Court File No. A-193-15

FEDERAL COURT OF APPEAL

B E T W E E N

BELL MOBILITY INC.

APPELLANTS

- and -

BENJAMIN KLASS, THE CONSUMERS' ASSOCIATION OF CANADA, THE COUNCIL OF SENIOR CITIZENS' ORGANIZATIONS OF BRITISH COLUMBIA AND THE PUBLIC INTEREST ADVOCACY CENTRE, THE CANADIAN NETWORK OPERATORS CONSORTIUM INC., BRAGG COMMUNICATIONS INC., CARRYING ON BUSINESS AS EASTLINK, FENWICK MCKELVEY, VAXINATION INFORMATIQUE, THE SAMUEL-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC, DAVID ELLIS, TERESA MURPHY, AND TELUS COMMUNICATIONS COMPANY

RESPONDENTS

-and-

ATTORNEY GENERAL OF CANADA

INTERVENER

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, CANADIAN NETWORK OPERATORS CONSORTIUM INC.

Tacit Law
320 March Road, Suite 604
Ottawa, ON K2K 2E3
Christian S. Tacit
Christopher Copeland
Tel: 613-599-5345
Fax: 613-248-5175

Bram Abramson
TekSavvy Solutions Inc.
800 Richmond Street
Chatham, ON N7M 5J5
Tel: 647-479-8093
Fax: 519-360-1716
Solicitors for the Respondent Canadian Network Operators Consortium Inc.

TO: Federal Court of Appeal
Courts Administration Service
Thomas D'Arcy McGee Building
90 Sparks Street, 5th Floor
Ottawa, Ontario K1A 0H9

AND TO: **John S Tyhurst and Sarah Sherhols**
The Attorney General of Canada
Department of Justice
50 O'Connor Street, 5th Floor
Ottawa, ON K1A 0H8
Tel: 613-670-6276
Fax: 613-954-1920
Email: jtyhurst@justice.gc.ca

Counsel for the Attorney General of Canada

AND TO: **McCarthy Tétrault LLP**
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON, M5K 1E6
Neil Finkelstein
Brandon Kain
Richard J. Lizius
Tel: (416) 601-7611
Fax: (416) 868-0673
Email: rlizius@mccarthy.ca

Counsel for the Appellant, Bell Mobility Inc.

AND TO: **Philip Palmer**
Philip Palmer Law
505 Windermere Ave.
Ottawa, ON K2A 2W3
Tel: (613) 809-9330
Fax: (613) 728-8545
Email: philip@philippalmerlaw.ca

Counsel for the Respondents Benjamin Klass, David Ellis, and Fenwick McKelvey

AND TO: **Christopher Rootham**
Nelligan O'Brien Payne LLP
Suite 1500, 50 O'Connor
Ottawa, ON K1P 6L2
Tel: (613) 231-8311

Fax: (613) 788-3667
Email: christopher.rootham@nelligan.ca

Counsel for the Respondent TELUS Communications Company

AND TO: **Christianne Laizner**
Canadian Radio-television and Telecommunications Commission
Gatineau, QC J8X 4B1
Tel: (819) 953-3990
Fax: (819) 953-0589
Email: contentieux.legalservices@crtc.gc.ca

Counsel for the Canadian Radio-television and Telecommunications Commission

INDEX

Index

Tab 1

INDEX

PART I – STATEMENT OF FACTS

1. Overview

1. The Respondent Canadian Network Operators Consortium Inc. ("**CNOC**") opposes the granting of Bell Mobility Inc.'s ("**Bell Mobility**") appeal from Broadcasting and Telecom Decision 2015-26[1] ("**Decision**").

2. The Canadian Radio-television and Telecommunications Commission ("**CRTC**") is a highly specialized tribunal. It is expert with respect to its enabling statutes, the *Telecommunications Act*[2] and the *Broadcasting Act.*[3] The Decision reflects the CRTC's application of those statutes to complex facts before it. In the Decision, the CRTC found that Bell Mobility, and Videotron G.P. ("**Videotron**"), were granting themselves an undue preference within the meaning of subsection 27(2) of the *Telecommunications Act*. This appeal is about the deference owed to the CRTC's application of its home statutes to those facts in order to reach its findings.

3. The Supreme Court of Canada has held that on questions of mixed fact and law, and questions of pure law, expert tribunals applying their enabling statutes should be shown deference – and that their interpretation ought to be reviewed on a standard of reasonableness. A review of the reasons provided by the CRTC demonstrates that the Decision was clearly correct and, more importantly, reasonable. There is therefore no basis to grant Bell Mobility's appeal

2. The proceedings leading to the Decision

4. Bell Mobility's mobile wireless customers incur standard "data charges" when they cause Internet data, including most online video, to be transmitted to or from their Bell Mobility mobile

---

1 Broadcasting and Telecom Decision CRTC 2015-26, *Complaint against Bell Mobility Inc. and Quebecor Media Inc., Videotron Ltd. and Videotron G.P. alleging undue and unreasonable preference and disadvantage in regard to the billing practices for their mobile TV services Bell Mobile TV and illico.tv*, issued 29 January 2015 [**Decision**], Appeal Book [**AB**], Tab 2.

2 *Telecommunications Act*, S.C. 1993, c. 38 [*Telecommunications Act*].

3 *Broadcasting Act*, S.C. 1991, c. 11 [*Broadcasting Act*].

wireless smartphones.[4] These data charges are based on the volume of data transmitted.[5] Video services that are subject to such charges include Google (YouTube, Play), Apple (iTunes) and Netflix, as just a few examples.[6] Bell Mobility also offers an online video service called "**Bell Mobile TV**". Bell Mobility customers typically access content from Bell Mobile TV by using a mobile software application ("**app**") installed on the smartphone, which focuses on arranging for the transmission of online video from the Bell Mobile TV service to the customer's smartphone.[7]

5. Just as users of other apps were charged for access to their content library, users of Bell Mobile TV were charged $5 per month to access up to the first ten hours of Bell Mobile TV content on their mobile devices, and $3 for each additional hour of Bell Mobile TV content.[8] But, until the Decision, Bell Mobility exempted such usage from its standard volume-based data transmission charges, regardless of the volume of data transmitted.[9] This exemption from data transmission charges was unique to the Bell Mobile TV service. Other video services accessed using Bell Mobility wireless transmissions were subject to the data transmission charges.

6. On November 20, 2013, Mr. Benjamin Klass filed an application with the CRTC against Bell Mobility.[10] The application argued that exempting the data consumed by the use of Bell Mobile TV from Bell Mobility's standard mobile wireless data charges conferred an undue preference on Bell Mobility's and Bell Mobile TV's parent, Bell Canada Enterprises ("**BCE**").[11] The application also argued that the same practice imposed an undue disadvantage on wireless customers that consume other mobile Internet-based video services, and on competing video

---

4 Decision, para. 46, AB, Tab 2.

5 Decision, para. 46, AB, Tab 2.

6 Rogers Comments dated March 5, 2014, para. 24, AB, Tab BB.

7 Decision, para. 4, AB, Tab 2.

8 Decision, paras 5-6, 37, AB, Tab 2.

9 Decision, para. 6, AB, Tab 2.

10 Part 1 Application requesting fair treatment of Internet services by Bell Mobility, Inc., Pursuant to CRTC 2010-445 and CRTC 2009-657 and *The Telecommunications Act*, s. 24 & subsection 27(2) ["**Klass Application**"], AB, Tab A.

11 Klass Application, para. 7, AB, Tab A.

services[12]. This undue preference and corresponding undue disadvantage, argued Mr. Klass' application, is contrary to subsection 27(2) of the *Telecommunications Act*.[13]

3. The Decision

7. Bell Mobility argued that the CRTC could not find, under subsection 27(2) of the *Telecommunications Act*, that exempting Bell Mobile TV from the standard data charges to which all other mobile television services were subject conferred an undue preference on Bell Mobile TV. Bell Mobility argued that subsection 27(2) could not apply to this activity due to section 4 of that same statute, which prohibits the application of the *Telecommunications Act* to broadcasting by broadcasting undertakings.[14]

8. The CRTC was fully alive to this argument. The CRTC agreed that "[s]ection 4 of the *Telecommunications Act* provides that the *Telecommunications Act* does not apply to broadcasting by a broadcasting undertaking, which is subject to the *Broadcasting Act*."[15] However, the CRTC did not find that Bell Mobility's activity of transporting mobile TV services to subscribers' devices, including Bell Mobile TV, was broadcasting by a broadcasting undertaking. After all, Bell Mobility treated the Bell Mobile TV the same as all other traffic.[16] In doing so, Bell Mobility was content-agnostic.[17] Bell Mobility was operating as a common carrier, and doing so separately from its involvement in broadcasting: with regard to this distinct activity it, and Videotron, were thus "operating as Canadian carriers providing telecommunications services and are therefore subject to the *Telecommunications Act* and policies made pursuant to that Act."[18]

---

12 Klass Application, para. 7, AB, Tab A.

13 Klass Application, para. 8, AB, Tab A.

14 Decision, para. 12, AB, Tab 2.

15 Decision, para. 9, AB, Tab 2.

16 Decision, para 17, AB, Tab 2.

17 Decision, para 18, AB, Tab 2.

18 Decision, para. 10, AB, Tab 2.

9. In answering the question of whether Bell Mobility operated as a Canadian carrier providing telecommunications services, the CRTC thus fully considered whether Bell Mobility was operating as a broadcasting undertaking and therefore not subject to the *Telecommunications Act* with respect to the transport of Bell Mobile TV.

10. To be clear, the Decision recognized that Bell Mobility was also the entity involved directly in the Bell Mobile TV activities. In acquiring the mobile distribution rights for the content available on Bell Mobile TV, in aggregating the content to be broadcast, and in packaging and marketing those services, Bell Mobility was involved in broadcasting, by creating the Bell Mobile TV service.[19] The Decision further noted that mobile TV services constitute broadcasting services as contemplated by the *Exemption Order for Digital Media Broadcasting Undertakings*[20] ("**DMBU Exemption Order**"), issued under the *Broadcasting Act*.[21] But the CRTC did not say that engaging in this broadcasting activity negated Bell Mobility's engagement in a separate activity, as a Canadian carrier, when providing the data connectivity and transport for Bell Mobile TV.

11. In fact, the CRTC was quite clear that the mere fact of Bell Mobility's involvement in broadcasting did not make a broadcasting undertaking, too, of the activity of providing the data connectivity and transport for Bell Mobile TV:

> "…Bell Mobility's and Videotron's roles as Canadian carriers in providing wireless data connectivity and transport services to enable subscribers to access content on their mobile devices **are not necessarily transformed into those of broadcasting undertakings merely because they are involved in the content**. Rather, it is necessary to examine in each case the facts to determine the true nature of the services being provided."[22]

12. In assessing the "true nature of the services being provided"[23], the CRTC developed a complete factual record in the proceeding leading to the Decision, including two rounds of formal

---

[19] Decision, para. 15, AB, Tab 2.

[20] Broadcasting Order CRTC 2012-409, Amendments to the *Exemption order for new media broadcasting undertakings* (now known as the *Exemption order for digital media broadcasting undertakings)* – Appendix, issued 26 July 2012 ["**DMBU Exemption Order**"].

[21] Decision, para. 15, AB, Tab 2.

[22] Decision, para. 16 (bolding and underlining added), AB, Tab 2.

[23] Decision, para. 16, AB, Tab 2.

"requests for information" ("**RFIs**") directed at Rogers Communications Partnership, and three at each of Bell Mobility and Videotron, requiring the filing of comprehensive information as to how each mobile TV service operated, from a technical standpoint.[24]

13. Two of Bell Mobility's RFI responses were particularly helpful in describing how Bell Mobile TV is provisioned by Bell Mobility. In the first such response[25], Bell Mobility confirmed that its ordinary wireless access network[26] is used to transport Bell Mobile TV —fetched from special Bell Mobile TV servers—to Bell Mobility computers called "content distribution network servers" (which make the programming available), to end-user mobile devices.[27] In the second such response[28], Bell Mobility confirmed that customers require Bell Mobility's data connectivity to access Bell Mobile TV.[29]

14. In other words, subscribers cannot access Bell Mobile TV unless they also purchase a data, voice, or tablet Internet plan from Bell Mobility; it is "the subscriber's wireless voice plan, data plan or tablet plan that provides the basis upon which the end user is identified as a subscriber and upon which the subscriber is connected to the network."[30] The CRTC found that wireless voice, tablet, and data plans, "are clearly telecommunications services subject to the *Telecommunications Act*."[31]

15. The CRTC also found, and no party disputed, that Bell Mobility operates as a telecommunications common carrier ("**TCC**") when it provides access to the Internet, voice, and other data services to its subscribers.[32] This categorization is clearly supported by Bell Mobility's

---

[24] AB, Tabs EE, QQ, and VV. The *Telecommunications Act* grants the CRTC the authority to require a Canadian carrier to submit any information the CRTC considers necessary for the administration of the *Telecommunications Act:* section 37.

[25] Bell Mobility Response to Bell Mobility(CRTC)4Apr14-7, AB, Tab FF, pgs 304-308.

[26] *I.e.*, the combination of the use of a fixed tower and wireless spectrum to communicate with the end-user's device. See Bell Mobility Response to Bell Mobility(CRTC)4Apr14-7, AB, Tab FF, pgs 305-308.

[27] Bell Mobility Response to Bell Mobility(CRTC)4Apr14-7, AB, Tab FF, pg 306.

[28] Bell Mobility Response to Bell Mobility(CRTC)5Aug14-13, AB, Tab RR.

[29] Bell Mobility Response to Bell Mobility(CRTC)5Aug14-13, AB at Tab RR, pgs 468-469.

[30] Decision, para. 21, AB, Tab 2.

[31] Decision, para. 17, AB, Tab 2.

[32] Decision, para. 16, AB, Tab 2.

own submissions in the proceeding leading to the Decision. In its May 12, 2014 Reply ("**Bell Mobility Reply**"),[33] Bell Mobility acknowledged that

> "[i]t is well established and no one is disputing that Bell Mobility is a TCC based on the fact that it operates licensed radio-frequency spectrum (a transmission facility) which we use to provide wireless services, such as voice, data and SMS text messaging to the public for compensation".[34]

16. Although Bell Mobility claimed that it was not acting as a TCC with respect to the transmission of programming generated by Bell Mobile TV, it also acknowledged:

> "We are a TCC offering a telecommunications service when providing wireless connectivity enabling our subscribers to view programming wirelessly."[35]

17. Therefore, the subscriber must subscribe to a telecommunications service subject to the *Telecommunications Act* in order to access Bell Mobile TV.[36] In this respect, the CRTC noted that from the end-users' perspective, Bell Mobile TV is accessed in the same manner as any other Internet-originated telecommunications services.[37]

18. The CRTC also made the factual finding that Bell Mobile TV traffic is "treated the same as other traffic" in Bell Mobility's network, including traffic from non-broadcasting services, and that the data traverses the same path regardless of whether a subscriber is accessing Bell Mobile TV broadcasting content, Netflix broadcasting content, or a Wikipedia article.[38]

19. The CRTC made the further factual finding that the functions performed by Bell Mobility to establish data connectivity and provide transport over its access networks would be the same whether the content being transported is Bell Mobile TV, or is other broadcasting or non-

---

[33] Bell Mobility Reply, AB, Tab II.

[34] Bell Mobility Reply, para 26, AB, Tab II. TCC stands for telecommunications common carrier, which for the purposes of this appeal is analogous to the term Canadian carrier.

[35] Bell Mobility Reply, para. 51, AB, Tab II.

[36] Decision, para. 21, AB, Tab 2.

[37] Decision, para. 19, AB, Tab 2.

[38] Decision, para. 17, AB, Tab 2. This is consistent with Bell Mobility's admission to the same effect in Bell Mobility(CRTC)4Apr14-7 c) and d), AB, Tab FF.

broadcasting services. In other words, these functions establish connectivity, and transport content, in a content-neutral way that is "agnostic as to the content itself".[39] They merely provide the mode of transmission.

20. Upon considering all of the evidence noted above, the CRTC concluded that Bell Mobility is providing telecommunications services, as defined in section 2 of the *Telecommunications Act*, and is operating as a telecommunications common carrier under Canadian jurisdiction (a "**Canadian carrier**")[40], when it provides the data connectivity and transport necessary to deliver Bell Mobile TV to its subscribers' mobile devices.[41]

21. The CRTC was reinforced in this conclusion by its finding of fact that Bell Mobile TV can be accessed by Bell Mobility's subscribers over another telecommunications service provider's Wi-Fi network.[42] In this situation, the other telecommunications service provider is clearly providing a telecommunications service "when it transports the mobile TV service accessed by a subscriber using Wi-Fi".[43]

22. For example, if a subscriber were sitting in a coffee shop using the shop's Wi-Fi, with such Wi-Fi being provided by a telecommunications service provider other than Bell Mobility, that telecommunications service provider would be providing a telecommunications service, wireless Internet connectivity, which is subject to the *Telecommunications Act*. Under no circumstances could that telecommunications service provider be said to be operating as a broadcasting undertaking.

23. Similarly, when Bell Mobility provides transport and data connectivity, and it does so in a fashion that is agnostic as to the content being transported[44], it is also providing a

---

39 Decision, para. 18, AB, Tab 2.

40 A "telecommunications common carrier" is, for the purposes of this appeal, analogous to the term "Canadian carrier." Both terms are defined in s 2 of the *Telecommunications Act*.

41 Decision, para. 22, AB, Tab 2.

42 Decision, para. 23, AB, Tab 2.

43 Decision, para. 24, AB, Tab 2.

44 Decision, para. 18, AB, Tab 2.

telecommunications service, regardless of whether the content being accessed is Bell Mobile TV or other online content.[45]

24. Therefore, to recapitulate, the CRTC found that Bell Mobility was acting as a Canadian carrier, providing a telecommunications service subject to the *Telecommunications Act*, when it provides data connectivity and transport to access its Bell Mobile TV service, based on the following key findings of fact, as enumerated in the reasons of the CRTC:

a. Bell Mobility, "in acquiring the mobile distribution rights for the content available on [its] mobile TV services, in aggregating the content to be broadcast, and in packaging and marketing those services", is "**involved** in broadcasting".[46]

b. While mobile TV services are themselves broadcasting services as contemplated by the DMBU exemption order, providing data connectivity and transport services by which subscribers access Bell Mobile TV did not necessarily make Bell Mobility a broadcasting undertaking."[47] Rather, it was necessary to examine "the facts to determine the true nature of the services being provided."[48]

c. The CRTC found, and no party disputed, that Bell Mobility operates as a "Canadian carrier" (that is, a "telecommunications common carrier" under Canadian jurisdiction) when it provides access to the Internet and voice and other data services to its subscribers.[49]

---

[45] Decision, para. 24, AB, Tab 2.

[46] Decision, para. 15 (bolding and underlining added), AB, Tab 2.

[47] Decision, para. 16, AB, Tab 2.

[48] Decision, para. 16, AB, Tab 2.

[49] Decision, para. 16, AB, Tab 2.

d. The CRTC also found, and Bell Mobility agreed with this,[50] that Bell Mobility acts as a Canadian carrier providing a telecommunication service when it makes available the wireless data connectivity used to view programming services over the Internet.[51]

e. Bell Mobility used the same wireless network to transport Bell Mobile TV to subscribers' devices as it did to transport other telecommunications services.[52]

f. Bell Mobile TV traffic, and the traffic of services that were clearly telecommunications services, were treated the same in Bell Mobility's network; and the data path is the same.[53]

g. The functions performed by Bell Mobility to establish data connectivity and provide transport over its network were the same regardless of whether the content being accessed was Bell Mobile TV or other content. The purpose of these functions is to establish data connectivity and transport, agnostic as to the content itself.[54]

h. From the subscriber's perspective, there is no difference in how Bell Mobile TV is accessed or delivered versus any other app.[55]

i. Subscribers to Bell Mobile TV require data connectivity to use Bell Mobile TV whether or not they have a data plan. Data connectivity is used to authenticate the end-user as a subscriber and transport the content.[56]

---

50 Bell Mobility Reply, para. 51, AB, Tab II.

51 Decision, para. 16, AB, Tab 2.

52 Decision, para. 17, AB, Tab 2.

53 Decision, para. 17, AB, Tab 2.

54 Decision, para. 18, AB, Tab 2.

55 Decision, para. 19, AB, Tab 2.

56 Decision, para. 20, AB, Tab 2.

j. Data connectivity to access Bell Mobile TV "cannot be established unless the subscriber obtains a telecommunications service from Bell Mobility".[57] It is "the subscriber's wireless voice plan, data plan or tablet plan that provides the basis upon which the end user is identified as a subscriber and upon which the subscriber is connected to the network."[58]

k. Bell Mobile TV can be accessed over the Wi-Fi network of another telecommunications service provider. Even though Bell Mobility's wireless access network is not then engaged, the end-user is no less able to access Bell Mobile TV. When this occurs, the other service provider is clearly providing a telecommunications service, namely Internet connectivity, subject to the *Telecommunications Act*.[59]

25. After concluding that Bell Mobility was acting as a telecommunications common carrier, the CRTC found that Bell Mobility, in providing the data connectivity and transport required for consumers to access Bell Mobile TV at substantially lower costs to those consumers relative to other audiovisual content services, had conferred an undue and unreasonable preference upon consumers of Bell Mobile TV, and upon Bell Mobile TV itself, in violation of subsection 27(2) of the *Telecommunications Act*.[60] The CRTC found that Bell Mobility had subjected its subscribers who consume other audiovisual content services that are subject to data charges, and subjected these other services, to an undue and unreasonable disadvantage, also in violation of subsection 27(2) of the *Telecommunications Act*.[61]

26. The CRTC's finding that the preference granted was undue is not in issue in the present appeal.

---

[57] Decision, para. 21, AB, Tab 2.

[58] Decision, para. 21, AB, Tab 2.

[59] Decision, paras. 23-24, AB, Tab 2.

[60] Decision, para 61, AB, Tab 2.

[61] Decision, para. 61, AB, Tab 2.

27. As its sole remedy, the CRTC directed Bell Mobility to eliminate its unlawful practice with respect to data charges for Bell Mobile TV by no later than 29 April 2015.[62]

28. Since Videotron had committed, prior to the release of the Decision, to cease exempting its own mobile TV service from data charges, the Decision directed Videotron to comply with its planned withdrawal of the illico.tv app by the dates proposed by Videotron, and to confirm by March 31, 2015 that the application had been withdrawn. The CRTC further directed Videotron to ensure that any new mobile TV service complies with the determinations set out in the Decision.[63]

PART II – ISSUES IN DISPUTE

29. The following issues are in dispute between the parties:

a. What is the applicable standard of review?

b. Did the CRTC commit a reversible error in applying the *Telecommunications Act* in this case?

PART III – SUBMISSIONS

Issue #1 The applicable standard of review

30. The *Canadian Radio-television and Telecommunications Commission Act*[64] sets out the CRTC's administrative form, and takes note of the *Telecommunications Act* and *Broadcasting Act* as statutes granting the CRTC specific powers and objects.[65] The Decision focused on applying, to the facts at hand, the *Telecommunications Act*'s definitions of "Canadian carrier" and "telecommunications service",[66] and the intersection of these with the *Broadcasting Act*'s definitions of "broadcasting" and "broadcasting undertaking"[67]:

> "The *Telecommunications Act* applies to the provision of telecommunications services by Canadian carriers and, in some respects, to other telecommunications service providers.

---

62 Decision, para. 62, AB, Tab 2.

63 Decision, para. 63, AB, Tab 2.

64 *Canadian Radio-television and Telecommunications Commission Act*, R.S.C. 1985, c. C-22 [***CRTC Act***].

65 *CRTC Act*, s. 12. A third statute, relating to anti-spam legislation, was added to this list in 2010.

66 *Telecommunications Act*, s. 2.

67 *Broadcasting Act*, s. 2.

> Section 4 of the *Telecommunications Act* provides that the *Telecommunications Act* does not apply to broadcasting by a broadcasting undertaking, which is subject to the *Broadcasting Act*."[68]

31. The Supreme Court of Canada has stated that when a tribunal is interpreting or applying its home statute, as the Decision clearly required the CRTC to do, it should be presumed that the appropriate standard of review is reasonableness.[69] For such a decision to instead be reviewed on a correctness standard, the question at issue must fall into one of four exceptions. Justice Rothstein, writing for the majority of the Supreme Court of Canada, enumerated these exceptions in the recent case of *Canadian National Railway Co v Canada (Attorney General)*:[70]

> "It is now well established that deference will usually result where a decision maker is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity (*Dunsmuir*, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 30). In such cases, there is a presumption of deferential review, unless the question at issue falls into one of the categories to which the correctness standard applies: constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside of the adjudicator's expertise, questions regarding the jurisdictional lines between two or more competing specialized tribunals, and the exceptional category of true questions of jurisdiction (*Dunsmuir*, at paras. 58-61, and *Alberta Teachers' Association*, at para. 30, citing *Canada (Canadian Human Rights Commission)*, at para. 18, and *Dunsmuir*)."[71]

32. In the Decision, the CRTC clearly applied home statutes closely connected to its function. No exception enumerated by Justice Rothstein is available to overcome the presumption of deference. Nor does a contextual analysis lead to a different result. The standard is therefore reasonableness—the Decision falls within the range of possible, reasonable conclusions.

---

[68] Decision, para. 9 (underlining added; footnotes omitted), AB, Tab 2.

[69] *Alberta (Information and Privacy* Commissioner*) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654 (Rothstein J., maj), para. 39 [***ATA***].

[70] *Canadian National Railway Co. v. Canada (Attorney General)*, [2014] 2 S.C.R. 135 [***CNR***], para. 55.

[71] *CNR*, *supra* note 70, para. 55.

1. No exception to the presumption of reasonableness is available

33. The four categories of question noted, in *CNR*, as ones on which the presumption of reasonableness could be rebutted, were: (1) constitutional questions; (2) questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise; (3) questions regarding the jurisdictional lines between two or more competing specialized tribunals; and (4) the exceptional category of true questions of jurisdiction.[72]

34. No party has argued that there is a constitutional question at issue. Nor, for the following reasons, are any of the three remaining categories of question at issue.

(i) Not of central importance to the legal system and outside the adjudicator's expertise

35. A question of law that is *both* of central importance to the legal system as a whole, *and* outside of the adjudicator's expertise, may rebut a presumption of deference.[73] Only where both criteria are present, not just one or the other, does a correctness standard become necessary, in order to "safeguard[s] a basic consistency in the fundamental legal order of our country":[74]

36. Here, neither mandatory criterion is fulfilled.

37. First, while this question is no doubt of central importance to the communications industry, it is not of central importance to the legal system. A case dealing with complex common law rules and conflicting jurisprudence on principles of *res judicata* and abuse of process rises to such a level, and lies at the heart of the administration of justice.[75] A debate as to what constitutes telecommunications and what constitutes broadcasting does not.

---

[72] *CNR*, *supra* note 70, para. 55.

[73] *ATA*, *supra* note 69, para. 46.

[74] *Canada (Human Rights Commission) v. Canada (Attorney General*, [2011] 3 S.C.R. 471, para. 22, cited in *ATA*, *supra* note 69, para. 46.

[75] *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190, para 60 [***Dunsmuir***].

38. Second, and in any event, this is not a matter that is outside the adjudicator's expertise. It is the very opposite. Applying the core definitions of the *Telecommunications* and *Broadcasting* Acts is what the CRTC is all about.

39. Rather than being both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, the question here at issue is neither. Thus, this exception to the reasonableness standard of review cannot apply.

(ii) Not about jurisdictional lines between competing administrative tribunals

40. It is plain and obvious that the Decision does not engage the jurisdictional lines between two or more competing specialized tribunals. In fact, the CRTC is the only administrative tribunal with jurisdiction over the matter at hand.

41. It is true that two statutes, the *Broadcasting* and *Telecommunications* Acts, are involved. But the presence of two home statutes, rather than only one, ought not to pose any difficulty. For instance, the Supreme Court of Canada contemplated explicitly such a situation:

> "[i]t is now well established that deference will usually result where a decision maker is interpreting its own ***statute or statutes*** closely connected to its function, with which it will have particular familiarity…"[76]

42. There is no case law, nor any good reason, to suggest that a tribunal's tracing of the relationship between its two home statutes is in any way analogous to the jurisdictional lines between two competing specialized tribunals. Indeed, the opposite is likelier. In entrusting to a single delegate the application of both interlocking statutes, Parliament explicitly conferred upon the CRTC the role of interpreting their relationship. The CRTC is the only tribunal with jurisdiction in this matter. There is no competing specialized tribunal to suggest any exception to the rule of deference.

[76] *CNR*, *supra* note 70, para. 55 (bolding and italics added).

(iii) Not a "true question of jurisdiction"

43. The *Telecommunications Act* provides for appeals, on leave, on a question of "law or jurisdiction".[77] The remaining exception under which such an appeal could derogate from reasonableness relates to the narrower, and "exceptional", matter of a "true question of jurisdiction". A true question of jurisdiction is not made out by a tribunal's mere, and commonplace, "interpretation of its home statute" to determine "whether it has the authority or jurisdiction to do what is being challenged on judicial review".[78]

44. It is not obvious that such mere interpretation of the jurisdiction granted by a tribunal's home statute constituted a "true question of jurisdiction", even before *Dunsmuir*. Courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so".[79] Indeed, invoking "preliminary jurisdictional questions"[80] to lower the standard of review for a tribunal's interpretation of its enabling statute "has the capacity to unravel the essence of the decision and undermine the very characteristic of the Agency which entitles it to the highest level of deference from a court – its specialized expertise."[81] Rather, a nexus with jurisdictional questions *outside* the tribunal's areas of expertise was required in order to attract a correctness standard—as when the CRTC looked into its jurisdiction over specialized labour relations matters, or over utilities' electricity transmission facilities.[82]

45. Such a nexus is not present in the current matter, in which the CRTC was required to interpret only its home statutes.

---

77 *Telecommunications Act*, subs. 64(1).

78 *ATA*, *supra* note 69, para. 34.

79 *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp*, [1979] 2 S.C.R. 227, pg 233 [***CUPE***].

80 *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, [***Council***], as described in *Public Service Alliance of Canada v. Canadian Federal Pilots Assn*. (2009), [2010] 3 F.C.R. 219, 2009 FCA 223 (QL) at para 43 [***Pilots***].

81 *Council*, *supra* note 80, para. 88.

82 *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739 (L'Heureux-Dubé J., concurring), paras. 30-31, cited in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, para. 13.

46. However, the heavy post-*Dunsmuir* scrutiny of what constitutes a true question of jurisdiction puts this exception still further out of reach. In *ATA* Justice Rothstein, writing for the majority, noted that the category's application would be truly exceptional:

> "Experience has shown that the category of true questions of jurisdiction is narrow indeed. Since *Dunsmuir*, this Court has not identified a single true question of jurisdiction…[83] (….)
>
> The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.[84] (….)
>
> What I propose is, I believe, a natural extension of the approach to simplification set out in *Dunsmuir* and follows directly from *Alliance* (para. 26). True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.[85] (….)
>
> I am unable to provide a definition of what might constitute a true question of jurisdiction. The difficulty with maintaining the category of true questions of jurisdiction is that without a clear definition or content to the category, courts will continue, unnecessarily, to be in doubt on this question. However, at this stage, I do not rule out, in our adversarial system, counsel raising an argument that might satisfy a court that a true question of jurisdiction exists and applies in a particular case. The practical approach is to direct the courts and counsel that at this time, true questions of jurisdiction will be exceptional and, should the occasion arise, to address in a future case whether such category is indeed helpful or necessary."[86]

---

[83] *ATA*, *supra* note 69, para. 33 (underlining added).

[84] *ATA*, *supra* note 69, para. 34 (underlining added).

[85] *ATA*, *supra* note 69, para. 39 (underlining added).

[86] *ATA*, *supra* note 69, para. 42 (underlining added).

47. Given the opportunity to apply these cautions later, in the case of *CNR*, the Supreme Court of Canada, again in a decision written by Justice Rothstein, held that,

> "[t]o the extent that questions of true jurisdiction or vires have any currency, the Governor in Council's determination of whether a party to a confidential contract can bring a complaint under s. 120.1 does not fall within that category. This is not an issue in which the Governor in Council was required to explicitly determine whether its own statutory grant of power gave it the authority to decide the matter (see *Dunsmuir*, at para. 59). Rather, it is simply a question of statutory interpretation involving the issue of whether the s. 120.1 complaint mechanism is available to certain parties. This could not be a true question of jurisdiction or vires of the Governor in Council -- the decision maker under review in this case."[87]

48. Justice Rothstein's analysis in *CNR* is directly transferable to the facts in this appeal. The CRTC was not required to determine if it had the authority to decide the matter: it clearly did, which no party disputed. The CRTC was instead only required to engage in statutory interpretation to determine if the undue preference provisions of the *Telecommunications Act* were available in respect of Bell Mobility's activity providing the transport and data connectivity services required for the delivery of Bell Mobile TV.

49. This analysis is consistent with Professor Audrey Macklin's conclusion as to the post-*Dunsmuir* "restraint" exercised by the Supreme Court in "labelling an issue as jurisdictional and thereby subject to the stricter standard of correctness":

> "The best proof lies in *Dunsmuir* itself. Without expending much effort, the Court could have transformed the question "does the statute authorize the adjudicator to inquire into the existence of cause for dismissal?" into "does the adjudicator have jurisdiction to inquire into the existence of cause for dismissal?" Yet, the Court refrained from even posing the question in jurisdictional terms. The adjudicator had jurisdiction over the parties (the employer and the employee) and over the subject matter (discharge, suspension, or other financial penalty), and that sufficed.…

[87] *CNR*, *supra* note 70, para. 61.

> The post-*Dunsmuir* Court has been so alert not to brand something as jurisdictional that the question before the courts is no longer "is this thing a jurisdictional question?", but "is there such a thing as a jurisdictional question?"[88]

50. In the Decision, similarly, the CRTC had jurisdiction over the parties (Canadian carriers) and the subject matter (applicability of the *Telecommunications Act* and, to the extent appropriate, the *Broadcasting Act*, to the specific technical activities under consideration). That Bell Mobility does not prefer the outcome of the CRTC's determination does not transform this situation into a question of true jurisdiction. The CRTC had the jurisdiction to interpret its home statutes, in a matter that did not engage questions outside the CRTC's expertise, in order to decide the questions before it. The standard of review remains reasonableness.

(iv) Additional factors

51. The Supreme Court of Canada, in *CNR*, was clear that where a decision maker is interpreting its home statutes, a reasonableness standard of review is required unless one of the four exceptions disposed of above applies. For completeness, however, it is worth undertaking the contextual analysis that some courts have suggested ought still be considered. Contextual analysis looks to the presence or absence of a privative clause, purpose of the tribunal, nature of the question at issue, and expertise of the tribunal.[89]

52. First, regarding a privative or preclusive clause: no such full clause is provided. However, relevant appeal clauses in both the *Broadcasting* and *Telecommunications* Acts explicitly narrow appeals to questions of law or jurisdiction (making the CRTC's findings of fact conclusive).[90] The same clauses direct appeals to this Court, and maintain the requirement for leave.[91] The Supreme

---

[88] Audrey Macklin, "Standard of Review: Back to the Future?" in Colleen M. Flood & Lorne Sossin, eds, Administrative Law in Context, 2nd ed (Toronto: Emond Montgomery Publications, 2013) 279, pg 307.

[89] See, *e.g.*, *Pfizer Canada Inc v Canada (Minister of Health)*, 2014 FC 1243 (QL) [*Pfizer*], paras. 88, 93-98, and 110-111 [***Pfizer***].

[90] See also with regard to the CRTC's ability to conclusively determine questions of fact *Telecommunications Act*, s 52(1); and *Broadcasting* Act**,** s 17.

[91] *Telecommunications Act*, subs. 64(1); *Broadcasting Act*, subs. 31(2).

Court has held that this amounts to a "strong privative clause" weighing in favour of a reasonableness standard.[92]

53. Second, regarding the purpose of the tribunal: both the CRTC's role administering a discrete and special administrative regime, and its expertise in doing so, are clearly engaged by the Decision. As this Court noted in *Wheatland County v. Shaw Cablesystems Limited*[93], "[t]he CRTC has a broad mandate to regulate telecommunications in Canada and a corresponding breadth of expertise with which to ensure that it discharges its responsibilities in a manner that best advances the statutory objectives."[94]

54. That mandate, this Court has recognized, is highly specialized[95]. This mandate is discharged in part through a large workforce of expert staff. The CRTC is best situated to make factual findings as to the classification of sophisticated telecommunications data connectivity and transport services. It is best situated to make findings as to the implications of this classification under the CRTC's own enabling legislation. And it is best situated to make findings as to the undueness and unreasonableness, if any, of these implications on competitors and the public. Such findings as to complex technical facts, their classification, and their implication, are the very essence of the "polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake."[96] This argues for a more deferential standard of review.

55. Third, regarding the nature of the question: where questions of mixed fact and law depend on factual circumstances, and concern the tribunal's appreciation and assessment of evidence, a reasonableness standard is to be adopted.[97] Deciding whether the CRTC properly applied its home

---

92 Thus, *e.g.*, *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764 [***Deferral Accounts***], noting, para. 37 the "strong privative clause in s. 52(1) protecting [the CRTC's] determinations on questions of fact from appeal, including whether a carrier has adopted a just and reasonable rate." Generally, *Dunsmuir*, *supra* note 75, para. 52: "The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard."

93 *Wheatland County v. Shaw Cablesystems Limited*, 2009 FCA 291 (QL), para 50 [***Wheatland***].

94 *Wheatland*, *supra* note 93, para. 50.

95 *Wheatland*, *supra* note 93, para. 50.

96 *Deferral Accounts*, *supra* note 92, para. 38.

97 *Canada (Social Development) v. Canada (Human Rights Commission)*, 2011 FCA 202, para. 17; generally, *Dunsmuir*, *supra* note 75, para. 53.

statute to Bell Mobility requires (a) assessing how the CRTC interpreted the definitions of "Canadian carrier" and "telecommunications services"; and (b) assessing how the CRTC's application of those interpretations to the facts of the case led to the conclusion that Bell Mobility acts as a Canadian carrier in providing transport and data connectivity for the delivery of Bell Mobile TV. Such a decision is therefore a question of mixed fact and law.

56. Indeed, the CRTC's application of these statutory terms is inextricably wound up with facts as to the "true nature of the services being provided."[98] Identifying that "true nature" amounts to the analysis of technical facts that the CRTC is best placed to assess. It is impossible to separate the facts as found by the CRTC from its legal interpretation of key definitions. This is a question of mixed fact and law. It is to be reviewed on a reasonableness standard.

57. Fourth, regarding the tribunal's expertise, relative to a court's, in the questions at issue: the nature of the definitions embedded in these questions, and their application to the facts of how Bell Mobility transports video signals requested from the Bell Mobile TV service, are not matters outside the CRTC's expertise. They lie squarely within it. All of these definitions are embedded in decisions that the CRTC renders weekly, having considered them in a broad range of contexts.[99] What is more, these definitions turn entirely on telecommunications technologies whose classification is at the heart of the CRTC's expertise and work.

58. Thus, on a contextual analysis, there is a limited privative clause; the CRTC's purpose is to administer a discrete and special administrative regime at the heart of which lays the question at issue, the nature of that question is one of mixed fact and law; and the CRTC has special expertise, and a comparative advantage, in those facts and that law. All of these factors confirm that the appropriate standard of review is reasonableness.

---

[98] Decision, para. 16, AB, Tab 2.

[99] In this regard, consider *Dunsmuir*'s approving citation, *supra* note 75 at paragraph 49, of D.J.Mullan's treatise on this point. "[I]n many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime". Thus, the decision continues, "deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system." The CRTC has no greater experience, nor any greater depth of experience, than in interpreting the core definitions of its home statutes.

3. The reasonableness standard of review

59. The following excerpt from *Dunsmuir* provides a complete description of the reasonableness standard of review and how it is applied:

> "Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[100]

60. On a reasonableness standard, Bell Mobility must show that the CRTC's decision does not fall within the range of possible, reasonable conclusions; nor the range of possible, acceptable outcomes that are defensible in respect of facts and law. Bell Mobility has not so shown, for the following reasons.

Issue #2 Did the CRTC commit a reversible error in applying the *Telecommunications Act* in this case?

1. The Decision is a reasonable outcome based on binding findings of fact

61. The Decision was based on a complete and extensive factual record. The CRTC's findings of fact under the *Telecommunications Act* are "binding and conclusive" [101] and, under the *Broadcasting Act*, "final and conclusive".[102] Those findings are not available for the appellant to put to this Court. The proceeding that led to them was open to the public, and it included multiple, lengthy rounds of written interventions and replies from service providers and other persons directly engaged in the relevant activities.

---

[100] *Dunsmuir, supra* note 75**,** para. 47 (underlining added).

[101] *Telecommunications Act*, subs. 52(1).

[102] *Broadcasting Act*, subs. 31(1), providing that an appeal lies to the Federal Court of Appeal only on questions of law or of jurisdiction. Questions of fact are not included.

62. The CRTC developed this record for the purpose of resolving the issues in dispute. Bell Mobility had every opportunity to contribute, and did contribute, to that record, including the following evidence:

a. The wireless connectivity provided by Bell Mobility's ordinary access network[103] is used to transport Bell Mobile TV—fetched from special Bell Mobile TV servers—to Bell Mobility computers called "content distribution network servers" (which make the programming available), to end-user mobile devices.[104]

b. Bell Mobility's activities include acting as a TCC, because it operates licensed radio-frequency spectrum (a "transmission facility"), that it uses to provide wireless telecommunications services to the public for compensation.[105]

c. Bell Mobility acts as a TCC when providing wireless connectivity enabling its subscribers to view programming wirelessly.[106]

63. Having reviewed its record, the CRTC's determinations included the following:

a. Bell Mobility, "in acquiring the mobile distribution rights for the content available on [its] mobile TV services, in aggregating the content to be broadcast, and in packaging and marketing those services", is "**involved** in broadcasting".[107]

b. While mobile TV services are themselves broadcasting services as contemplated by the DMBU exemption order, providing data connectivity and transport services by which subscribers access Bell Mobile TV did not necessarily make Bell Mobility a

[103] *I.e.*, the combination of the use of a fixed tower and wireless spectrum to communicate with the end-user's device. See Bell Mobility Response to Bell Mobility(CRTC)4Apr14-7, AB, Tab FF, pgs 305-308.

[104] Bell Mobility Reply, para. 13, AB, Tab II.

[105] Bell Mobility Reply, para. 26, AB, Tab II.

[106] Bell Mobility Reply, para. 51, AB, Tab II.

[107] Decision, para. 15 (bolding and underlining added), AB, Tab 2.

broadcasting undertaking."[108] Rather, it was necessary to examine "the facts to determine the true nature of the services being provided."[109]

c. The CRTC found, and no party disputed, that Bell Mobility operates as a "Canadian carrier" (that is, a "telecommunications common carrier" under Canadian jurisdiction) when it provides access to the Internet and voice and other data services to its subscribers.[110]

d. The CRTC also found, and Bell Mobility agreed with this,[111] that Bell Mobility acts as a Canadian carrier providing a telecommunication service when it makes available the wireless data connectivity used to view programming services over the Internet.[112]

e. Bell Mobility used the same wireless network to transport Bell Mobile TV to subscribers' devices as it did to transport other telecommunications services.[113]

f. Bell Mobile TV traffic, and the traffic of services that were clearly telecommunications services, were treated the same in Bell Mobility's network; and the data path is the same.[114]

g. The functions performed by Bell Mobility to establish data connectivity and provide transport over its network were the same regardless of whether the content being accessed was Bell Mobile TV or other content. The purpose of these functions is to establish data connectivity and transport, agnostic as to the content itself.[115]

---

[108] Decision, para. 16, AB, Tab 2.
[109] Decision, para. 16, AB, Tab 2.
[110] Decision, para. 16, AB, Tab 2.
[111] Bell Mobility Reply, para. 51, AB, Tab II.
[112] Decision, para. 16, AB, Tab 2.
[113] Decision, para. 17, AB, Tab 2.
[114] Decision, para. 17, AB, Tab 2.
[115] Decision, para. 18, AB, Tab 2.

h. From the subscriber's perspective, there is no difference in how Bell Mobile TV is accessed or delivered versus any other app.[116]

i. Subscribers to Bell Mobile TV require data connectivity to use Bell Mobile TV whether or not they have a data plan. Data connectivity is used to authenticate the end-user as a subscriber and transport the content.[117]

j. Data connectivity to access Bell Mobile TV "cannot be established unless the subscriber obtains a telecommunications service from Bell Mobility".[118] It is "the subscriber's wireless voice plan, data plan or tablet plan that provides the basis upon which the end user is identified as a subscriber and upon which the subscriber is connected to the network."[119]

k. Bell Mobile TV can be accessed over the Wi-Fi network of another telecommunications service provider. Even though Bell Mobility's wireless access network is not then engaged, the end-user is no less able to access Bell Mobile TV. When this occurs, the other service provider is clearly providing a telecommunications service, namely Internet connectivity, subject to the *Telecommunications Act*.[120]

64. In summary, based on its extensive findings of fact, the CRTC concluded that Bell Mobility is conducting two separate and distinct activities. First, Bell Mobility engages in the selection, origination and packaging of content and is involved in broadcasting when doing so.[121]

65. Second, Bell Mobility provides the telecommunications services that are used to enable customers to access Bell Mobile TV (except when, as is explained above, the service is accessed

[116] Decision, para. 19, AB, Tab 2.
[117] Decision, para. 20, AB, Tab 2.
[118] Decision, para. 21, AB, Tab 2.
[119] Decision, para. 21, AB, Tab 2.
[120] Decision, paras. 23-24, AB, Tab 2.
[121] Decision, para. 15, AB, Tab 2.

using the Wi-Fi telecommunications service of another telecommunications service provider). Based on these determinations, the CRTC logically held that in engaging in this second activity, which is separate from the first, Bell Mobility is operating solely in its capacity as a telecommunications common carrier under Canadian jurisdiction, known as a "Canadian carrier".[122] In performing this second activity, Bell Mobility provides the data connectivity and the transport to deliver Bell Mobile TV to its end users' devices, and is subject to the *Telecommunications Act* in respect of so doing.[123] Canadian carriers' roles in providing these connectivity and transport services, whether undertaken by Bell Mobility over its wireless network or another service provider over its Wi-Fi network, are "not necessarily transformed into those of broadcasting undertakings merely because they are involved in the content".[124]

66. Section 4 of the *Telecommunications Act* states that the *Telecommunications Act* "does not apply in respect of broadcasting by a broadcasting undertaking": this is what allows certain telecommunications activities to be carved out of the *Telecommunications Act* and regulated separately as "broadcasting" under the *Broadcasting Act.* The corresponding subsection 4(4) of the *Broadcasting Act* confirms that: "[f]or greater certainty, this [Broadcasting] Act does not apply to any telecommunications common carrier, as defined in the *Telecommunications Act*, when acting solely in that capacity." This interlocking scheme certainly does not oust the co-existence of distinct undertakings under each statute. As the CRTC stated on this point:

> "Section 4 of the *Telecommunication Act* does not apply as a shield to the application of the *Telecommunications Act* in this case given that Bell Mobility and Videotron are acting as Canadian carriers in providing transport and data connectivity services required for the delivery of their mobile TV services."[125]

67. These two activities described above are not inseparable. Nor are they inextricably linked, nor single and indivisible. The opposite is true. Section 4 of the *Telecommunications Act* makes this clear when it notes that only "broadcasting by a broadcasting undertaking" (the French version refers to "activités de radiodiffusion") is exempt from the application of the *Telecommunications*

[122] See the definitions of "telecommunications service" and "Canadian carrier" (incorporating the definition of a "telecommunications common carrier") in subs. 2(1) of the *Telecommunications Act*.

[123] Decision, para. 22, AB, Tab 2.

[124] Decision, para. 16, AB, Tab 2.

[125] Decision, para. 25, AB, Tab 2.

Act, not the person doing it. Where a person engaged in a broadcasting undertaking undertakes common carrier activities that are separate from its broadcasting activities, these common carrier activities are not carved out of the *Telecommunications Act* as "broadcasting". These common carrier activities remain subject to the *Telecommunications Act*.

68. The separability of telecommunications activities that are distinct from broadcasting activities, as the CRTC found that Bell Mobility's were in treating Bell Mobile TV's traffic the same as other traffic, is further illustrated by subsection 28(1) of the *Telecommunications Act*, which provides that, even when reviewing telecommunications common carrier activities,

> "[t]he Commission shall have regard to the broadcasting policy for Canada set out in subsection 3(1) of the *Broadcasting Act* in determining whether any discrimination is unjust or any preference or disadvantage is undue or unreasonable in relation to any transmission of programs, as defined in subsection 2(1) of that Act, that is primarily direct to the public and made
>
> (*a*) by satellite; or
>
> (*b*) through the terrestrial distribution facilities of a Canadian carrier, whether alone or in conjunction with facilities owned by a broadcasting undertaking."

69. In the Decision, the CRTC found two separate activities. Bell Mobility's telecommunications activity treats Bell Mobile TV traffic "the same as other traffic in Bell Mobility's core and access networks."[126] This activity is, in fact and in law, part of Bell Mobility's Canadian carrier activities. That is the very essence of the CRTC's findings, of fact and of law, applying its home statutes to an extensive evidentiary record.

70. The resulting decision not only falls within the range of reasonable outcomes, as is the minimum requirement for judicial deference.[127] It is, objectively, the correct outcome, because Bell Mobility was not acting as a broadcasting undertaking "in providing transport and data

---

[126] Bell Mobility Response to RFI Bell Mobility(CRTC)4Apr14-7 c) and d) in AB, Tab FF, pg 308. For reference, see the network diagram that Bell Mobility provided in response to Bell Mobility(CRTC)4Apr14-7 a) and b) in AB, Tab FF, pgs 305-306.

[127] *Dunsmuir*, *supra* note 75, para. 47.

connectivity services required for the delivery of their mobile TV services".[128] In fact, the data connectivity necessary to enable the customer to access the mobile TV service was obtained by the customer by virtue of the telecommunications plan – whether voice, data or tablet plan - purchased from Bell Mobility.[129]

(i) The *Radio, Capital Cities* and *Dionne* Cases

71. As against these findings of fact and law, Bell Mobility relies heavily on *Reference re Regulation and Control of Radio Communication,*[130] *Capital Cities Communications Inc. v. Canadian Radio-Television Commission,*[131] and *Public Service Board v. Dionne*[132] as precedents for a legal argument that the distinct broadcasting and transmission activities tied to Bell Mobile TV are actually bound and inseparable.[133] However, that reliance elides the factual components of each case and mischaracterizes their holdings.

72. These three cases had nothing to do with the separability of broadcasting activities from content-agnostic transmission activities treating that broadcasting the same as any other traffic. Rather, these three cases broadly examined the activities of radiotelegraph and radio communications generally, in one case (*Radio Reference*), and of selecting, originating, and packaging television programming, in the other two cases (*Capital Cities* and *Dionne)*, as they relate to the constitutional division of provincial and federal jurisdiction.[134]

73. The underlying context of these cases, as well as the activities involved, are simply not analogous to the issue and facts at hand. This Court was clear on that point in the *FCA ISP Reference*, which paid particular attention to the *Capital Cities* case regarding the right to insert

---

[128] Decision, para. 25, AB, Tab 2.

[129] Decision, para 21, AB, Tab 2.

[130] *Reference re Regulation and Control of Radio Communication*, [1932] A.C. 304 (P.C.), 314-315 and 317 [***Radio***].

[131] *Capital Cities Communications Inc. v. Canadian Radio-Television Commission,* [1978] 2 S.C.R. 141, p. 157 and pp. 159-163 [***Capital Cities***]

[132] *Public Service Board v. Dionne,* [1978] 2 S.C.R. 191, pp. 197-198 [***Dionne***].

[133] Appellant's Memorandum, paras. 104-113.

[134] *Radio, supra* note 130, pp. 314-315; *Capital Cities, supra* note 131, p. 153; *Dionne, supra* note 132, pp. 197-198.

advertisements into specific television channels selected, originated, and packaged by cable television companies:[135]

> "In *Capital Cities* there was no question that the entities concerned were involved in broadcasting: they were cable television companies. The question before the Court was whether the provinces ought to retain regulatory control over cable television stations and their programming because the cable infrastructure was located wholly within the province. The Court's conclusion that the cable infrastructure fell within federal jurisdiction stemmed from the fact that the signals that were received and retransmitted by the companies were extra provincial in origin and the technology involved did not change that fact.
>
> I do not see how this decision can be of assistance to the Cultural Group. It was reached at a time when the regulatory scheme did not include the *Telecommunications Act* and once the Court found that the undertaking fell within federal jurisdiction, it was assumed that the *Broadcasting Act* would apply. The most that can be taken from this decision is that undertakings that receive broadcasting signals and send them to their subscriber by a different technology are properly regulated by the federal government as interprovincial undertakings**."**[136]

74. The cases cited by Bell Mobility were concerned solely with the constitutional division of powers between the federal and provincial governments. These cases did not relate to a factual situation involving separable content-agnostic telecommunications carrier activities, on one hand, and broadcast programming that the carrier treated the same as any other data. The cases cited by Bell Mobility are of no use in determining whether the CRTC committed a reversible error in applying the *Telecommunications Act* to Bell Mobility in the present circumstances.

(ii) The *SCC ISP Reference*[137]

75. The *SCC ISP Reference* provides further support for the proposition that the Decision is correct and, more importantly, reasonable, and that this appeal must fail.

76. The *SCC ISP Reference* turned on the finding that "broadcasting" is "not meant to capture entities which merely provide the mode of transmission".[138] In the same manner, the Decision

---

[135] *Reference re Broadcasting Act* (2010), [2012] 1 F.C.R. 219 [***FCA ISP Reference*].**

[136] *FCA ISP Reference*, *supra* note 135, paras. 57-58 (underlining added).

[137] *Reference re Broadcasting Act*, [2012] 1 S.C.R. 142 [***SCC ISP Reference*]**.

[138] *SCC ISP Reference*, *supra* note 137, para. 3.

found that Bell Mobility establishes data connectivity and transport used by Bell Mobility subscribers to get access to Bell Mobile TV content – and found that Bell Mobility's performance of these functions is

> "the same whether the content being transported is their mobile TV services, other broadcasting services, or non-broadcasting services. That is, the purpose of these functions is to establish data connectivity and transport the content - agnostic as to the content itself."[139]

77. The *SCC ISP Reference* is all about distinguishing between content-agnostic and content-oriented activities, because merely providing the mode of transmission does not engage with the policy objectives of the *Broadcasting Act*[140]. The Decision is grounded in the same distinction: Bell Mobility's network operates in a content agnostic manner.

78. When Bell Mobility acts as a Canadian carrier in providing the data connectivity and transport necessary to deliver Bell Mobile TV to its subscribers' mobile devices, it does not engage with any of the policy objectives in subsection 3(1) of the *Broadcasting Act*. When acting in a content-neutral fashion merely to provide the mode of transmission as a Canadian carrier, Bell Mobility is subject to the *Telecommunications Act*, regardless of "whether or not concurrent broadcasting services are also being offered."[141]

79. The *SCC ISP Reference* demonstrates that the Decision is firmly grounded within the range of acceptable outcomes, and that, based on the facts determined by the CRTC, it is demonstrably correct.

---

[139] Decision, para. 18 (underlining added), AB, Tab 2.

[140] *SCC ISP Reference*, *supra* note 137, paras. 4-5. *Broadcasting Act*, subsection 3(1).

[141] Decision, para. 22, AB, Tab 2.

Conclusion: The Decision was reasonable, and correct

80. The CRTC properly exercised its broad discretion when determining that subsection 27(2) of the *Telecommunications Act* applies to Bell Mobility when providing the data connectivity and transport functions for Bell Mobile TV. This finding was based on a full record, and applied the CRTC's specialized expertise. The process employed by the CRTC was transparent. The Decision was justified and intelligible. Thus, in accordance with *Dunsmuir*, the decision was reasonable.[142] Moreover, for the reasons noted above, the decision is also correct.

81. Consequently, the appeal should be dismissed.

PART IV – ORDER SOUGHT

82. Based on the submissions set out herein, CNOC seeks:

(a) an order dismissing this appeal; and

(b) its costs of this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

August 5, 2015

Tacit Law
Christian S. Tacit
Christopher Copeland

Bram Abramson
Chief Legal and Regulatory Officer
TekSavvy Solutions Inc.

Solicitors for the Responding Party, Canadian Network Operators Consortium Inc.

[142] *Dunsmuir*, *supra* note 75, para. 47.

SCHEDULE A – LIST OF AUTHORITIES

A. Statutes and Regulations

1. *Broadcasting Act*, S.C. 1991, c. 11

2. *Canadian Radio-television and Telecommunications Commission Act*, R.S.C. 1985, c. C-22

3. *Telecommunications Act*, S.C. 1993, c.38

B. Case Law

CRTC Decisions

4. Broadcasting and Telecom Decision CRTC 2015-26, *Complaint against Bell Mobility Inc. and Quebecor Media Inc., Videotron Ltd. and Videotron G.P. alleging undue and unreasonable preference and disadvantage in regard to the billing practices for their mobile TV services Bell Mobile TV and illico.tv*, issued 29 January 2015.

5. Broadcasting Order CRTC 2012-409, Amendments to the *Exemption order for new media broadcasting undertakings (*now known as the *Exemption order for digital media broadcasting undertakings)* – Appendix, issued 26 July 2012

Judicial Decisions

6. *Alberta (Information and Privacy* Commissioner*) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654

7. *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764

8. *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739

9. *Canada (Attorney General) v. Mowat*, [2011] 3 S.C.R. 471

10. *Canada (Social Development) v. Canada (Human Rights Commission)*, 2011 FCA 202 (QL)

11. *Canadian National Railway Co. v. Canada (A.G.)*, [2014] 2 S.C.R. 135

12. *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.* [1979] 2 S.C.R 227

13. *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141

14. *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650

15. *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190

16. *Pfizer Canada Inc. v. Canada (Minister of Health)*, 2014 FC 1243 (QL)

17. *Public Service Alliance of Canada v. Canadian Federal Pilots Assn.*, [2010] 3 F.C.R. 219

18. *Public Service Board v. Dionne*, [1978] 2 S.C.R. 191

19. *Reference re Broadcasting Act* (2010), [2012] 1 F.C.R. 219

20. *Reference re Broadcasting Act*, [2012] 1 S.C.R. 142

21. *Reference re Regulation and Control of Radio Communication*, [1932] A.C. 304 (P.C.)

22. *Wheatland County v. Shaw Cablesystems Limited*, 2009 FCA 291 (QL)

C. Secondary Sources

23. Audrey Macklin, "Standard of Review: Back to the Future?" in Colleen M. Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery Publications, 2013) 279.

Court File No. A-193-15
FEDERAL COURT OF APPEAL

BELL MOBILITY INC.

Appellants

-and-

BENJAMIN KLASS, THE CONSUMERS' ASSOCIATION OF CANADA, THE COUNCIL OF SENIOR CITIZENS' ORGANIZATIONS OF BRITISH COLUMBIA AND THE PUBLIC INTEREST ADVOCACY CENTRE, THE CANADIAN NETWORK OPERATORS CONSORTIUM INC., BRAGG COMMUNICATIONS INC., CARRYING ON BUSINESS AS EASTLINK, FENWICK MCKELVEY, VAXINATION INFORMATIQUE, THE SAMUEL-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC, DAVID ELLIS, TERESA MURPHY and TELUS COMMUNICATIONS COMPANY

Respondents

-and-

ATTORNEY GENERAL OF CANADA

Intervener

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, CANADIAN NETWORK OPERATORS CONSORTIUM INC.

Tacit Law
320 March Road, Suite 604
Ottawa, ON K2K 2E3

Christian S. Tacit LSUC#: 29334D
Christopher Copeland LSUC#: 63350P

Fax: 1-613-248-5175
Tel: 1-613-627-1205

Bram Abramson LSUC#: 56039B
TekSavvy Solutions Inc.
800 Richmond Street
Chatham, ON N7M 5J5
Tel: 647-479-8093
Fax: 519-360-1716
Solicitors for the Respondent Canadian Network Operators Consortium Inc.