Disposition

I would dismiss the appeal against conviction. While leave to appeal is granted I would dismiss the appeal against sentence.

Appeal dismissed.

Re Mahar and Rogers Cablesystems Limited*

[Indexed as: Mahar v. Rogers Cablesystems Ltd.]

Ontario Court (General Division), Sharpe J. October 17, 1995

Administrative law — Boards and tribunals — Jurisdiction — Subscriber to TV cable service applying to court for declaration that cable service charging fees in violation of regulations under Broadcasting Act — Application dismissed — CRTC having exclusive jurisdiction — Alternatively, it would not be appropriate for court to exercise its jurisdiction — Broadcasting Act, S.C. 1991, c. 11.

Administrative law — Judicial review — Declaratory relief — Court declining jurisdiction to grant declaratory relief — Curial deference to role and decisions of specialized tribunal — Subscriber to TV cable service applying to court for declaration that cable service charging fees in violation of regulations under the Broadcasting Act — Application dismissed — CRTC having exclusive jurisdiction — Alternatively, it would not be appropriate for court to exercise its jurisdiction — Broadcasting Act, S.C. 1991, c. 11.

The respondent was licensed by the CRTC under the *Broadcasting Act* to provide a television cable service and to charge fees in accordance with the *Cable Television Regulations, 1986*, enacted pursuant to the Act. The regulations specified that notice be given of proposed fee increases to allow subscribers to comment to the CRTC before it authorized any increase. After a series of hearings before the CRTC in 1992, the fee regulations were changed, and under s. 18(6.3) of the regulations, a licensee who made a contribution to a fund for the production of Canadian television programming was allowed to continue to charge a portion of its fees that would otherwise not have been chargeable because of a sunset provision in the fee regulations. In January 1995, the respondent invoked s. 18(6.3) and accordingly did not reduce its fees. It did not, however, give any prior notice to subscribers of its invocation of s. 18(6.3), the regulations being silent in this regard. The applicant, who was a subscriber to the respondent's cable service, applied for, among other things, declarations that the respondent had failed to provide notice of fee changes, that a portion of the fees charged violated the Act, and for an order for a refund of the unlawfully charged fees. The respondent moved for an order staying the application contending that the CRTC had exclusive jurisdiction or that the court ought not to exercise its

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* Supplementary reasons respecting costs were released on October 30, 1995 and are reproduced at p. 702 *post*.

jurisdiction, if any, over the matter. The applicant contended that the court had jurisdiction but conceded that the CRTC had jurisdiction to deal with the matter in its entirety.

Held, the court did not have jurisdiction and the appropriate order was to dismiss the application for declaratory and other relief.

Given the nature of the relief sought, which did not attack the regulations or any order of the CRTC, the court did not have jurisdiction. Alternatively, if the court had jurisdiction, it was not appropriate to exercise that jurisdiction. Focusing on the statutory or regulatory framework, s. 3(2) of the Act states that the Canadian broadcasting system is a single system and its objectives and policies can best be achieved under the supervision of a single independent public authority. The CRTC, which is a specialized body with particular expertise, was given this supervisory mandate and a broad remedial authority, with a right of appeal to the Federal Court of Appeal. Section 3(2) of the Act establishes a principle of exclusivity. If the court were to assume jurisdiction, it would violate the spirit, if not the letter, of s. 3(2). This conclusion was fortified by the case-law which had consistently given a broad and generous interpretation of the powers and authority of the CRTC. The case-law directed a strong element of curial deference to CRTC decisions. Further, the case-law indicated that where Parliament has created a statutory regime that includes both rights and a procedure for their resolution, there is a strong reluctance to permit jurisdiction to be divided between the specialized tribunal and the courts or to permit overlapping or concurrent jurisdiction. The applicant's case was based almost exclusively on the regulations. To decide the application, it would be necessary to interpret the regulations and to consider their purposes and objectives. This task was within the mandate of the CRTC. Assumption of jurisdiction by the court would evade the authority of the CRTC, remove the case from the authority of the Federal Court of Appeal, and, because the court was but one of ten provincial superior courts, raised the spectre of various approaches from various provincial courts. The result would be to disrupt Parliament's scheme for the interpretation of the regulations. The respondent satisfied the heavy onus of showing that the court did not have jurisdiction. Alternatively, this was a case where it could be determined without a hearing on the merits that the court's discretion to grant declaratory relief ought not to be exercised. The appropriate order, therefore, was to dismiss the application for declaratory and other relief.

Cases referred to

Bell Canada v. Canadian Radio-Television & Telecommunications Commission, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682, 97 N.R. 15; *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.* (1995), 125 D.L.R. (4th) 443, 183 N.R. 184 (S.C.C.); *Capital Cities Communications Inc. v. Canadian Radio-Television & Telecommunications Commission*, [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609, 36 C.P.R. (2d) 1, 18 N.R. 181; *Centra Gas Alberta Inc. v. Three Hills (Town)* (1994), 109 D.L.R. (4th) 661, 15 Alta. L.R. (3d) 276, [1994] 4 W.W.R. 36 (Q.B.); *CKOY Ltd. v. R.*, [1979] 1 S.C.R. 3, 90 D.L.R. (3d) 1, 24 N.R. 254, 43 C.C.C. (2d) 1, 40 C.P.R. (2d) 1; *CTV Television Network Ltd. v. Canadian Radio-Television & Telecommunications Commission*, [1982] 1 S.C.R. 530, 134 D.L.R. (3d) 193, 41 N.R. 271, 65 C.P.R. (2d) 19; *Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 74 O.R. (2d) 325, 72 D.L.R. (4th) 218 (H.C.J.) [revd (1990), 1 O.R. (3d) 122, 78 D.L.R. (4th) 52, 33 C.C.E.L. 225, 42 O.A.C. 176 (C.A.)]; *Gendron v. Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, 44 Admin. L.R. 149, 66 Man. R. (2d) 81, 109 N.R. 321, [1990] 4 W.W.R. 385, 90 C.L.L.C. ¶14,020; *Lethbridge*

(City) v. Canadian Western Natural Gas, [1923] S.C.R. 652, [1923] 4 D.L.R. 1055, [1923] 3 W.W.R. 976; *MuchMusic Network v. Coast Cable Vision Ltd.* (1995), 59 C.P.R. (3d) 207 (B.C.S.C.); *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385, 92 B.C.L.R. (2d) 145, 168 N.R. 321, 14 B.L.R. (2d) 217 *sub nom. Ivany v. British Columbia*; *Rogers Cable TV Ltd. v. 373041 Ontario Ltd.*, Ont. Gen. Div., Borins J., April 27, 1994; *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583, 183 N.R. 241, 30 C.R.R. (2d) 1, 12 C.C.E.L. (2d) 1, 24 C.C.L.T. (2d) 217, 95 C.L.L.C. ¶210-027, 24 O.R. (3d) 358*n* (S.C.C.); *Whistler Cable Television Ltd. v. Ipec Canada Inc.* (1992), 75 B.C.L.R. (2d) 48, [1993] 3 W.W.R. 247, 17 C.C.L.T. (2d) 16 (S.C.)

Statutes referred to

Broadcasting Act, S.C. 1991, c. 11, ss. 3(1), (2), 5, 12, 17, 31
Canadian Charter of Rights and Freedoms

Rules and regulations referred to

Cable Television Regulations, 1986, SOR/86-831, ss. 2, 18(6.1), (6.2), (6.3) [enacted SOR/94-133, s. 6(4)], (7)
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 14.05(3)(*d*), (*h*)

MOTION for a stay of proceedings in an application for a declaration that fees for cable services under the *Broadcasting Act*, S.C. 1991, c. 11, had been unlawfully charged.

Christopher K. Leafloor, *J. Blair Drummie* and *N. Milton*, for applicant.
T.G. Heintzman, Q.C., and *Susan L. Gratton*, for respondent.

SHARPE J. (orally): — This is a motion to stay or dismiss the application on jurisdictional grounds.

The background is as follows. The application is brought pursuant to rule 14.05(3)(*d*) and (*h*) of the Rules of Civil Procedure. The applicant is a subscriber to a cable service provided by the respondent. The respondent is licensed by the C.R.T.C. pursuant to the *Broadcasting Act*, S.C. 1991, c. 11, to provide cable T.V. services. The applicant seeks a series of declarations relating to fees charged by the respondent to the applicant and specifically alleges that the respondent has failed to provide notice of certain fee changes. The applicant also seeks an order requiring the respondent to refund the amounts charged in violation of this alleged default in providing notice.

The application was originally brought in the name of the applicant only, but there is also a motion before me to have the matter certified as a class action. Although the applicant's individual stake is small, there is a substantial sum at issue when one cumulates the charges made to all of the subscribers of the respondent.

The motion to stay or dismiss the action is based on the respondent's contention that this matter is within the exclusive jurisdic-

tion of the C.R.T.C. Alternatively, it is submitted that if the court does have jurisdiction, it should decline to exercise that jurisdiction in deference to the C.R.T.C. as the more appropriate forum to resolve the matters in issue.

The regulatory framework specific to the contentions of the applicant is as follows. The fees that may be charged for cable TV services are governed by the *Cable Television Regulations, 1986*, SOR/86-831, enacted pursuant to the *Broadcasting Act*. The respondent charges what is called in the regulations a "basic monthly fee" (s. 2). That fee has three components; namely, a base portion, a portion attributable to eligible capital expenditures, and a pass-through portion. Each of these are dealt with in some detail by the regulations which specify the amounts to be charged, within certain limits. The regulations also provide that with respect to increases to these fees, certain notice requirements to subscribers have to be met. The notice periods vary between 60 and 90 days depending upon the type of increase that is being sought.

The element of the fee at issue here relates to the eligible capital expenditure portion. The regulations permit cable licensees to recover a portion of eligible capital expenditures through the basic monthly subscriber fees, subject to an upper limit and determined on the basis of a formula the details of which are not at issue.

The increases on account of the capital expenditure portion may only be made on 60 days' notice to each of the subscribers (s. 18(7)). The regulations provide that upon notice, the subscribers have a chance to comment on the proposed fee increase in writing to the C.R.T.C. and the C.R.T.C. in turn can suspend or disallow all or part of the proposed increase.

There are two important additional provisions which relate to the eligible capital portion of the fee. First, in 1989 the C.R.T.C. initiated a process which involved public hearings and ultimately resulted in a change to the regulations, introducing what is termed a "sunset" provision (s. 18(6.1), (6.2)). This requires that any eligible capital expenditure portion of the basic monthly fee be deleted from the basic monthly fee five years after the date of its implementation.

The second change followed another series of hearings which commenced in 1992, known as the "structural hearings". This related to the question of providing assistance to funding the production of Canadian television programming. These hearings led to another change to the regulations, creating a fund from contributions from cable licensees. The fund was created in the following manner. The "sunsetting" of eligible capital expenditure rate

increases would be suspended for those licensees who contributed to the fund an amount equal to one-half of the amount by which their basic monthly fee would otherwise decrease (s. 18(6.3)).

The respondent invoked this provision with respect to fees payable in January 1995 with the result that there was no reduction to subscribers, including the applicant, of the eligible capital portion of the fee, $2.52 per month, which otherwise would have been subject to the "sunset" provision. There is no explicit provision in the regulations that requires cable licensees to provide notice to its subscribers of its intention to invoke s. 18(6.3) and maintain the capital expenditure portion of the fee. The applicant contends, however, that the respondent should be required to give notice and submits that, in effect, his cable fee has been increased contrary both to the regulations and to his common law rights in that no notice was given to him when the respondent elected to maintain its fees without reduction by contributing one-half of the capital expenditure portion of the fee to the Canadian programming fund.

The substantive basis of the application as disclosed by the notice of application, the factum that has been filed on the application and by the argument on this preliminary motion indicates that the applicant relies on the following grounds. The applicant says there is an established practice whereby the respondent gives notice of fee increases. It is conceded, however, only those notices mandated by the C.R.T.C. have been given by the respondent. The applicant also relies on a code of conduct which was developed by the cable industry and approved by the C.R.T.C. which, in his submission, requires notice. The applicant relies on the terms of his contract with the respondent. The contract is found on the reverse of the bills submitted to the applicant. Specifically, the applicant relies on the following provision:

> Rates for cable services may be adjusted from time to time, subject only to any required approvals or consents of the Canadian Radio-Television and Telecommunications Commission or other governmental authority having jurisdiction.

The applicant contends that that provision requires compliance with the regulations and that the regulations require notice of a fee increase. The applicant also submits that in the process of developing the Canadian programming fund and the capital expenditure levies it was, in effect, held out to subscribers that the capital expenditure levy would be temporary and that any change to that policy submitted requires notice.

Finally, the applicant relies on what his counsel terms the "background law" or "common law" right to notice. Specifically, it

is argued that given the public law flavour of the contract between the applicant and the respondent, common law principles requiring notice apply.

The applicant does make what, in my view, is a significant concession, namely, that the C.R.T.C. would have jurisdiction to deal with this matter in its entirety. That concession, as I understood it, included not only the portions of the claim based on the regulations, but also that element of the claim which is based on the alleged "background law" or common law right of the applicant to notice.

While the applicant makes that concession, counsel did insist that this court retain jurisdiction and that it should exercise that jurisdiction. It is submitted that essentially this is a private contractual dispute between private parties. No attack on any regulation, order or decision of the C.R.T.C. is being made. As the application involves essentially an interpretation of the statute, regulations and common law principles, it is submitted that this court is the best place to have the matter resolved. The applicant adds that there is a heavy onus on the respondent to show that the jurisdiction of this court, exercising the inherent jurisdiction of a superior court, is ousted.

It is important to note specifically what it is the applicant is asking for. The prayer for relief in the notice of application asks for declarations to the following effect:

> 1(a) (i) that between August 1, 1986 and May 14, 1990, the respondent increased the capital expenditure portion of the applicant's basic monthly fee by a total of $2.52 per month,
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> (ii) that pursuant to section 18(6.2) and subject to section 18(6.3) of the *Cable Television Regulations*, 1986, the applicant was entitled to reduction in the capital expenditure portion of his monthly fee by $2.52 per month, effective January 1, 1995, and
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> (iii) that the respondent invoked section 18(6.3) of the regulations effective January 1, 1995, and that the applicant's basic monthly fee remained unchanged as a result;
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> (b) a declaration that consequently as of January 1, 1995, the respondent increased by $2.52 the "base portion" of its monthly fee charged to the applicant;
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> (c) a declaration that the respondent is not entitled to increase the "base portion" of the monthly fee for cable television service until proper notice of this increase is given to the applicant, at least 90 days in advance of the proposed increase;
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> (d) a declaration that the respondent failed to give to the applicant the required notice when it increased the "base portion" of the monthly basic fee for cable television service as of January 1, 1995;

(e) a declaration that as a result of this failure to give proper advance notice, the respondent was not entitled to increase the "base portion" of its monthly fee for basic cable service as of January 1, 1995;

(f) an order requiring the respondent to refund to the applicant all money, including taxes, improperly collected as a result of the respondent's improper increase in the "base portion" of its basic monthly fee for basic cable television service.

I express no opinion as to the merit or lack thereof in the substantive claim of the applicant. It is, however, clear that the regulations under the *Broadcasting Act* and the interpretation of those regulations, are not only a central substantive component of the applicant's case, but indeed the focus of the relief that the applicant seeks. To decide this case would require a detailed consideration and interpretation of those regulations. That exercise would require consideration of how those regulations operate in the overall framework of the scheme established by the Act and by the Regulations as that scheme is administered by the C.R.T.C.

I have concluded that given the nature of the claim and relief sought, this court does not have jurisdiction to dispose of the application and, alternatively, that even if the court does have jurisdiction, it would not be an appropriate exercise of the discretion of the court to proceed with this matter with a view to granting declaratory relief. I reach those conclusions on the following basis.

First, I think it important to focus on the statutory and regulatory framework. The *Broadcasting Act*, s. 3(1) sets out in some considerable detail a broadcasting policy for Canada as mandated by Parliament. That policy includes the role of the Canadian Broadcasting System in safeguarding, enriching, strengthening the cultural, political social and economic fabric of Canada (s. 3(1)(*d*)). It also includes requiring private networks and programming undertakings to contribute to the creation and presentation of Canadian programming (s. 3(1)(*s*)), and requiring distribution undertakings to provide efficient delivery of programming at affordable rates using the most effective technologies available at reasonable cost (s. 3(1)(*t*)).

A provision central to this application is s. 3(2) of the Act which provides as follows:

> It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policies 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.

I will return to this provision below. By s. 5, the C.R.T.C. is mandated to regulate and supervise all aspects of the Canadian

Broadcasting System with a view to implementing the broadcasting policy set out in s. 3(1). The Act provides a mechanism whereby any person can complain to the C.R.T.C. about any default under the Act or under the regulations (s. 12). Broad remedial powers are conferred on the C.R.T.C. in respect of such complaints by s. 12(2). The C.R.T.C. is given authority to determine questions of fact or law in relation to any matter within its jurisdiction under the Act (s. 17). There is an appeal from decisions of the C.R.T.C. on any question of law or jurisdiction to the Federal Court of Appeal pursuant to s. 31.

The regulations set out in some considerable detail various aspects of the broadcasting policy of Canada. The regulations relied on by the applicant in this case contain what I would describe as a detailed regulatory code regarding the contractual terms between cable suppliers and subscribers. In effect, the Act and the regulations mandate a monopoly system that is subject to regulation whereby subscribers are protected and the public can be assured that the broader policy objectives of the Act and regulations are met. As I have indicated, the regulations include detailed provisions on permissible fees, fee increases, procedures for altering those fees and the notices that are to be provided to subscribers regarding those changes.

I referred earlier to s. 3(2) of the Act which is central to the issue of jurisdiction. In my view, that section establishes, in effect, a principle of exclusivity. It clearly states Parliament's determination that the policies of the Act will best be achieved if a single independent public authority, namely, the C.R.T.C., is established to deal with all matters relating to those policies. The C.R.T.C. is a specialized body with particular expertise in the area. In my view, if this court were to assume jurisdiction, it would violate the spirit, if not the letter, of s. 3(2). The statutory mandate of the C.R.T.C. is fortified by the case-law which has consistently given a broad and generous interpretation to its powers and authority. I was referred in argument to a number of cases including *Capital Cities Communications Inc. v. Canadian Radio-Television & Telecommunications Commission*, [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609, *CKOY Ltd. v. R.*, [1979] 1 S.C.R. 3, 90 D.L.R. (3d) 1, and *CTV Television Network Ltd. v. Canadian Radio-Television & Telecommunications Commission*, [1982] 1 S.C.R. 530, 134 D.L.R. (3d) 193. Each of those cases indicates the broad and generous interpretation the Supreme Court of Canada has accorded to the mandate of the C.R.T.C. I note as well that in the case at bar, there really is no issue as to the authority of the C.R.T.C. given the concession made by the applicant that the C.R.T.C. could deal with all aspects of the applicant's claim.

The second significant element that emerges from the case-law is that the Supreme Court has held that there should be a strong element of curial deference to decisions of the C.R.T.C. The most recent statement of that principle is the court's decision in *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.* (1995), 125 D.L.R. (3d) 443 at p. 454, 183 N.R. 184, where Justice L'Heureux-Dubé stated as follows regarding the standard of review to be applied to the C.R.T.C.:

> In determining the standard of review applicable to an administrative tribunal, a number of factors are relevant. Specifically, it is necessary to consider the tribunal's role or function, whether or not the tribunal is protected by a privative clause, the expertise of the tribunal and the nature of the question considered by the tribunal.
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> . . . . .
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> The case at hand concerns a specialized administrative tribunal, the C.R.T.C., which possesses considerable expertise over the subject matter of its jurisdiction. However, despite the expertise of the C.R.T.C., its decision in the case in hand is not protected by a privative clause and is, in fact, subject to an express statutory right of appeal.

L'Heureux-Dubé J. then refers to another recent decision of the Supreme Court, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385, holding that deference is to be accorded to decisions of specialized tribunals, even on matters of law, where those matters fall within their jurisdiction. Reference is also made to *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682, holding that a specialized tribunal, such as the C.R.T.C., acting within its area of expertise and jurisdiction, is entitled to curial deference even in the absence of a privative clause and in the presence of a statutory right of appeal. After quoting from the *Bell Canada* decision, L'Heureux-Dubé J. concludes as follows (p. 455):

> Accordingly I conclude that the C.R.T.C. is entitled to curial deference with respect to questions of law within its area of jurisdiction and expertise.

The third point which emerges from the case-law and which bears upon the issue before me is that where Parliament has created a statutory regime which includes both rights and a procedure for their resolution, there is at the very least a strong reluctance to permit jurisdiction to be divided between the specialized agency or tribunal and the courts or to permit overlapping or concurrent jurisdiction,

The principle just referred to is clearly articulated in recent decisions of the Supreme Court of Canada. Both arise from

labour disputes, and although the context is different, I find the reasoning in those cases persuasive and have no hesitation in saying that I think it should be applied to this situation.

The first case I was referred to on this point is *Gendron v. Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, 44 Admin. L.R., 149. I refer specifically to the passage from the judgment of Justice L'Heureux-Dubé at p. 1321 S.C.R., p. 169 Admin. L.R.:

> While the legislation does not expressly provide that the Board has exclusive jurisdiction, it indicates that Parliament envisioned a fairly autonomous and specialized Board whose decisions and orders were to be accorded deference by the ordinary courts, subject only to review within the confines of the privative clause. As noted earlier, Parliament has provided the duty, the procedure for adjudicating an alleged breach, a wide array of remedies and a privative clause protecting the Board. It can therefore be assumed to have intended that the ordinary courts would have but a small role if any to play in the determination of disputes covered by the statute. An analysis of the legislative scheme would not seem to permit any alternative as any other interpretation would endanger the special role of the Labour Board and the policy underlying the code. An examination of this particular legislation and its policy objectives would not seem to permit an action in the ordinary courts for a breach of the statutory duty.

A decision very much to the same effect is that in *Weber v. Ontario Hydro*, a judgment released on June 29, 1995 [now reported 125 D.L.R. (4th) 583, 30 C.R.R. (2d) 1]. In that case, the court was confronted with the situation of tort and *Charter* claims being advanced in an action rather than by way of arbitration pursuant to a collective agreement. The court held that it was inappropriate to permit the action to proceed and that the labour arbitration provisions had to be respected. The judgment of Madam Justice McLachlin contains a detailed consideration of various models reconciling the role of the courts with that of specialized tribunals. She concluded that models permitting overlapping or concurrent jurisdiction should be rejected and that an exclusivity model should be adopted. With respect to the argument that the tort and *Charter* claims were particularly appropriate for the courts, she held as follows (p. 12) [p. 603 D.L.R.]:

> . . . the appellant Weber argues that jurisdiction over torts and Charter claims should not be conferred on arbitrators because they lack expertise on the legal questions such claims raise. The answer to this concern is that arbitrators are subject to judicial review. Within the parameters of that review, their errors may be corrected by the courts. The procedural inconvenience of an occasional application for judicial review is outweighed by the advantages of having a single tribunal deciding all issues arising from the dispute in the first instance.

In my view that passage is particularly applicable here given the contention that this court should deal with the legal claims in

preference to the C.R.T.C. It seems to me that the scheme envisaged by the *Broadcasting Act*, namely, a single independent public authority, subject to review or questions of law by the Federal Court of Appeal, and the principles expressed by Justice McLachlin in the *Weber* case, go directly contrary to that contention.

The applicant has cited a number of cases in which courts have entertained actions which had an administrative law flavour, some of which related to broadcasting. In my view, those cases are distinguishable. The applicants rely on a decision from the British Columbia Supreme Court, *MuchMusic Network v. Coast Cable Vision Ltd.* (1995), 59 C.P.R. (3d) 207. I note however that in that case the judge concluded as follows at p. 210:

> I conclude that what is at issue is not a matter concerned primarily with the regulation or licensing of broadcast signals or cable systems. Rather, the issues are whether a contract exists between the parties, whether it has been breached and whether there has been an infringement of the law of copyright.

Similarly, the decisions in *Whistler Cable Television Ltd. v. Ipec Canada Inc.*, [1993] 3 W.W.R. 247, 75 B.C.L.R. (2d) 48 (S.C.), and the decision of Borins J. in *Rogers Cable TV Ltd. v. 373041 Ontario Ltd.*, Ont. Gen. Div., April 27, 1994, do not, in my view, involve issues of broadcast policy nor do they involve detailed consideration of the regulations. Rather they involve actions against unlicensed competitors by licensed competitors and involve no consideration of broadcasting policy whatsoever. The decision of Sutherland J. in *Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 74 O.R. (2d) 325, 72 D.L.R. (4th) 218 (H.C.J.), is also distinguishable. The learned judge specifically notes in his reasons (at p. 327):

> . . . that the act not only does not purport to clothe the Commission with exclusive jurisdiction to decide all relevant questions of fact and law but, indeed, expressly allows other remedies.

In my view, that is completely different from the situation before me.

Looking at the prayer for relief, the affidavit in support, and the legal arguments that have been advanced, I simply cannot accept the applicant's characterization of his claim as a private contractual dispute between private parties. This is not a private contract or a private law dispute but rather a relationship which is defined and constrained in almost every aspect by the regulations and jurisdiction of the C.R.T.C.

The applicant's case is based almost exclusively on the regulations and what they require. To decide his case would require me to consider in a detailed way those regulations. I would have

to interpret those regulations. In order to interpret them I would have to consider their purposes and objectives. That can only be done with a proper understanding of the underlying policies behind the regulations and in light of the overall regulatory context.

The applicant argues that the issue here is not a major policy issue. Clearly the issue raised here is not as significant from a policy perspective as many issues coming before the C.R.T.C. However, it is not devoid of policy implications. It requires the person or body deciding the case to understand and assess the purpose of the various categories of fees and to assess the purpose and operation of the notice provisions. After all, those notice provisions are only relevant to the extent that they trigger a possible complaint and review by the C.R.T.C. Moreover, the issue raised affects many parties not before the court. It is true that there are intervenor rules which can be relied on in such cases, but the procedure of the C.R.T.C. appears to be tailor-made for such a diversity of interests.

In my view, the task of deciding this case has been specifically assigned by Parliament to the C.R.T.C. The principle established by the case-law, in particular the *Shaw* case, *supra*, of the deference due to the decisions of the C.R.T.C. on legal matters within its jurisdiction seems to me significant. It is true that this is not a case where review is sought of the decision of the C.R.T.C. nor is it a collateral attack on such a decision. In some ways, however, the case at bar presents a more serious challenge to the integrity of the regime established by Parliament. If the applicant's submissions were accepted and this court were to decide the case, there would, in effect, be an alternate forum for the determination of an important aspect of the relationship between suppliers of cable services and subscribers. A superior court would be deciding that issue without the benefit of the opinion of the C.R.T.C. Because this is but one of ten provincial superior courts the spectre of various approaches from various provincial courts is raised. Assumption of jurisdiction by this court would not only evade the C.R.T.C., it would also remove the case from the authority of the Federal Court of Appeal which is mandated to review the C.R.T.C. The net result would be to disrupt the scheme envisaged by Parliament for the interpretation of the regulations, a scheme which includes scrutiny by a court exercising jurisdiction akin to that of a superior court.

The applicant has indicated that the interest in having a speedy resolution favours a hearing here. It is clear that the result of my decision will be to delay resolution of this matter. However, it is my view that the other factors that I have indi-

cated override the consideration of speed. I note as well that the applicant was the one to choose this forum and that delay can, at least in part, be laid at the applicant's door on that account.

In my view the respondent has satisfied the heavy onus of showing that this court does not have jurisdiction. If I am wrong and the court does have jurisdiction, then I would have no hesitation whatsoever in holding on the authority of *Lethbridge (City) v. Canadian Western Natural Gas*, [1923] S.C.R. 652, [1923] 4 D.L.R. 1055, and *Centra Gas Alberta Inc. v. Three Hills (Town)* (1994), 15 Alta. L.R. (3d) 276, 109 D.L.R. (4th) 661 (Q.B.), that this is a case where the discretion of the court to grant declaratory relief ought not to be exercised. In my view, that determination can be made on a preliminary basis without hearing full argument as to the merits.

In light of the determination I have made as to jurisdiction, the appropriate order is to dismiss the application. I will defer consideration of costs to permit both counsel an opportunity to prepare their submissions.

ADDENDUM — *October 30, 1995*

SHARPE J.: — Counsel have now attended before me to make their submissions with respect to costs.

Counsel for the respondent urges me to make the usual order and require the unsuccessful applicant pay the respondent's party and party costs. The application raised both jurisdictional and substantive issues of some considerable complexity and a substantial amount of preparation was required. Counsel for the respondent submitted a bill of costs in the amount of $55,485, inclusive of disbursements and G.S.T.

It is apparent that the applicant's individual financial interest in this matter is minimal. The applicant was formerly employed in the broadcasting industry, but resigned his managerial position with CHUM Limited in September 1994 to oppose publicly the proposed merger of McLean Hunter Ltd. and Rogers Communications Inc. He formed the group called STOP (Stop The Ongoing Problems) and appeared as a witness before the C.R.T.C. While the material does not indicate that this application was brought by or with the backing of any public interest group, the evidence before me indicates that it was brought by the applicant in pursuit of what he conceives to be the public interest rather than for any personal financial gain. The applicant did submit that the jurisdictional issue should be decided on the basis that the dispute was one between two private parties, but that does not detract from the fact that the application was brought to ben-

efit the broader public interest of cable subscribers. Had I found that the court had jurisdiction, the next matter to be dealt with was the motion to have the application certified as a class action on behalf of all Rogers subscribers. It was suggested in the material that the legal point to be resolved also concerned the subscribers of many other cable services in Canada.

There will always be debate about what is the public interest, but it is fair to characterize this proceeding as a public interest suit. While the ordinary cost rules apply in public interest litigation, those rules do include a discretion to relieve the loser of the burden of paying the winner's costs and that discretion has on occasion been exercised in favour of public interest litigants.

Orkin, *The Law of Costs*, 2nd ed. (1994), at pp. 2-33 to 2-34, describes the discretion as follows:

> An action or motion may be disposed of without costs when the question involved is a new one, not previously decided by the courts on the theory that there is a public benefit in having the court give a decision; or where it involves the interpretation of a new or ambiguous statute; or a new or uncertain or unsettled point of practice; or where there were no previous authoritative rulings by courts; or decided cases on point; or where the application concerned a matter of public interest and both parties acted in complete good faith . . .

(References omitted)

The matter was considered in depth by the Ontario Law Reform Commission in its *Report on Class Actions* (1982), where the following summary was given of the court's discretion in this area (vol. III, p. 649):

> While the general rule is well established in our legal system, there are well accepted exceptions that justify a denial of costs to a victorious party, even where there has been no misconduct by him or his lawyer. In some cases, a successful party may not be awarded costs where the issue determined is novel, where the court has been asked to interpret a new or ambiguous statute, or where the action is a "test case". The existence of certain exceptions indicates that the general rule is not immutable, but a rule that, however deeply entrenched, occasionally defers to special considerations dictating that its application is inappropriate.

(References omitted)

The matter is also discussed by Fox, "Costs in Public-Interest Litigation" (1989), 10 *Advocates Quarterly* 385. Despite this discretion, public interest litigants are often required to pay costs when they are unsuccessful. The respondent relies on *Sierra Club of Western Canada v. British Columbia (Chief Forester)* (1994), 28 C.P.C. (3d) 253, 94 B.C.L.R. (2d) 331 (S.C.), affirmed B.C.C.A., June 15, 1995 [now reported 7 B.C.L.R. (3d) 375, 126 D.L.R. (4th) 437]. That case involved a well-established and well-financed public interest litigant and the court emphasized that the discre-

tion was to be exercised on a case-by-case basis. Smith J. expressly noted that the public interest motivation "will always be a relevant and important factor" and that "the court must retain the flexibility to do justice in each case". It is also worth noting that while the Court of Appeal did not interfere with Smith J.'s order requiring the Sierra Club to pay costs, the appeal itself was dismissed on the basis that each party bear its own costs. In *Garland v. Consumers' Gas Co.* (1995), 22 O.R. (3d) 767, 17 B.L.R. (2d) 239*n* (Gen. Div.), Winkler J. held that the losing party should not be required to bear the costs of Consumers' Gas Co. While that case was disposed of under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 31(1), Winkler J. noted that it had always been open to the court to consider the factors listed in the Act, which incorporates the common law principles referred to above. It is also worth noting certain similarities between that case and the case at bar. The defendant had succeeded in having the case disposed of in its favour early in the proceedings, in that case by obtaining summary judgment dismissing the action prior to it being certified as a class proceeding. Moreover, that case also involved a claim by a representative plaintiff contesting the legality of certain charges for a utility provided to the public by a private entity under a regulated regime.

In my view, it is appropriate in this case to exercise my discretion in favour of the applicant and to make no order as to costs. The issue raised was novel and certainly involved a matter of public interest. While I decided the jurisdictional point against the applicant, I am satisfied that the application was brought in good faith for the genuine purpose of having a point of law of general public interest resolved. It is true that many of the cases in which an unsuccessful public interest litigant has been relieved of the usual cost order have involved suits against the government and the respondent here is a private entity. However, the respondent does enjoy the substantial benefit and protection of a statutory monopoly in the provision of its services to the public, and this application was brought in relation to an important aspect of the terms on which that monopoly is enjoyed. While the targets of public interest litigation are certainly entitled to the protection of the rules of court, it should not be forgotten that those rules include a discretion to relieve the loser of the burden of paying the winner's party and party costs. As observed by Fox, *supra*, and by the Ontario Law Reform Commission report, *supra*, public interest litigants are in a different position than parties involved in ordinary civil proceedings. The incentives and disincentives created by costs rules assume that the parties are primarily motivated by the pursuit of their own private and financial interests.

An unrelenting application of those rules to public interest litigants will have the result of significantly limiting access to the courts by such litigants. Such a consequence would be undesirable with respect to proceedings such as the present one which was, in my view, brought on a bona fide basis and which raised a genuine issue of law of significance to the public at large.

I should perhaps add that had I ordered the applicant to pay the respondent's costs, the amount claimed in the bill of costs already referred to was reasonable in the circumstances of this case.

Order accordingly.