

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20110414

Docket: 11-A-5

Citation: 2011 FCA 135

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

BETWEEN:

CKLN RADIO INCORPORATED

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 14, 2011.

**REASONS FOR ORDER BY:
CONCURRED IN BY:**

**SHARLOW J.A.
EVANS J.A.
LAYDEN-STEVENSON J.A.**

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REASONS FOR ORDER

SHARLOW J.A.

[1] On January 28, 2011, the Canadian Radio-television and Telecommunications Commission (the Commission) made an order revoking the broadcasting licence for CKLN-FM Toronto, a community-based campus radio station that has operated on the campus of Ryerson University in Toronto since 1983. The broadcasting licence was a renewal issued in 2007 to the applicant CKLN Radio Incorporated for the period September 1, 2007 to August 31, 2014. CKLN has applied under subsection 31(2) of the *Broadcasting Act*, S.C. 1991, c. 11, for leave to appeal the Commission's decision. For the following reasons, I would dismiss the application for leave to appeal.

[2] Subsection 31(2) reads as follows:

31. (2) An appeal lies from a decision or order of the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction if leave therefor is obtained from that Court on application made within one month after the making of the decision or order sought to be appealed from or within such further time as that Court under special circumstances allows.

31. (2) Les décisions et ordonnances du Conseil sont susceptibles d'appel, sur une question de droit ou de compétence, devant la Cour d'appel fédérale. L'exercice de cet appel est toutefois subordonné à l'autorisation de la cour, la demande en ce sens devant être présentée dans le mois qui suit la prise de la décision ou ordonnance attaquée ou dans le délai supplémentaire accordé par la cour dans des circonstances particulières.

[3] The Commission's decision has been stayed pending the disposition of this leave application: *CKLN Radio Incorporated v. Attorney General of Canada*, 2011 FCA 56.

[4] The parties do not agree on the correct test for granting leave to appeal under subsection 31(2) of the *Broadcasting Act*. CKLN relies on *Canadian Broadcasting Corp. v. Canadian Radio-television and Telecommunications Commission*, [1999] F.C.J. No. 1288 (F.C.A.). In granting leave to appeal in that case Justice Marceau, speaking for this Court, said that "the grounds on which the appellant intends to base its appeal – jurisdictional error and breached rules of natural justice – are not as futile and frivolous as they would have to be to deny the appellant an opportunity to argue them formally for lack of any reasonable chance of success."

[5] The Crown argues that the *Canadian Broadcasting Corp.* decision sets the bar too low. The position of the Crown is that leave to appeal should be granted only if the applicant for leave to

appeal establishes that the decision sought to be appealed is arguably based on an error on a question of law or jurisdiction. That is the test applied by this Court in *Rogers Cable Communications Inc. v. Province of New Brunswick*, 2007 FCA 168, which determined an application under subsection 64(1) of the *Transportation Act*, S.C. 1993, c. 38, for leave to appeal a telecommunications decision of the Commission. The language of subsection 64(1) of the *Telecommunications Act* is substantially the same as the language of subsection 31(2) of the *Broadcasting Act*.

[6] I agree with the Crown that the test applied under the two statutes should be the same and that the *Rogers Cable* decision states the correct test. Therefore, the question to be considered by this Court is whether CKLN has established an arguable case that the decision of the Commission revoking its broadcasting licence was based on an error of law or jurisdiction.

[7] In its application for leave to appeal, CKLN proposed two grounds of appeal:

- (a) whether the Commission acted inconsistently with CKLN's legitimate expectations and thereby erred in law and jurisdiction by failing to follow its established procedures and practice of "graduated discipline" before revoking CKLN's broadcasting licence, and
- (b) whether the Commission acted inconsistently with CKLN's right to meaningful notice and full and fair opportunity to be heard and thereby erred in law and jurisdiction by first deeming the issue of "infighting" to be beyond the scope of

inquiry and then basing its decision upon certain allegations or evidence pertaining to the very same subject matter.

[8] These grounds of appeal allege errors of law which, if made out, could result in the quashing of the Commission's decision. However, in my view, the record presented by CKLN with its leave application does not disclose an arguable case for either ground of appeal.

“K. Sharlow”

J.A.

“I agree
John M. Evans”

“I agree
Carolyn Layden-Stevenson”

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

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: SHARLOW J.A.

CONCURRED IN BY: EVANS J.A.
LAYDEN-STEVENSON J.A.

DATED: April 14, 2011

WRITTEN REPRESENTATIONS BY:

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