor in the Commission's conclusion that the CRTC had declined jurisdiction.

[58] In addition, the Commission failed to consider the implications of section 3(2) of the *Broadcasting Act*, which declares that the "Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority." Thoroughness of the investigation would require some consideration of whether referring the matter to the Tribunal was contrary to Parliament's intention to delegate the regulation of the Canadian broadcasting system to a single independent public authority, which was clearly the CRTC. The Commission was proposing to operate in a realm where the CRTC had exercised sole jurisdiction over such issues since its inception. A determination by the Tribunal to impose on MTS requirements that it adopt a technical solution to make broadcast programming available to the complainant in some fashion would in effect be setting policy on these matters across Canada for all the other BDUs who have intervened in this process.

[59] The Commission would also have to reflect on its expertise, in comparison with that of the CRTC, to determine whether a technical solution in matters of broadcasting was available, feasible, or even would cause undue hardship to the entire Canadian broadcasting industry affected by the Tribunal's decision.

[60] The Commission should also have seriously considered whether the issue of available technical solutions had not already been the subject of careful consideration by the CRTC. Again, it avoided any substantive consideration of this issue on the basis that the CRTC had declined jurisdiction. Otherwise it would have had to investigate whether the availability of a technical solution appeared to have been the principal matter for consideration before the CRTC in its policy hearings, including whether the non-availability of solutions appropriately led the CRTC to conclude that it was unable at the time to enact policies providing the accessibility requested by Mr Eadie. It should have at least considered whether Mr Eadie's TV Speak solution had been considered by the CRTC and if not, why not.

[61] Similarly, the Commission would have had to give some cognizance to the participation of the complainant in the CRTC proceedings and his admission in that context that no technical solutions involving software of STBs were yet available. It would have had to investigate whether the continuing work of the DV Working Group which was mandated to encourage and find technical solutions was a consequence of a conclusion by the CRTC that technical solutions were not available to meet the complainant's needs. This aspect of investigating would have been as

simple as a telephone call to those participants on the working group who were representatives from organizations with the mandate to advance the interests of visually impaired Canadians.

[62] Finally, it is noted that the Commission did not dispute that the human rights elements of the dispute would have been appropriately considered by the CRTC had the complaint been brought before it. Despite suggestions to this effect by the respondent, neither the investigation nor the Commission's decision indicated that the CRTC lacked competence in issues of human rights to apply proper principles or that it failed to give appropriate consideration to these principles in the hearings and policies enacted relating to accessibility for visually impaired persons. Ironically with respect to the issue of finding discrimination, it appears that CRTC's legislation is the more mandatory of the two. On a strict reading of paragraph 3(1)(*p*) little discretion is left to the CRTC not to require BDUs to provide the services i.e. "should be provided… as resources become available".

[63] Despite the deference owed the Investigator and the Commission, for all of the foregoing reasons described above I am satisfied that the investigation was not sufficiently thorough on the determinants of the fundamental issue of appropriateness, including whether the CRTC had declined jurisdiction. These failures led to an unreasonable decision that the CRTC declined jurisdiction as is discussed below.

C. *Was the Commission's decision that the CRTC declined to exercise jurisdiction over the subject matter unreasonable?*

[64] The lynch-pin conclusion in the Commission's decision is that the CRTC refused to exercise its jurisdiction over STBs. This conclusion eliminated any debate about the more appropriate forum

inasmuch as a procedure obviously cannot be appropriate when its decision-maker declines jurisdiction over the subject matter. To assist in analysis of this issue, I reproduce the relevant passage from the Commission's decision where this conclusion is described:

> The Complainant, however, asserts in his submissions that the CRT has refused to exercise its jurisdiction over STBs. This is referred to in the Investigation Report at paragraphs 26 and 29. This is not challenged by the Respondent (see paragraph 19 of the Respondent's October 11, 2011 submission), however, the respondent argues that the Commission also lacks jurisdiction over STBs.
>
> In the Commission's view, the fact that the CRTC has refused to exercise jurisdiction over STBs confirms that the complaint cannot be more appropriately dealt with under a procedure provided for under another Act of Parliament, i.e. the *Broadcasting Act*. It cannot be said that the CRTC will either initially or completely deal with a human rights complaint when it refuses to exercise its jurisdiction over the very source of the complaint. Moreover, if the CRTC does not have jurisdiction over STBs, then a proceeding under the CHRA relating to discrimination relating from the use of STBs will not necessarily involve the same evidence and considerations as a proceeding before the CRTC.
>
> [Emphasis added]

[65] There is no justification for the Commission's finding that the CRTC refused to exercise its discretion, or that MTS agreed with this statement in a fashion which would permit the Commission to differentiate its procedures from those before the CRTC.

[66] The conclusion that the CRTC refused to exercise its jurisdiction over STBs is based solely upon the Notice of Public hearing of June 10, 2008. This was cited as the source for the complainant's contention that the CRTC declined jurisdiction. It is repeated below:

> The Commission notes that it does not regulate terminal equipment or the design and manufacture of communications devices intended for accessing telecommunications or broadcasting services. Accordingly, the Commission invites comments on which measures,

> short of regulating terminal equipment, would improve the accessibility of telecommunications and broadcasting services to persons with disabilities.

[67] The essence of the Notice is that the CRTC cannot regulate the manufacturers of terminal equipment or the design and manufacture of their equipment. It must await development of equipment with the necessary functionality before it can regulate how STBs are used in the broadcasting system.

[68] The meaning of the CRTC's notice is evident from its legislative mandate with respect to providing programming accessibility to disabled persons. I refer to section 3(1)(p) which reads as follows:

> 3. (1) It is hereby declared as the broadcasting policy for Canada that
>
> (p) programming accessible by disabled persons should be provided within the Canadian broadcasting system as resources become available for the purpose.
>
> [Emphasis added]

[69] This mandate does not allow the CRTC to regulate how system resources become available, although it did put in place a procedure intended to encourage a technological solution to be brought forward. Thus, when the CRTC says that it does not regulate terminal equipment or the design and manufacture of communications devices, it is merely stipulating the limits of its mandate as applied to developing resources. It is required to wait for these resources to become available before it can adopt policies regulating their functionality.

[70] It is common sense and an obvious reality that manufacturers cannot be ordered to add functionality to their STBs, particularly if there are no existing solutions which provide the functionality required. This is all the more so when the manufacturers of the equipment are not Canadian but are located in the United States.

[71] But more to the point, the Commission ultimately adopts MTS's submission that it too has no jurisdiction over STBs. This is seen from the penultimate paragraph of its decision as follows:

> […] While the equipment itself and the manufacturer of the equipment may be beyond the jurisdiction of the Commission, it is the Respondent's selection and use of this equipment in the provision of its service that concerns the Commission.
>
> [Emphasis added]

[72] Obviously if the Commission cannot regulate the manufacturers of the equipment, then it too is declining jurisdiction over the subject matter in the same fashion as the CRTC. Thus, the fundamental premise underlying the Commission's reasoning lacks justification and intelligibility.

[73] At this point near the conclusion of its reasons, the Commission switches horses. It no longer differentiates its jurisdiction because the CRTC has declined to regulate STBs. Instead it raises a new rationale intended to differentiate its mandate from that of the CRTC on the basis that a proceeding under the CHRA will be all about the "selection and use of equipment" by MTS. The Commission appears to believe that by proper direction to BDUs about the selection of equipment through RFIs or other requests for proposals that its jurisdiction for providing accessible programming is distinguished from that of the CRTC.

[74] There is no foundation in logic or anywhere in the investigation report to distinguish CHRT's jurisdiction on the basis of the selection and use of equipment from what the CRTC does. The CRTC is required to regulate equipment when it becomes available so as to provide accessibility to disabled persons. As was noted in the statement of background facts, it also required a form of RFI from the BDUs to "identify all of the fully accessible devices (and where applicable, the software that would make the device fully accessible) to provide access to broadcasting and telecommunications services and would not require prohibitive network modifications. This includes, at a minimum, set-top boxes and wireless devices. For each device or software, provide a detailed description of its functionalities, the manufacturer and where it can be obtained". Thus, the selection of the equipment occurs when the resource becomes available. The CRTC imposes the use of the equipment on the BDUs in accordance with its policies and procedures, taking into consideration the hardship this entails on the BDUs, as would the CHRT if it were to consider the matter.

[75] What the Commission may be saying, if one can read between the lines in the investigation report, is that the CRTC has declined to consider the complainant's submission that there is an aftermarket product ("TV Speak").

[76] If this is what the Commission somehow means by the CRTC declining jurisdiction, it is not substantiated in the investigation. There is no evidence that the TV Speak product was ever referred to the CRTC. Before the CRTC, Mr Eadie only made reference to the Ocean Blue product being used in Europe. He acknowledged that no feasible technical solution existed for his issue at the time. Moreover, there appears no distinction between equipment being an "aftermarket" product and

being an STB. It remains a "resource" under section 3(1)(*p*) of the *Broadcasting Act* that can be used to provide accessibility to disabled persons. If TV Speak was a viable solution to provide accessibility to visually disabled persons as part of the broadcast system, it would fall within the mandatory legislated jurisdiction of the CRTC.

[77] The Commission also rejected MTS's argument that the complainant was seeking to re-litigate a matter already considered by the CRTC. It reached that conclusion on three bases. First, it restated that the CRTC had not exercised jurisdiction over STBs, which I have already indicated is not justified for the all reasons as described above. This includes the Commission's admission that it too is not in a position to exercise jurisdiction over the STBs.

[78] An additional rationale advanced by the Commission was that the DV Working Group was not a "procedure provided for under an Act of Parliament" as contemplated in section 41(1)(*b*) and 44(2)(*b*) of the CHRA, and that the working group had not considered the issue of whether equipment and services used to provide audible cues to more easily access and use the interactive programming guide had been litigated before the CRTC or made a decision on the issue.

[79] With respect to the working group not being a procedure contemplated by section 44(2)(*b*), the Commission noted that this group had been established under the Accessibility Policy announced July 21, 2009, but without recognizing that the policy was a result of a procedure provided for under the *Canadian Radio-television and Telecommunications Commission Act*, RSC 1985, c C-22 [CRTCA]. In that sense the policy represented the decision that flowed from that procedure under the CRTCA.

[80] The working group was part of the CRTC's ongoing remedy to provide accessibility to the visually impaired person including adding functionality to the EPG on STBs, over which it remained seized pending a satisfactory outcome. CRTC mandating a working group to find solutions to enable it to enact policies is analogous to an order from the Canadian Human Rights Tribunal, the implementation of which it would remain seized until satisfied with the outcome.

[81] With respect to the process not being comparable to a litigious adjudicative process, paragraph 41(1)(*b*) of the CHRA speaks only about a more appropriate "procedure provided under an Act". It is therefore incorrect to reject the CRTC activities on the basis that they were not necessarily adjudicative litigation resulting in a decision in the form of an order. Moreover, there is a complaint process under the *Broadcasting Act* which provides for a more adjudicative process.

[82] With respect to the CRTC's "decision", the CRTC indicated implicitly in its Accessibility Policy announced July 21, 2009 that it was not able to adopt a policy with respect to described video features because the resources were not available. If the resources, by which is meant technical solutions, had been available, then by its mandate the CRTC would have been under an obligation to adopt a policy to provide access to visually impaired persons using the functionality of those resources.

[83] The CRTC's conclusion as to the absence of any viable technical solution is also understood from its statement of expectations on the part of BDUs at paragraphs 120 and 122 of its Policy, exhorting them to look for a solution, in addition to its recognition of the need to create the DV

Working Group, and through its terms of reference search for a technical solution that would work as described at paragraphs 123 and 125 of the Policy:

> 120 … It further encourages BDUs to continue to work with the vendors to develop set-top box software that provides increased font sizes, audio prompts or other audio information.
>
> [. . .]
>
> 122 Accordingly, the Commission expects:
>
> [. . .]
>
> licensees of BDUs to develop one or more means of identifying programming with described video in their electronic program guides. This could include an audio tone, a visual indicator, or the offer of an audio electronic program guide.
>
> 123 The Commission considers that would be useful to create a working group to develop solutions to issues related to subscriber access to described video [. . .]
>
> [. . .]
>
> 125 The working group will be tasked to develop common practices and other solutions that will improve the accessibility of described programming including:
>
> [. . .]
>
> • ensuring that information regarding described programming is made available in print and online programming listings and electronic programming guides.
>
> [Emphasis added]

[84] In terms of not re-litigating the same facts and issues that were before the CRTC, inasmuch as any proceeding under the CHRA would have to first consider whether any technical solution was available, its feasibility and the hardship in implementing it, it is not clear what new issue would be before the Tribunal that was not squarely front and centre before the CRTC.

[85] Accordingly, I am satisfied that the Commission's decision must be set aside on its unreasonable conclusion that the CRTC declined jurisdiction in a fashion different from itself and by its failure to conduct a thorough investigation on jurisdictional issues. In other words, the decision cannot reasonably be sustained either on the evidence or in law and must be set aside.

D. *Can the Court determine at this stage whether the CRTC has exclusive jurisdiction over the subject matter?*

[86] MTS did not argue before the Commission that the CRTC had exclusive jurisdiction over these matters pursuant to section 41(1)(*c*) of the CHRA that directs the Commission to refuse to deal with a complaint that is beyond its jurisdiction. Despite submissions in these proceedings by MTS and supported somewhat by the BDUs interveners, to the effect that exclusive jurisdiction was raised before the Commission, it is clear that the applicant's argument and the Commission's decision relied solely on section 41(1)(*b*) and 44(2)(*b*) of the Act concerning appropriateness.

[87] Despite the matter not being raised before the Commission, the interveners argue that this does not amount to a bar to the matter of exclusive jurisdiction of the CRTC being considered in these proceedings. I disagree.

[88] Firstly as noted above, by the fact that I have already concluded that the standard of reasonableness applies to the Commission's decisions under sections 41(1)(*b*) and (*c*), this argument cannot be sustained. If I was required to review the Commission's decision on exclusive jurisdiction, had it been argued, on the standard of reasonableness, it is illogical to suggest that I could consider the issue for the first time at this point in the proceedings on basically what would be

correctness principles. Otherwise, MTS would be in a better position not to argue jurisdiction before the Commission and await the judicial review application to bring it forward so as to be able to argue correctness. Despite this conclusion, I briefly review the arguments of the BDUs on this matter.

[89] Secondly, the BDUs referred to case law in the Federal Court holding that a matter of true jurisdiction, even if not addressed by the administrative tribunal under review, remains nevertheless open for consideration by the reviewing court. See generally the cases of *Byers Transport Ltd v Kosanovich*, [1995] 3 FC 354 (FCA) and *Canadian Broadcasting Corp v Paul***,** [1999] 2 FC 3 (TD). These cases however, do not concern a preliminary screening decision by a commission to refer the matter to a tribunal. Apart from this important distinction, I do not disagree that even if a tribunal which has jurisdiction to adjudicate and determine a jurisdictional issue fails to do so, the issue may nevertheless be brought forward before the reviewing court, or for that matter in any further appeal stage of the proceeding, unless somehow undue prejudice arises from raising the issue at too late a stage.

[90] The Supreme Court has spoken in *Halifax* in the clearest of terms, saying that jurisdictional issues raised in preliminary screening decisions to refer the complaint to an adjudicative tribunal cannot be set aside even if the reviewing judge is of the view that the Commission clearly lacks jurisdiction over the matter. The reviewing court can only act on the decision taken on grounds of unreasonableness in the fashion such as I have found above.

[91] *Halifax* was a matter where the reviewing judge concluded that a human rights commission clearly lacked jurisdiction. The Court rejected any distinction to the standard of reasonableness on the basis of jurisdiction, explaining its rationale at paragraphs 17, 36 and 37 as follows:

> [17] The resolution of two issues separated the chambers judge and the Court of Appeal in their understanding of the role of the reviewing court in this case. The first relates to the applicable standard of judicial review. This turns mainly on the nature of the Commission's decision. My view is that the Commission's decision was not a determination of its jurisdiction but rather a discretionary decision that an inquiry was warranted in all of the circumstances. That discretionary decision should be reviewed for reasonableness.
>
> [. . .]
>
> [36] While such intervention [on issues of jurisdiction] may sometimes be appropriate, there are sound practical and theoretical reasons for restraint: Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes: and 3:4400. Thus, reviewing courts now show more restraint in short-circuiting the decision-making role of the tribunal, particularly when asked to review a preliminary screening decision such as that at issue in Bell (1971). [Citations removed]
>
> [37] Moreover, contemporary administrative law accords more value to the considered opinion of the tribunal on legal questions, whether the tribunal's ruling is ultimately reviewable in the courts for correctness or reasonableness... [Citations removed]
>
> [Emphasis added]

[92] The interveners' attempt to argue that situations of "true" jurisdiction which concern statutory interpretation of jurisdictional boundaries requiring correctness on the part of the decision-makers should be distinguished from the lesser forms of jurisdiction. However, I can see no distinction based upon the reasoning of the Supreme Court in *Halifax* cited above.

[93] I conclude that I have no jurisdiction to determine whether the CRTC has exclusive jurisdiction, thereby requiring the complaint to be dismissed pursuant to section 41(1)(*c*). Accordingly, while the application is allowed and the decision of the Commission to refer the complaint to the Tribunal is set aside, it is not on the basis of any exclusivity of jurisdiction of the CRTC over the matter pursuant to section 41(1)(*c*) of the CHRA.

VII. Conclusion

[94] For the above reasons, the application is allowed and the decision of the Commission is set aside and referred back to it for a redetermination.

[95] I make no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed without costs.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1057-12

STYLE OF CAUSE: MTS INC. v
ROSS EADIE AND CANADA HUMAN RIGHTS COMMISSION, SHAW COMMUNICATIONS INC., COGECO CABLE INC., ROGERS COMMUNICATIONS PARTNERSHIP, BCE INC., TELUS COMMUNICATIONS COMPANY, AND QUEBECOR MEDIA INC.

PLACE OF HEARING: WINNIPEG, MANITOBA

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REASONS FOR JUDGMENT AND JUDGMENT: ANNIS J.

DATED: JANUARY 17, 2014

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