

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20110211**

**Docket: 11-A-5**

**Citation: 2011 FCA 56**

**Present: LAYDEN-STEVENSON J.A.**

**BETWEEN:**

**CKLN RADIO INCORPORATED**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Ottawa, Ontario, on February 11, 2011.

Order delivered at Ottawa, Ontario, on February 11, 2011.

**REASONS FOR ORDER BY:**

**LAYDEN-STEVENSON J.A.**

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**REASONS FOR ORDER**

**LAYDEN-STEVENSON J.A.**

[1] “CKLN-FM Toronto” is a community-based campus radio station licensed to CKLN Radio Incorporated, based on the campus of Ryerson University (Ryerson) in Toronto, Ontario. It has held a licence to broadcast since 1983.

[2] CKLN Radio Incorporated (CKLN) moves, on an urgent basis, for a stay of execution of the decision of the Canada Radio-television and Telecommunications Commission (the CRTC) in CKLN-FM Toronto – Revocation of Licence, Broadcasting Decision CRTC 2011-56, dated January 28, 2011 (the decision), pending the disposition of CKLN’s motion for leave to appeal from the decision, and if leave is granted, pending appeal. The motion was filed on February 9, 2011.

[3] The respondent Attorney General of Canada (Attorney General), by correspondence dated February 10, 2011, takes no position with respect to CKLN's motion relating to an interim stay (that is, the stay pending determination of its leave application) subject to the caveat that such position should not be interpreted to mean that the Attorney General admits any of the facts or concedes any of the positions or arguments set out in CKLN's motion record.

[4] The Attorney General's correspondence advises that the parties are agreed that CKLN will address the issue of a further interim stay, simultaneous to the filing of its motion record for leave to appeal the decision. With respect to the leave application, the parties will adhere to the timeframes for the exchange of materials set out in Rules 354 and 355 of the *Federal Courts Rules* SOR/98-106 (the Rules).

[5] Because the position with respect to the requirement for a further motion, simultaneous with the motion record for leave to appeal the decision, is at odds with the relief requested on this motion and because it was not clear to me why scarce judicial resources should be expended for determination of the same issue twice, I directed counsel for the parties to attend for oral argument by teleconference.

[6] Having heard counsel, I now understand that the Attorney General's position is premised on the basis that he wishes to preserve his right to argue against the granting of a stay pending appeal in the event that leave is granted. Further, he wishes to be able to consult with his client and ascertain what position will be taken. In the circumstances, and because it appears that counsel discussed the

matter and were agreed that such an approach was acceptable, I am hard pressed to do otherwise. Consequently, my order and these reasons for order relate only to a stay pending the determination of the application for leave to appeal. Counsel for the Attorney General has indicated that, as soon as practicable, he will notify counsel for CKLN as well as the Court if the ultimate decision is to take no position on the request for a stay pending appeal.

[7] Given the time available within which to determine the matter – the decision revokes the CKLN licence and requires it to cease broadcasting as of February 12, 2011 (tomorrow) – these reasons may be less extensive than they would otherwise be.

[8] CKLN must satisfy the tripartite test articulated in *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, that is, it must demonstrate: (a) the existence of a serious issue; (b) irreparable harm if the stay is not granted; and (c) that the balance of convenience, taking into consideration both the interests of the parties and the public interest, favours the granting of a stay.

[9] The serious issue threshold is low and requires only a preliminary assessment of the merits in the sense that the matter is not vexatious or frivolous. CKLN's proposed grounds are:

- (1) the CRTC deprived it of procedural fairness by creating and then ignoring a legitimate expectation that, in these circumstances, the CRTC would follow its clear, unambiguous and entrenched practice of graduated escalation of regulatory measures prior to applying

the exceedingly rare measure of a revocation of licence mid-way through a full, seven-year licence term; and

- (2) The CRTC acted contrary to natural justice by basing its decision upon criteria – namely the existence and details of a legitimacy dispute among the station’s leadership – which it had earlier determined to be irrelevant.

[10] In addition to heavy reliance on the dissenting reasons of a CRTC Commissioner, CKLN provides references to jurisprudence in support of its grounds. I am prepared to accept, for present purposes, that the low threshold of the existence of a serious issue is met.

[11] Regarding irreparable harm, I must assess whether refusing to grant the relief could so adversely affect CKLN’s interests that the harm could not be remedied if the eventual decision on the merits is contrary to the decision underlying the stay application. It is the nature rather than the magnitude of the harm that is pertinent. In this respect, CKLN says, even if successful on its leave application and, if leave is granted, if successful on its eventual appeal, it will be too late to remedy the following:

- it will lose its sought-after 88.1 FM frequency in a hotly-contested Toronto market, a danger forecast by the dissenting Commissioner and confirmed by the expressions of interest by other broadcasters in obtaining that frequency;
- it stands to lose its purpose-built, rent-free broadcast studio premises in the Ryerson Student Campus Centre, which it will not be able to replace on a comparable or rent-free basis;

- it will lose its core funding from the Ryerson University Students' Union collected in the form of a CKLN-FM radio levy from each student enrolled at Ryerson because if the station goes off the air on February 12<sup>th</sup>, Ryerson Students' Union's legally binding obligation to continue funding CKLN would cease;
- it will lose the listenership it has slowly built over 28 years, which will negatively affect its reputation, goodwill and ultimately the reciprocal connection to the Ryerson and broader Toronto community that is the station's *raison d'être*;
- the loss of listenership will, in turn, impair its ability to raise revenues through advertising and fundraising activities, both of which are inextricably linked to listenership;
- it will lose programmers, including high-profile on-air personalities, who will find other stations, should it cease to operate on February 12<sup>th</sup>;
- it will lose volunteers which are the lifeblood of the station, as they are with most campus and community radio stations;
- the loss of the programmers and volunteers will seriously compromise CKLN's unique role and personality in the Toronto community as the source of alternative musical and spoken-word programming not found on mainstream media as well as the forum and "voice" for a range of under-represented groups

[12] The evidentiary foundation detailing the above-noted consequences is comprised of the affidavit of Lauren Speers (past member of the Board of Directors of CKLN and presently working as a volunteer on station management and operational issues) sworn February 7, 2011 and the

affidavit of Andrew Lehrer (Vice-Chair of the Board of Directors of CKLN) sworn February 7, 2011. The evidence is uncontradicted and unchallenged.

[13] I am satisfied, on the basis of the evidence before me, that irreparable harm has been demonstrated. More specifically, in my view, the loss of the station's frequency, studio space and funding agreement with the students' union would mean that even if CKLN were ultimately to obtain leave to appeal and eventually succeed on its appeal, it would be left without the means or capacity to resume broadcasting.

[14] The balance of convenience prong of the test requires me to determine which of the two parties will suffer greater harm from the granting or refusal of the stay. The public interest must also be considered. The harm to CKLN has been delineated above; I have no submissions on the potential harm that could accrue to the CRTC. As for the public interest, CKLN has provided a detailed recitation of the various ways that it has sought to serve the public interest as well as examples regarding why the continued broadcasting would be in the public interest. In view of the time constraints, I will not reiterate the list, but am satisfied that CKLN has tipped the scales in its favour in this respect. Further, I note the absence of any reference in the decision to any harm to the public interest that might ensue if the station remained on the air.

[15] CKLN has satisfied the tripartite test. An order that the decision of the CRTC dated January 28, 2011 be stayed pending determination of CKLN's application for leave to appeal will maintain the *status quo*. I advised counsel accordingly and my order will follow.

"Carolyn Layden-Stevenson"

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J.A.



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** 11-A-5

**STYLE OF CAUSE:** **CKLN Radio Incorporated v  
Attorney General of Canada**

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** February 11, 2011

**REASONS FOR ORDER BY:** LAYDEN-STEVENSON J.A.

**DATED:** February 11, 2011

**APPEARANCES:**

Y. Monica Song FOR THE APPLICANT

John L. Syme FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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