THEME 9

THE MEDIA AND ELECTIONS

IN THE COURT OF APPEAL OF ALBERTA
EDMONTON SPECIAL SITTINGS
HEARD OCTOBER 1, 1993

	COUNSEL	TRIAL JUDGE	COURT
NATIONAL PARTY OF CANADA, MEL HURTIG and MEL HURTIG on behalf of the members of the NATIONAL PARTY OF CANADA	T.W.Wakeling R.D.Gibson G.D. Chipeur	Berger J	LIEVERMAN J A McCLUNG J A IRVING J A
Plaintiffs/Appellants			
– and –			
CANADIAN BROADCASTING CORPORATION	L.M. Huculak		
Defendant/ Respondent			

***Elections** – role of media – right of political party to be included in leadership debates.*

Background facts
The Canadian Broadcasting Corporation ("C.B.C.") was part of a Broadcasters' Consortium which was planning to produce and broadcast leadership debates in French and English during a federal election campaign. Participation in the debates was determined by consensus within the Broadcasters' Consortium. The Broadcasters' Consortium decided to include in the debates those party leaders whose parties met certain criteria. The parties whose leaders were invited to the debate were the Progressive Conservative Party of Canada, the Liberal Party of Canada, the New Democratic Party, the Reform Party of Canada and the Bloc Quebecois.

Mel Hurtig, leader of the National Party of Canada, the leaders of other registered political parties, and the leaders of political parties accepted for registration, but had not yet registered, were not invited to participate in the debate Mr Hurtig and the National Party of Canada sought an order in the District Court of Edmonton requiring the C.B.C. to include him. His application was dismissed. He appealed.

Held
That the appeal was dismissed.

Cases cited in the original Judgement
Trieger v *Canadian Broadcasting Corporation (1988) 66 O.R.*
McKinnie v *University of Guelph (1990) (2) 273 (out.H.C.J.) 16 D.L.R.(4th) 545(S.C.C.)*
Her Majesty the Queen v *Jobin 66 C.C.C. (3rd) 281*
Mackay v *Manitoba (1989) 2 S.C.R. 357*

October 4, 1993

JUDGEMENT

National Party of Canada, Mel Hurtig – and – Mel Hurtig on behalf of the members of the National Party of Canada v Canadian Broadcasting Corporation (23726)

The Chief Justice (orally)

Notwithstanding your best efforts, I am afraid we are unable to accede to your request. It is only in the most extraordinary situations, such as issues of life and death, that we have abridged notice which this Court and responding and intervening litigants require to dispense justice adequately. This is not such a case.

The application for an order abridging the time within which these applications may be heard is denied.

C.J.C.
J.C.C.

APPEAL #9303-0690-AC

MEMORANDUM OF JUDGEMENT
DELIVERED FROM THE BENCH

McClung J A (for the Court):

As I have said, we find it unnecessary to call upon counsel for the C.B.C.

The Court is in substantial agreement with the Reasons for Judgement of Mr. Justice Berger in Chambers, as well as those reasons rendered by Mr. Justice Mckeown of the Federal Court of Canada dismissing a similar application by Natural Law Party.

Accordingly, we dismiss the appeal, but would add the following. Even if Mr Hurtig and the National Party of Canada, by their exclusion from the forthcoming debate, have been differentiated against, or even discriminated against, this Court is powerless to intervene under the Canadian Charter of Rights and Freedoms unless his antagonist is a governmental actor within the conduct that is complained about. Here Mr Hurtig says that the C.B.C. excluded him under a mandate from government, in that its Board of Governors are appointed by the Governor-General in Council. But nothing in the evidence points to the Broadcasting consortium and the debate qualifications it has erected as government driven. As well, there is no evidence that the Broadcasting Consortium is the child – at least as far as the C.B.C. is concerned – of anything but the journalistic freedom guarantees that are stressed in section 35(2) of the *Broadcast Act.*

Mr. Wakeling has not persuaded us that the activities of the C.B.C. must be judged on the mere potential for governmental influence, and not the impugned conduct itself – a functional test. We will simply say that we do not read the *Lavigne* case and the *McKinney* case as enthusiastically as Mr. Wakeling has in his argument of the appellant's cause. This was stressed in argument.

As I have said, the appeal is dismissed.

(Discussion re costs.)

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

Between:

NATIONAL PARTY OF CANADA, MEL HURTIG
and MEL HURTIG on behalf of the members of the
NATIONAL PARTY OF CANADA

Applicants

– and –

CANADIAN BROADCASTING CORPORATION

Respondent

REASONS FOR JUDGEMENT
OF THE HONOURABLE MR. JUSTICE R. L. BERGER

The Canadian Broadcasting Corporation (the "C.B.C.") is part of a Broadcasters' Consortium which is planning to produce and broadcast leadership debates in French and English in the early part of October during the current federal election campaign. The Broadcasters' Consortium consists of the C.B.C., C.T.V., Global Television Network, and S.R.C. Participation in the debates was determined by consensus within the Broadcasters' Consortium. The Broadcasters' Consortium decided to include in the debates those party leaders whose parties met all the following criteria (as set out in the affidavit of David Bazay sworn September 14, 1993):

a. having at least one representative sitting as a Member of Parliament;

b. showing itself consistently over recent years to have had an impact on the Canadian public inasmuch as each has scored more than 5% popularity in various public opinion polls;

c. its leader [having] been involved in a very publicly visible manner in the constitutional and economic debates in Canada over recent years.

The parties whose leaders were invited to the debate are the Progressive Conservative Party of Canada, the Liberal Party of Canada, the New Democratic Party, the Reform Party of Canada and the Bloc Quebecois. The leaders of the five named political parties have accepted the invitation. The format of the debate is still being negotiated. The debates will be televised live and it is anticipated that the leaders will have no advance knowledge of the questions to be asked of them by the reporters and members of the public that will be present.

Mel Hurtig, leader of the National Party of Canada, the leaders of other registered political parties and the leaders of political parties accepted for registration but not yet registered were not invited to participate in the debates. Mr. Hurtig and the National Party of Canada seek an order requiring the C.B.C. to include him. No relief is sought against other members of the Consortium.

When the matter first came before the Court on September 15, 1993, counsel for the Applicants advised that he had not provided notice of the application to other members of the Consortium nor to the leaders of those political parties who have agreed to participate in the debates. I reminded counsel of the provisions of R. 388 of the Alberta Rules of Court. Counsel elected to proceed with his submission on the merits. His argument was not completed by the end of the day and court adjourned to Monday, September 20, 1993. On September 20th, counsel for the applicants advised that he had, on Friday, September 17, 1993, notified all of the foregoing parties and broadcasters of the current application and had also faxed to them a copy of the Statement of Claim and Notice of Motion but did not include copies of the filed affidavits. Certain other registered political parties received the same packet of information on September 17th. No one has formally appeared save for the C.B.C.

During the course of argument, counsel for the Applicants urged the Court to "define the constitutional obligations" of the C.B.C. in the present context and to declare that the actions of the C.B.C. in failing to include Mr. Hurtig in the scheduled debates, are contrary to the Charter of Rights and Freedoms.

Section 32 (1) of the Charter of Rights and Freedoms reads as follows:

> "32.(1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

The role of the Charter is to protect the individual against the coercive power of the state. With respect, I agree with the statement of Campbell, J in *Trieger* v *Canadian Broadcasting Corporation* (1988) 66 O.R. (2d) 273 (Ont. H.C.J.) that the Charter "represents a curb on the power of government, not a fetter on the rights of organizations independent of government which do not exercise the functions of government" (at p 278).

The question to be decided, accordingly, is whether the C.B.C. is a government entity for the purpose of attracting the provisions of the Canadian Charter of Rights and Freedoms. In *McKinnie* v *University of Guelph* (1990) 76 D.L.R. (4th) 545 (S.C.C.), Sopinka, J (at p 697) made the following observations:

> "In attempting to classify the conduct of an entity in a given case it is important to know, first, that it is governmental body and, second, that it is acting in that capacity in respect of the conduct sought to be subjected to Charter scrutiny."

It follows that even if the C.B.C. is a governmental body, not all of its activities will necessarily be adjudged "governmental in nature" so as to attract the provisions of the Charter.

Indeed, in *McKinnie*, Sopinka, J found as follows (at p 697):

> "I would not go so far as to say that none of the activities of a university are governmental in nature. For the reasons given by my colleague, I am of the opinion that the core functions of a university are non-governmental and therefore not directly subject to the Charter."

Sopinka, J was, of course, referring to the comments of LaForest, J in *McKinnie* (at pp 642–643) that:

> "Though the legislature may determine much of the environment in which universities operate, the reality is that they function as autonomous bodies within that environment. There may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government, but there is nothing here to indicate any participation in the decision by the government and, as noted, there is no statutory requirement imposing mandatory retirement on the universities."

What then is the legislative framework within which the C.B.C. functions? Section 47(1) of the *Broadcasting Act,* S.C. 1991, c. 11 designates the C.B.C. as an agent of the Crown. It reads:

> "47.(1) Except as provided in subsections 44(1) and 46(2) the Corporation is for all purposes of this Act, an agent of Her Majesty, and it may exercise its powers under this Act only as an agent of Her Majesty."

Section 40 of the *Broadcasting Act* speaks of accountability:

> "40. The Corporation is ultimately accountable, through the Minister, to Parliament for the conduct of its affairs."

The Act describes the C.B.C. as "the national public broadcaster" and calls upon it to provide "a wide range of programming that informs, enlightens and entertains" in a manner that will "reflect Canada". The C.B.C. is also required by section 3(1) of the Act to:

> "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada" (para. (d(i));
>
> provide "a wide range of programming that reflects Canadian attitudes, opinions, ideas, values....." (para. (d(ii));
>
> "reflect the circumstances and aspirations of Canadian men, women and children, including equal rights....." (para. d(iii));
>
> "be varied and comprehensive" (para. (i (ii));
>
> "provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern." (para. (i (iv)).
>
> Section 3(1) (b) of the *Broadcasting Act* also specifies that:
>
> "The Canadian Broadcasting System .....comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty."

Counsel for the Applicants urged upon me that the foregoing provisions evidence the governmental character of the C.B.C. thereby, without more, attracting the provisions of the Charter. I do not agree. While the omnibus provisions of the *Broadcasting Act* applicable to the C.B.C. cited above assist in an assessment of the broad scope of its mandate, indeed, its raison d'être, the analysis does not stop there. It is not the mandate of the C.B.C. that is under scrutiny in the case at Bar. It is the decision to exclude Mr. Hurtig from the debates.

The C.B.C. has embarked upon a specific programming venture; along with other broadcasters, leadership debates are to be produced and televised. The relevant inquiry is whether in all of the circumstances it can fairly be said that the decision to organise the debates and to invite certain political leaders to the exclusion of Mr. Hurtig is a decision of government. Can it fairly be said that government, mindful of the entire legislative framework and the evidence before me, sufficiently partook in the decision-making process so as to render the decision an act of government?

Section 2(3) of the *Broadcasting Act* which is applicable to all broadcasters, including the C.B.C., provides as follows:

> "2. (3) This Act shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings."

Section 35 (2) of the *Broadcasting Act,* under Part III, applicable only to the Canadian Broadcasting Corporation, reads:

> "35. (2) This part shall be interpreted and applied so as to protect and enhance the freedom of expression and the journalistic, creative and programming independence enjoyed by the Corporation in the pursuit of its objects and in the exercise of its powers."

Section 39 makes clear that the Board of Directors of the Canadian Broadcasting Corporation is responsible for the management of the businesses, activities and other affairs of the Corporation. Pursuant to section 44(3) the officers and employees of the Corporation (presumably, including journalists) are not officers or servants of Her Majesty.

Section 46 (5) is clear and unequivocal. It reads:

> "46.(5) The Corporation shall, in the pursuit of its objects and in the exercise of its powers, enjoy freedom of expression and journalistic, creative and programming independence."

Even in respect of financial matters dealt with in sections 53 to 70 of the *Broadcasting Act,* Parliament has taken great pains to ensure that the C.B.C. functions as an autonomous body within its mandate. Section 52 (1) reads:

> "52.(1) Nothing in sections 53 to 70 shall be interpreted or applied so as to limit the freedom of expression or the journalistic, creative or programming independence enjoyed by the Corporation in the pursuit of its objects and in the exercise of its powers."

The Court in *Trieger (supra)*, decided in 1988, addressed the issue of the Charter's application to a televised leadership debate. Although he did not resolve the issue, Mr. Justice Campbell observed:

> "Analysing the function of the C.B.C. in accordance with the 'degree of control' test referred to by the Court of Appeal in *McKinnie and Board of Governors of the University of Guelph,* I think it quite possible on the basis of *Canadian Broadcasting Corp. v. The Queen* (1983) 1 S.C.R. 339 that the C.B.C., in discharging its parliamentary mandate as a broadcaster, is in exactly the same position as any private broadcaster. Whatever the application of the Charter may be to other aspects of the C.B.C., its independence from government in respect of its editorial decisions in its broadcast operations suggest to me that it should perhaps not, in respect of those editorial broadcasting decisions, be treated as if it were a governmental organization subject to government control and subject to the Charter."

Many of the provisions of the *Broadcasting Act* to which I referred *supra* were not in place in 1988. Parliament in its wisdom enacted in 1991 specific provisions aimed at protecting the journalistic, creative and programming independence of the C.B.C., Parliament recognised that the broadcast media must be free from government interference – a touchstone of a democratic society.

Although the C.B.C. is a Crown agency and although its functions are undoubtedly public in nature, the decision under scrutiny here, in my opinion, cannot properly be characterised as a decision of government. There is no evidence here to suggest that government participated in the decision-making process in any way whatsoever.

There is nothing in the *Broadcasting Act* nor in any other act of Parliament that compelled the C.B.C. to join the Consortium of Broadcasters and to organise the debates. Nor is there evidence of compulsion, statutory or otherwise, for the C.B.C. and its Consortium colleagues to have invited certain leaders to the debates and not others. On the contrary, the provisions of the *Broadcasting Act* applicable to such programming decisions and the affidavits filed with the Court lend support to the proposition that the C.B.C. and its Consortium associates exercised an independent judgement in respect of these matters unfettered by government influence or interference. Nor is there any suggestion of oblique or ulterior motive to manipulate the electoral process by shutting out Mr. Hurtig.

The statutory scheme, I find, has as its object to safeguard the journalistic integrity and programming independence of the C.B.C. Absent cogent evidence of mischief calculated to subvert the democratic process and absent evidence of statutory breach, this court should not enter the broadcasting arena and usurp the functions of the broadcast media. The political agenda is

best left to politicians and the electorate; television programming is best left to the independent judgement of broadcast journalists and producers.

In the result, I conclude that the decision of the Canadian Broadcasting Corporation to produce and televise along with its Consortium associates a leadership debate that does not include the participation of the leader of the National Party of Canada is a non-governmental decision and is not subject to Charter scrutiny. I am also unable to accede to the submission that the C.B.C. has acted in contravention of the *Broadcasting Act* or the Television Broadcasting Regulations, 1987.

Although the foregoing disposes of the application, I consider it appropriate to touch upon R. 388. It reads:

> "388 If on the hearing of a motion or other application it appears that any person to whom notice has not been given ought to have had notice, the court may either dismiss the motion or application or adjourn the hearing thereof in order that notice may be given."

The Applicants have urged the Court to find that their rights pursuant to sections 2(b), 3 and 15 of the Charter have been infringed. It is trite law that Charter pronouncements, which often require a balancing of competing interests, should not be made in a vacuum. I so held in *Majesty the Queen* v *Jobin,* 66 C.C.C. (3d) 281. In *MacKay* v *Manitoba* (1989) 2 S.C.R. 367, Cory, J, speaking for a unanimous Court, stated at pp 361–362:

> "Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues.....".

Campbell, J in *Trieger (supra)* at pp 279–280 said:

> "There is a significant constitutional value at stake here in the freedom of the press and the other media of communication, particularly the broadcast media. The delicate balancing of their constitutional rights against the constitutional rights asserted by the applicants would involve a very complex factual process of broadcast regulation."

In the case at Bar, the constitutional rights of other members of the Broadcasting Consortium, without now deciding the point, might well be affected were the Court to grant the order prayed for. The same is true of the Charter rights of the leaders of those political parties who have chosen to debate with each other. The failure of the applicants to properly serve the Notice of Motion and supporting material upon all those who might have an interest in these proceedings

is, in my view, fatal. On that basis as well, I would dismiss the application. Counsel may speak to costs.

J. C. Q. B. A

DATED at the City of Edmonton,
this 23rd day of September, A.D. 1993.

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