Federal Court of Appeal | Cour d'appel fédérale

Date: 20241223

Dockets: A-304-24, 24-A-38;
A-229-24, A-308-24, 24-A-37;
A-225-24, 24-A-25;
A-309-24, 24-A-36

Citation: 2024 FCA 217

Present: WEBB J.A.

Dockets: A-304-24
24-A-38

BETWEEN:

AMAZON.COM.CA ULC

Appellant/Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Dockets: A-229-24
A-308-24
24-A-37

AND BETWEEN:

APPLE CANADA INC.

Appellant/Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Dockets: A-225-24
24-A-25

AND BETWEEN:

MOTION PICTURE ASSOCIATION-CANADA, CRUNCHYROLL, LLC, NETFLIX SERVICES CANADA ULC, PARAMOUNT ENTERTAINMENT CANADA ULC and PLUTO INC.

Appellants/Applicants

and

CANADIAN ASSOCIATION OF BROADCASTERS

Respondent

Dockets: A-309-24
24-A-36

AND BETWEEN:

SPOTIFY AB

Appellant/Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on December 23, 2024.

REASONS FOR ORDER BY: WEBB J.A.

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REASONS FOR ORDER

WEBB J.A.

[1] Following amendments made to the *Broadcasting Act*, S.C. 1991, c.11, by the *Online Streaming Act*, S.C. 2023, c.8, the Canadian Radio-television and Telecommunications Commission (CRTC) issued a Broadcasting Regulatory Policy (CRTC 2024-121) on June 4,

2024 (the June Policy). The June Policy included, as an Appendix, “Proposed orders imposing conditions of service and expenditure requirements for carrying on certain online undertakings”.

[2] Following a period of consultation, the CRTC made some changes to the June Policy and released a revised version on August 29, 2024 together with an order (Broadcasting Regulatory Policy CRTC 2024-121-1 and Broadcasting Order). The order attached to the August Policy as an Appendix was no longer identified as a “proposed order”. In these reasons, the Broadcasting Policy CRTC 2024-121-1 (excluding the appended order) will be referred to as the August Policy.

[3] At the beginning of the August Policy, the CRTC noted:

> On 4 June 2024, the Commission issued Broadcasting Regulatory Policy 2024-121 (the Policy). The Policy establishes base contributions that particular online streaming services must make to support Canadian and Indigenous content. The Policy also included proposed orders on which the Commission sought comments, as required by the Broadcasting Act. The Commission received over 50 comments from various parties on the proposed orders.
>
> Today, the Commission is implementing the decisions that were established in the Policy. Based on the comments received, it is clarifying certain aspects of the Policy and is finalizing the orders that establish conditions of service for particular online streaming services. These include questions of interpretation and application, noting that this process was not meant to reconsider the policy determinations made by the Commission. With these clarifications, the requirement to make base contributions will start during the 2024-2025 broadcast year, which begins on 1 September 2024.

[4] With respect to the orders it issued, the CRTC noted:

> 78. In light of the above, and pursuant to subsections 9.1(1) and 11.1(2) of the Act, the Commission hereby makes orders imposing on particular operators of online undertakings the conditions of service set out in the appendix to this regulatory policy.
>
> 79. The financial information submitted by online undertakings through the Annual Digital Media Survey has been treated as confidential by the Commission since 2022. Based on that information, the Commission has identified the particular operators that are subject to the base contribution requirements. Concurrently with the publication of this regulatory policy, the Commission has issued specific orders to each of these operators. In order to maintain the confidentiality of the information received by the Commission, the identity of each individual operator has not been publicly disclosed. However, the Commission confirms that the orders issued to the operators are the orders set out in the appendix to this regulatory policy.

[5] Paragraphs 1 and 2 of the orders issued by the CRTC impose a requirement on certain operators of an online undertaking providing audio-visual services (paragraph 1) and audio services (paragraph 2) to devote not less than 5% of its annual contributions revenues (as defined in the orders) to certain specified funds. The first payments under paragraph 1 must be made by August 31, 2025, while paragraph 2 provides that part of the amount to be paid to the Indigenous Music Office is to be paid by December 31, 2024, with the balance of the amounts payable under paragraph 2 to be paid by August 31, 2025. Paragraph 3 of the orders imposes a financial reporting requirement on the same operators.

I. Motions for a Stay Brought by Amazon.com.ca ULC (Amazon), Apple Canada Inc. (Apple), and Spotify AB (Spotify)

[6] Amazon, Apple and Spotify have each filed an application for judicial review and have also been granted leave to appeal the August Policy and the related orders (as identified by the parties). Each of these appellants also brought a motion for a stay, in whole or in part, of the

orders issued by the CRTC. Amazon and Apple each requested a stay of the payment requirements imposed by paragraphs 1 and 2 of the orders. Apple also identified certain alternative requests. Spotify requested a stay of the order.

[7] Spotify, in its motion, included a request to stay the August Policy. However, Spotify's written submissions focus only on the payment and reporting requirements of the order appended to the August Policy. Since Spotify did not include any submissions supporting its request for a stay of the August Policy, there is no basis on which a stay of the August Policy could be granted.

[8] The Attorney General of Canada (AGC) filed a single record responding to the motions for a stay brought by Amazon, Apple, and Spotify.

[9] The Supreme Court of Canada in *RJR-MacDonald v. Canada*, [1994] 1 S.C.R. 311, at page 334; [1994] S.C.J. No. 17, set out the three-stage test to be applied in determining whether a stay should be granted:

> *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits….

A. *Serious Question*

[10] In its memorandum, the AGC did not dispute that there are serious issues to be tried. Therefore, the first step of the analysis is satisfied.

B. *Irreparable Harm*

[11] As noted by the Supreme Court in *RJR-MacDonald*, the question for irreparable harm is whether the person (or persons) applying for the stay will suffer irreparable harm. Therefore, the issue is whether Amazon, Apple and Spotify have established that they will suffer irreparable harm if the stay is not granted and they are ultimately successful in their applications for judicial review and appeals. In *RJR-MacDonald*, the Supreme Court noted, at page 341, that:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. …

[12] Only Spotify is seeking a stay of the reporting requirements of the orders issued by the CRTC. Spotify submits, in the opening part of its written representations at paragraph 10, that it:

> … has never previously been required to consider its revenues by territory, it has been required to initiate a comprehensive internal financial review in order to determine amounts it will have to pay under the Contributions. Due to the complexity and scale of this task, it may not be complete before the first Contribution payment is due on December 31, 2024.

[13] In the part of its written representations concerning irreparable harm, Spotify only focuses on the obligations to make the payments as provided in the order issued by the CRTC. Spotify has not established that it will suffer any irreparable harm if a stay of the reporting requirements as set out paragraph 3 of the order issued by the CRTC is not granted. As a result, a stay of paragraph 3 of the order issued by the CRTC will not be issued.

[14] Amazon, Apple and Spotify argue that if they make the payments as provided in the orders and they are ultimately successful in their judicial review applications and appeals, they will not be able to recover the payments. Amazon and Apple attempted, for the most part unsuccessfully, to obtain confirmation from the various funds that, if the payments are made and Amazon and Apple are successful in setting aside the orders, the payments would be refunded. The AGC does not challenge the submissions by Amazon, Apple and Spotify that they would not be able to recover any payments made if they are successful in their judicial review applications and appeals, but instead submits that Amazon, Apple and Spotify did not quantify the amounts that they would be required to pay and did not indicate how making such payments would affect their businesses and bottom lines.

[15] With respect to the quantification issue, the contributions contemplated by the orders are to be made by operators with $25 million or more of annual contribution revenues or Canadian gross broadcasting revenues. The contributions are 5% of those revenues. Since each of Amazon, Apple and Spotify have confirmed that the contributions would apply to them, the annual payments would be at least $1.25 million. There is no need to establish the exact amount that each will have to pay in order to satisfy the requirement that they will suffer irreparable harm.

[16] In *Apotex Inc. v. Wellcome Foundation Ltd.*, 232 N.R. 40, 82 C.P.R. (3d) 429, the Federal Court, Appeal Division stated:

> 8 The refusal of the motions judge to order a stay was due, in my respectful opinion, to his misunderstanding of the notion of irreparable harm as being necessarily one that could threaten the very viability of the business concerned and his unwarranted application of the idea that the loss was merely a foreseeable normal business risk. In my judgment, he exercised his discretion unjudicially. His decision should not be allowed to stand.

[17] Whether the payments must be so significant that they would threaten the viability of a business is not the test for irreparable harm. Making payments that cannot be recovered if Amazon, Apple and Spotify are successful in their judicial review applications and appeals, would result in irreparable harm.

[18] In *RJR-MacDonald* the issue was whether a stay should be granted in relation a regulation that required new health warnings to be printed on the packaging for tobacco products. In concluding that the tobacco companies would suffer irreparable harm if the stay was not granted and the companies were ultimately successful, the Supreme Court stated, at page 350:

> Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

[19] The finding of irreparable harm was based on the inability of the applicants to obtain monetary redress if the stay was denied and they were ultimately successful.

[20] As a result, I am satisfied that each of Amazon, Apple and Spotify have established they will suffer irreparable harm if the payment obligations are not stayed and they are ultimately successful in their judicial review applications and appeals.

C. *Balance of Inconvenience*

[21] The AGC argues that if the stay is granted, it will delay the payments to the various funds. The amount to be paid by December 31, 2024 is set out in paragraph 2 of the order. It is a relatively small amount (0.05% of the annual contribution revenue (as defined) derived from audio broadcasting activities). The 5% of annual contribution revenues to be paid under paragraph 1 and the balance of the 5% to be paid under paragraph 2 are not due to be paid until August 31, 2025.

[22] The AGC acknowledges, in its written representations, that:

> 33. The parties have also agreed to an expedited and streamlined schedule for the litigation to ensure that the judicial reviews and any appeals, if leave is granted, proceed together efficiently. The parties have further agreed to set deadlines leading to a June 2025 hearing date.

[23] Having an expedited and streamlined schedule for the litigation with deadlines leading to a June 2025 hearing date mitigates the inconvenience arising from a possible delay in the

payment due August 31, 2025. For the payment due December 31, 2024, as noted above, this payment is relatively minor compared to the August 31, 2025 payment. The AGC has failed to establish how the delay in this payment would outweigh the irreparable harm that would be suffered by Amazon, Apple and Spotify if the payment is made, they are successful in the litigation and they cannot recover the money.

[24] The AGC argued, in relation to whether Amazon, Apple and Spotify would suffer irreparable harm, that they could increase their subscription rates and hence recover any payments that they would make under the orders (which would not be payable if they are successful in the litigation and the stay is not granted).

[25] The Supreme Court in *RJR-MacDonald* considered a similar argument. However, it was not considered in evaluating the irreparable harm, but rather in analysing the balance of inconvenience. At pages 350 - 351, the Supreme Court noted:

> The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.
>
> [Emphasis added.]

[26] As well, the effect that the payment of amounts that, if successful in the litigation, did not have to be paid, on the long-term viability of the payor, was only considered as part of the balance of inconvenience analysis.

[27] If Amazon, Apple and Spotify are successful in the litigation and a stay is not granted, they will have paid amounts (which could include the payments due August 31, 2025) that, in all likelihood, they will not be able to recover. When compared to the inconvenience that would be caused by what might be a short delay in making the payments (given the streamlined and expedited schedule for the hearing), the balance of inconvenience weighs in favour of granting the stay.

D. *Conclusion*

[28] The CRTC, as noted above, issued specific orders to each operator that would be required to make payments under the orders. The CRTC also confirmed that the specific orders "are the orders set out in the appendix to" the August Policy. As a result, a stay will be granted for Paragraphs 1 and 2 of the order appended to the August Policy and any individual orders issued by the CRTC to Amazon, Apple or Spotify until this Court renders its decision in relation to the applications for judicial review and the appeals related to the August Policy.

II. Motion for a Stay Brought by the Motion Picture Association-Canada, Crunchyroll, LLC, Netflix Services Canada ULC, Paramount Entertainment Canada ULC and Pluto Inc. (Collectively MPAC et al.)

[29] MPAC et al. also seek a stay. The stay request is restricted to the requirement to contribute to the Independent Local News Fund (ILNF). The first payment to this fund will be due August 31, 2025.

[30] The Canadian Association of Broadcasters (CAB) opposes the stay. Although the CAB submits that there is not a serious issue to be tried, the Supreme Court in *RJR-MacDonald*, at pages 337-338, found that the threshold for a serious question to be tried is low:

> What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. …
>
> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[31] In this case, MPAC et al. were granted leave to appeal the August Policy and related orders. I am satisfied that their application for judicial review and appeal are neither vexatious nor frivolous.

[32] MPAC et al. raise essentially the same argument concerning irreparable harm, as do Amazon, Apple and Spotify. For the same reasons that Amazon, Apple and Spotify will suffer irreparable harm if the stay is not granted and they are successful in their litigation, MPAC et al.

will also suffer irreparable harm if the stay is not granted and they are successful in their litigation.

[33] With respect to the balance of inconvenience, since the first payment for MPAC et al. will not be due until August 31, 2025, the balance of inconvenience, for essentially the same reasons as stated above, weighs in favour of granting the stay.

[34] It should also be noted that once the notices of appeal are filed, Rule 342 of the *Federal Courts Rules*, SOR/98-106, provides for a consolidation of all appeals from the same order:

342 (1) Unless the Court orders otherwise, where more than one party appeals from an order, all appeals shall be consolidated.	**342 (1)** Sauf ordonnance contraire de la Cour, lorsque plus d'une partie a interjeté appel d'une même ordonnance, tous les appels sont joints.
(2) The Court may give directions as to the procedure to be followed in a consolidation under subsection (1).	**(2)** La Cour peut donner des directives concernant la procédure applicable à la jonction d'appels effectuée en vertu du paragraphe (1).

[35] Therefore, once MPAC et al. file their appeal of the August Policy and related orders, their appeal will be consolidated with the appeals of the other parties appealing the same order.

[36] Since the order appended to the August Policy will be stayed as provided above, it is only necessary to stay any individual orders issued to MPAC et al. Since they have only requested a stay of the requirement to make a payment to the ILNF, only this part of any individual orders

issued to MPAC et al. will be stayed until this Court has rendered its decision in relation to the applications for judicial review and appeal of the August Policy and related orders.

III. Costs

[37] Costs of the motions shall be in the cause.

"Wyman W. Webb"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-304-24, 24-A-38; A-229-24, A-308-24, 24-A-37; A-225-24, 24-A-25; A-309-24, 24-A-36
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STYLE OF CAUSE:	AMAZON.COM.CA ULC v. ATTORNEY GENERAL OF CANADA
AND DOCKETS:	A-229-24, A-308-24 & 24-A-37
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STYLE OF CAUSE:	MOTION PICTURE ASSOCIATION-CANADA *et al.* v. CANADIAN ASSOCIATION OF BROADCASTERS
AND DOCKETS:	A-309-24 & 24-A-36
STYLE OF CAUSE:	SPOTIFY AB v. ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	WEBB J.A.
DATED:	DECEMBER 23, 2024

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