

FEDERAL COURT OF CANADA

TRIAL DIVISION

Ottawa, Ontario, the 29th day of September 1993

Present: The Honourable Mr. Justice McKeown

Between:

THE NATURAL LAW PARTY OF CANADA, DONALD JACKSON
and DONALD JACKSON on behalf of the members of
THE NATURAL LAW OF PARTY OF CANADA,

Applicants

and

CANADIAN BROADCASTING CORPORATION

Respondent

Elections – Role of Media – Right of Political Party to be included in debates organised by consortium of other political parties to be broadcast by Canadian Broadcasting Corporation (C.B.C.) – Whether C.B.C. was under obligation to provide equitable treatment to political concerned.

Background facts

On September, 1993, several media organisation disseminated the news that a broadcasting consortium composed of the major television services the CBC, Global Television Network and SRC (Société Radio Canada), had reached a deal to broadcast debates among the leaders of five political parties (the Progressive Conservative Party, the Liberal Party, the New Democratic Party, the Reform Party and the Bloc Québécois). Neil Paterson of the Natural Law Party was included. The participants in the debates were determined by consensus within the Broadcasters' Consortium and the format was still being negotiated with the five political parties. The C.B.C. had no power to unilaterally include other participants in the debates. The Broadcasters' Consortium considered certain criteria for the inclusion of political leaders in the debates.

The Natural Law Party and Donald Jackson privately and on behalf of the members of the Party brought an application for an interim order. The motion was for an interim order declaring that the law required that the C.B.C. provide equitable treatment to the Natural Law Party in all

television broadcasting of C.B.C.-produced Town Hall meeting and leaders' debates among federal political party leaders or their representatives, and, in particular, required C.B.C. to include the leader of the Natural Law Party of Canada, Neil Paterson, or his representative, in debates if C.B.C. continued to participate in the production of broadcast of debates.

Held

That motion was dismissed.

Cases cited in the Judgement

Green Party Political Association of British Columbia and Valsic Parker v Canada Broadcasting Corporation (Oct. 8, 1991) Vancour, B.C. Doc. No 9116786

Trieger v Canadian Broadcasting Corp. 54 D.L.R.(4th) 143 (Ont. HCJ 1988)

National Party of Canada, Mel Hurtig and Mel Hurtig on behalf of the members of the National Party of Canada v Canadian Broadcasting Corporation (unreported)(September 23, 1993) Q.B. No. 9303-18257 (Alta. Q.B.)

Upon the Applicants Notice of Motion dated September 27, 1993 for an interim order declaring that the law requires the Canadian Broadcasting Corporation ("C.B.C.") to provide equitable treatment to the Natural Law Party of Canada in all television broadcasting of C.B.C. produced "town hall" meetings and leaders debates ("debates") among federal political party leaders or their representatives and, in particular, requires C.B.C. to include the leader of the Natural Law Party of Canada, Neil Paterson, or his representative, in debates if C.B.C. continues to participate in the production of broadcast and a mandatory interlocutory injunction to that effect.

ORDER

For oral reasons the application is dismissed. Travel disbursements of the respondent shall be paid by the applicants.

W. McKeown

Judge

FEDERAL COURT OF CANADA
TRIAL DIVISION

T-2319-93

Between:

THE NATURAL LAW PARTY OF CANADA,
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REASONS FOR ORDER

MCKEOWN, J

The Natural Law Party Donald Jackson privately and on behalf of the members of the Party brought this application for an interim order. The motion is for an interim order declaring that the law requires the Canadian Broadcasting Corporation ("C.B.C.") to provide equitable treatment to the Natural Law Party of Canada in all television broadcasting of C.B.C.-produced Town Hall meetings and leaders' debates ("debates") among federal political party leaders or their representatives, and, in particular, requires C.B.C. to include the leader of the Natural Law Party of Canada, Neil Paterson, or his representative, in debates if C.B.C. continues to participate in the production or broadcast of debates and a mandatory interlocutory injunction to that effect.

FACTS

On September 4, 1993, several media organisations disseminated the news that a broadcasting consortium composed of the major television services the C.B.C., Global Television Network and SRC (Société Radio-Canada), had reached a deal to broadcast debates among the leaders of five political parties (the Progressive Conservative Party, the Liberal Party, the New Democratic Party,

the Reform Party and the Bloc Québécois). Neil Paterson of the Natural Law Party was not included.

The participants in the debates have been determined by consensus within the Broadcasters' Consortium and the format is still being negotiated with the five political parties. The CBC had no power to unilaterally include other participants in the debates.

Due to the large number of political parties contesting the federal election, the Broadcasters' Consortium considered including in the debates leaders whose parties met all of the following criteria:

- a. having at least one representative sitting as a Member of Parliament;
- b. showing themselves consistently over recent years to have had an impact on the Canadian public inasmuch as each has scored more than 5% popularity in various opinion polls; and
- c. its leader has been involved in a very publicly visible manner in the constitutional and economic debates in Canada in recent years.

Once all of the details of the leaders' debates have been settled, the CBC intends to be involved in another television programme enabling the leaders of the parties not represented in the proposed debates to present their views to the public, and invitations were sent out on the date of this hearing to the nine remaining parties. The nature of the programme has not yet been decided upon.

The debates are considered by C.B.C. to be news events and C.B.C. considers its television coverage of these debates to be part of its overall news coverage of the federal election campaign. The debates will be in front of an audience and will be broadcast as they take place. The parties involved 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.

The C.B.C. has also conducted two Town Halls and plans to present more. The Town Halls are also considered by C.B.C. to be news events and part of its overall news coverage of the federal election campaign. The Town Halls provide opportunities for voters and political parties to debate various issues and provide important information that could not be conveyed in the formal debates. The Natural Party has not been invited to any of the Town Halls. The C.B.C. has not told the representatives of the Natural Law Party why Mr. Paterson or other members of the Party were not asked to participate in the debates of Town Halls. The criteria were disclosed in an affidavit filed by Mr. Bazay of the C.B.C.

If any organisation or political party were to organise another debate or Town Hall, the C.B.C. would consider providing appropriate coverage of it.

JURISDICTION

The Natural Law Party of Canada is applying for relief on an expedited basis but the relief can be provided by the Canadian Radio-television and Telecommunications (CRTC) under sections 18(1)(d) and 12(2) of the *Broadcasting Act*, S.C.1991. c. 11 ("Broadcasting Act"). There is no provision in the Broadcasting Act for providing relief on an expedited basis, but this does not mean that the Federal Court of Canada can obtain jurisdiction. Section 23 of the *Federal Court Act* R.S.C 1985, c. F-7 (as amended) (Federal Court Act") limits the jurisdiction of the Federal Court to the extent that jurisdiction had been otherwise specially assigned. Since the Broadcasting Act has assigned jurisdiction to the CRTC, I do not have jurisdiction.

This Court is a statutory court. I am unable to rely on the inherent jurisdiction of other superior courts as was the case in *Green Party Political Association of British Columbia and Valerie Parker v Canadian Broadcasting Corp.* (October 8, 1991) Vancouver, B.C. Doc. No. C916786 where Collver, J accepted jurisdiction. Collver, J was a judge of the Supreme Court of British Columbia, which is not a statutory court. There is no gap in the jurisdiction.

INTERIM INJUNCTION

However, in the event that I am not correct in my views on jurisdiction, I would still refuse to grant an interim injunction for the reasons set out in *Trieger v Canadian Broadcasting Corp.*, 54 D.L.R (4th) 143 (Ont. H.C.J. 1988) (Trieger) and *National Party of Canada, Mel Hurtig and Mel Hurtig on behalf of the Members of the National Party of Canada v Canadian Broadcasting Corporation*, (unreported) (September 23, 1993) Q.B. No. 9303-18257 (Alta Q.B.) (National Party).

In my view, the C.B.C. is acting as a broadcaster and not as an agent of the government in its participation in the Broadcasters' Consortium. There is no legislation in Canada which prevents broadcasters from participating in such debates. The American jurisprudence is not of assistance in this respect.

In *Trieger, supra*, Campbell, J succinctly dealt with several important points in deciding that the public interest would not be served by depriving the public of the opportunity to hear the debate. He states at page 146:

Counsel have referred to no case in which any of our courts have purported to dictate to the broadcast networks what they should cover and what they should not cover as a matter of newsworthy public political debate during an election campaign. There is no issue raised in this case of the equal free time regulations or the paid time rules which obtain during election campaigns. The issue here is purely a question of the coverage of national leaders' debates which are considered newsworthy by the various networks in question.

In this case, the Town Hall meetings as well as the debates are involved, but Campbell, J's reasoning is applicable to the Town Hall meetings as well. In addition, all the other leaders have been invited to participate in another television programme enabling those leaders to present their views to the public in a forum to be determined.

Although the Natural Law Party has not brought a complaint to the CRTC, I must agree with Campbell, J when, at page 146 of the *Trieger* decision, he rejects the idea of the Court assuming the role of a regulator:

"Generally speaking, it is not the court to assume the role of the regulator. The C.R.T.C. is still dealing with the complaint of the applicants. I am satisfied that it is appropriate, for the purpose of disposing of this matter on the merits, for this court to assume the role of a regulator and to second-guess the C.R.T.C. on matters within C.R.T.C, jurisdiction. Neither is it for this court to conjure up out of thin air some new regulatory scheme to govern the broadcast agenda for national political debate in this country. Regulation of the airwaves is a matter for the Parliament to decide within any constitutional limits that may obtain. Parliament has chosen the machinery of the *Broadcasting Act*, R.S.C 1970, CB-11, and the C.R.T.C. for this purpose."

Campbell, J then proceeds to review why the Canadian Charter should not apply to the C.B.C. when it is operating as a broadcaster. He states at page 147:

"The *Canadian Charter of Rights and Freedoms* applies to government action. It represents a curb on the power of government, not a letter on the rights of organizations or individuals independent of government which do not exercise the functions of government.

It is not the function of the government or indeed the courts to dictate to the news media what they should report. The broadcasters are exercising a function that is very central to the democratic process. But it is a function that they perform quite independently of government.

The CRTC has not delegated any of its regulatory or other functions to the private broadcasters or to the Canadian Broadcasting Corporation (the "C.B.C."). By leaving broadcasters a wide individual discretion and responsibility to ensure fair treatment of issues, candidates and parties during elections, the C.R.T.C is emphasizing the editorial freedom of broadcasters rather than delegating to them any power of regulation."

Campbell J then deals with the merits of the application before him and, in view of the many parallels in the two applications, I apply the same reasoning to the application before me. He states at page 148:

"What the applicants are really asking this court to do is to dictate the content and the agenda of the political debate in the forthcoming federal general election. It is for the leaders of the various political parties to decide of their own free will and accord, without any coercion from this court, whom they want to debate and when and on what terms such debates should take place. It is not for this court to dictate the agenda of political debate. It is not for this court, certainly on an interlocutory application of this nature without full opportunity as at trial to canvas the facts and the legal issues, to interfere with the freedom of speech and expression of the various party leaders by dictating the debate format, content or participants. Neither is it up to this court to dictate in any way to broadcast editors what is news and what is not news, subject of course to non-publication orders in criminal cases and a few other exceptional cases. It is up to broadcasters and editors to decide what they wish to publish. Their decisions to cover a particular event or not to cover it are matters, to use the words of the U.S. Supreme Court in *Columbia Broadcasting System, Inc. v Democratic Nat. Committee; Federal communications comm'n v Business Executives' Move for Vietnam Peace; Post-Newsweek Stations v Business Executives' Move for Vietnam Peace; American Broadcasting Companies v Democratic Nat. Committee*, 412 U.S. 94 at P.118 (1973). "within the area of journalistic discretion". Those editorial decisions do not amount to the carrying out of any government functions.

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. It would require a great deal more factual material than this court has before it right now on the eve of the scheduled debate and so close to the actual time of the election itself.

Since 1991, the amendments of the new Broadcasting Act have the effect of strengthening the rights of the broadcasters to enjoy freedom of expression; see the Broadcasting Act; section 2(3), which concerns all broadcasters, and sections 35(2), 46(5) and 52(1), which specifically concern the C.B.C. There is nothing on the face of the criteria chosen which is so unreasonable as to require the intervention of the Court. The criteria are not arbitrary, unfair or based on irrational considerations on their face.

Campbell, J at pp 150–151 points out the dangers which could result from a court interfering in journalistic endeavours in order to satisfy the demands of groups seeking more attention from the media on the grounds of freedom of expression:

"The applicants say that their right to freedom of expression is infringed by the broadcast policy and by the non-enforcement of the broadcast policy. It is by no means clear on this record that their freedom of expression requires a court to force the media to carry their views to the public. It is by no means clear on this record that any citizen's right to vote is impaired by the failure of this group to get the media attention which is sincerely and profoundly believes it requires. To make the orders sought would not promote free public discussion in political debate. It would interfere with free public discussion and political debate by forcing on unwilling participants a certain debate format.

I will say little more about the merits of the constitutional arguments raised by the applicants. The applicants in my view have some very considerable legal hurdles to overcome at trial. As to free speech, the right to speak does not necessarily carry with it the right to make someone else listen or the right to make someone else carry one's own message to the public. That point was made by Thurlow CJ of the Federal Court in *Re New Brunswick Broadcasting Co... Ltd. v C.R.T.C.* (1984), 13 D.L.R.(4th) 77 at p.89, 2 C.P.R. (3rd 433, [1984] 2 F.C. 410 (C.A.)"

At page 152, Campbell J, concludes his discussion of the merits of the application before him:

"This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all.

The proper purpose of an interlocutory injunction is to preserve or restore the *status quo*, not to give the plaintiff his remedy, until trial". I refer to these remarks of Mahoney J in *Re A.G. Can, and Gould* (1984), 13 D.L.R. (4th) 485 at p 490, [1984] 1 F.C. 1133, 42 C.R. (3rd) 88 (C.A.), quoted by the Divisional Court in *Re Metropolitan Toronto School Board and Minister of Education* (1985), 53 O.R.(2nd) 70 at P.81, 23 D.L.R. (4th) 303 at p 313, 6 C.P.C. (2d) 281 at p 293.

I also seek to preserve the *status quo* until trial, and an interlocutory injunction in this application would have the effect of giving the applicants their remedy without a trial. Most of the foregoing reasoning was reviewed and accepted by Berger J in *the National Party case supra*. Due to the

necessity of producing these reasons quickly, I have not reviewed his reasons in detail, but I am in agreement with his judgement.

The foregoing reasoning is also applicable to the Bill of Rights. The Bill of Rights encompasses freedom of the press and again the Court should not attempt to balance that right with the right of freedom of speech in an interlocutory motion.

Despite the very able arguments by counsel for the applicants, I am not satisfied that they have met the legal test of a serious issue to be tried and I am not satisfied that they succeeded on the balance of probabilities. The motion will be dismissed.

William P. McKeown

Judge

OTTAWA, ONTARIO,
October 1, 1993

OPINION OF THE COURT

delivered by

THE LORD PRESIDENT

in causa

BRIAN HOUSTON AND PATRICK
CHALMERS,

-Pursuers;

against

BRITISH BROADCASTING CORPORATION,

-Defenders:

Act:- Dean of Faculty et
Boyd QC et Brown
Drummond Miller, WS,
for Pursuers

Alt:- P Taylor, Solicitor -
Advocate
McGrigor Donald for
Defenders

4 April 1995