Federal Court of Appeal | Cour d'appel fédérale

Date: 20160902

Dockets: A-231-15
A-63-16
A-67-16

Citation: 2016 FCA 217

CORAM: **GAUTHIER J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

A-231-15

BETWEEN:

BELL CANADA AND BELL MEDIA INC.

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

and

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC AND NFL PRODUCTIONS LLC

Interveners

A-63-16

BETWEEN:

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC AND NFL PRODUCTIONS LLC

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

A-67-16

BETWEEN:

BELL CANADA AND BELL MEDIA INC.

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

and

TELUS CORPORATION

Respondent

Heard at Montréal, Quebec, on June 20, 2016.

Judgment delivered at Ottawa, Ontario, on September 2, 2016.

REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	GAUTHIER J.A. BOIVIN J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20160902

Dockets: A-231-15
A-63-16
A-67-16

Citation: 2016 FCA 217

CORAM: **GAUTHIER J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

A-231-15

BETWEEN:

BELL CANADA AND BELL MEDIA INC.

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

and

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC AND NFL PRODUCTIONS LLC

Interveners

A-63-16

BETWEEN:

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC AND NFL PRODUCTIONS LLC

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

A-67-16

BETWEEN:

BELL CANADA AND BELL MEDIA INC.

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

and

TELUS CORPORATION

Respondent

REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is a consolidation of three statutory appeals under subsection 31(2) of the *Broadcasting Act*, S.C. 1991, c. 11 (the *Broadcasting Act* or the *Act*). The appellants are seeking to quash two broadcasting regulatory policies issued by the Canadian Radio-television and Telecommunications Commission (the Commission) regarding simultaneous substitution, in which the Commission enacted regulations providing remedies in case of errors in simultaneous substitution, and announced its intention to implement its policy not to permit simultaneous substitution during the broadcast of the Super Bowl, and for the general broadcast of specialty channels, starting in 2017.

[2] The three appeals were consolidated by order of this Court dated April 12, 2016, the appeal in file A-231-15 being designated as the lead appeal. In conformity with this order, the following reasons will be filed in the lead file and a copy thereof will be filed as Reasons for Judgment in file numbers A-63-16 and A-67-16.

[3] For the reasons that follow, I am of the view that these appeals should be dismissed.

I. Background

[4] Simultaneous substitution has been an integral part of the Canadian broadcasting system for more than 40 years. It is a process by which the signal of a distant (usually American) station being broadcast in Canada is replaced by the signal of a local Canadian broadcaster that

broadcasts comparable programming at the same time, such that Canadian viewers tuning to an American channel will in fact view the same program from a Canadian broadcaster, with Canadian commercials. This allows the broadcaster holding the rights to market the program in Canada to maximize its audience and advertising revenue.

[5] The simultaneous substitution regime is set out in the *Broadcasting Distribution Regulations*, S.O.R./97-555 (the *Distribution Regulations*). Pursuant to section 7, the general rule is that the signal of a programming service cannot be altered or deleted. As an exception, sections 38 and 51 of the *Distribution Regulations* permit or require the replacement of lower priority (usually American) signals with higher priority (usually local) signals if the programming service to be deleted and the programming service to be substituted are "comparable and simultaneously broadcast" (paras. 38(2)(a) and 51(1)(a) of the *Distribution Regulations*).

[6] In October 2013, the Commission announced the start of a broad public consultation initiative on the future of the television system entitled *Let's Talk TV: A Conversation with Canadians* (*Let's Talk TV)*. That consultation proceeded in three phases: 1) an initial phase for collecting public input by a variety of means; 2) a second phase for compiling and sharing the information received, coupled with an interactive questionnaire; and 3) a third phase which provided more opportunities, including an oral hearing, for the public to provide input on proposals for new approaches to Canadian television regulation (see *Notice of Invitation*, Joint Appeal Book, vol. 2, Tab 6, pp. 413-415). The Commission announced the *Let's Talk TV* process was intended to involve significant and fundamental changes to television regulation, in order to

ensure that the broadcasting system continues to serve Canadians in light of a rapidly changing broadcasting environment.

[7] At the beginning of the third phase, the Commission issued the *Broadcasting Notice of Consultation CRTC 2014-190* (*Notice 2014-190*), soliciting submissions and comments on specific issues, including simultaneous substitution. The *Notice 2014-190* mentioned complaints regarding substitution errors particularly for live sports events, and complaints from viewers that would prefer to see American commercials at the Super Bowl, and sought comments on whether simultaneous substitution should be maintained, and how changes should be implemented. Shortly before the commencement of the public hearing that took place between September 8 and 19, 2014, the Commission released another *Broadcasting Notice of Consultation CRTC 2014-190-3* and further requested comments on various proposals for the future regulation of the Canadian television system. On the issue of simultaneous substitution, the Commission set out two proposals for discussion. According to Option A, broadcasting distribution undertakings (BDU) would no longer be permitted to perform simultaneous substitution, whereas according to Option B, BDUs would not be permitted to perform simultaneous substitution for live event programming (e.g. sporting events or award shows).

[8] In *Broadcasting Regulatory Policy CRTC 2015-25* issued on January 29, 2015 (the First Policy), the Commission announced that it would continue to allow simultaneous substitution generally, but would disallow its use for specialty channels (i.e. channels that are not broadcast over the air and to which viewers subscribe through a BDU) and the Super Bowl (starting at the 2016-2017 season), and would amend regulations to be able to remove simultaneous substitution

privileges and require that licensees pay compensatory rebates when recurring, substantial errors occur in the simultaneous substitution process.

[9] In support of these determinations, the Commission reasoned that since the simultaneous substitution regime is an exception to the general rule against altering or deleting a programming service upon distribution, the "burden of proof" was on broadcasters and BDUs. In the Commission's view, the record demonstrated that simultaneous substitution was still of significant benefit to Canadian broadcasters since it allowed them to monetize their investments in programming rights, and put that revenue towards developing Canadian programming. However, the Commission considered that the practice should no longer be allowed for specialty channels. It also stated that based on comments from the public and the fact that American advertising is an integral part of the Super Bowl, simultaneous substitution would not be allowed for this program starting in the 2016-2017 season. The Commission acknowledged that the current rights-holder's contract extended beyond that time, but considered that this would provide it with a reasonable timeframe to make adjustments. Finally, the Commission stated that broadcasters and distributors have an obligation to ensure that simultaneous substitution is done properly, and that they are currently not meeting the required level of service. The Commission announced its intention to amend its regulations so that broadcasters making substitution errors can lose their simultaneous substitution privileges for a period of time or particular type of programming, and to require that BDUs that make such errors provide compensatory rebates to customers.

[10] The Commission did not specify how it would implement these policy reforms, except to say that it would issue a notice of consultation seeking comments on the text of the proposed amendments to the *Distribution Regulations*.

[11] On May 5, 2015, the Court granted Bell Canada and Bell Media Inc. (collectively referred to as Bell) leave to appeal from the First Policy in file number A-231-15. The NFL was given leave to intervene.

[12] Bell Canada is the parent company of Bell Media Inc., a broadcaster that holds exclusive broadcasting rights in Canada for the Super Bowl until the 2018-2019 season based on a contract concluded with NFL International LLC (NFLI) in 2013. They also broadcast certain specialty channels. Bell Canada is also the parent company of Bell ExpressVu Limited Partnership, a BDU that is a party to the proceedings in file numbers A-63-16 and A-67-16.

[13] The National Football League (the League) is an unincorporated association of 32 separately owned member clubs, each of which operates a professional football team. NFLI and NFL Productions LLC (Productions) are limited liability companies whose operations include producing, licensing and distributing programming relating to NFL football. The League, NFLI and Productions will be referred to collectively as the NFL.

[14] In this appeal, Bell and the NFL challenged the First Policy on the grounds of: i) denial of procedural fairness; ii) unlawful administrative law discrimination; iii) unauthorized retrospective regulation and interference with vested rights; iv) unreasonableness; and v) lack of

jurisdiction to enact the regime addressing simultaneous substitution errors. The Attorney General also raised a number of issues as to whether the First Policy was a "decision" subject to appeal, and whether the appeal was premature.

[15] On July 23, 2015, the Commission issued *Broadcasting Notice of Consultation CRTC 2015-330* (*Notice 2015-330*), together with *Broadcasting Information Bulletin CRTC 2015-329* (*Bulletin 2015-329*) entitled "Simultaneous substitution errors". These documents gave further details about changes that the Commission had decided to make to the simultaneous substitution regime, and requested comments on the draft regulations implementing penalties and rebates for simultaneous substitution errors, which the Commission had announced in its First Policy. The *Bulletin 2015-329* indicated that the elimination of broadcasters' simultaneous substitution rights for the Super Bowl would be implemented not by regulation, as stated in the First Policy, but by an order made under paragraph 9(1)(*h*) of the *Broadcasting Act*. Bell and the NFL provided comments in response to the *Notice 2015-330*.

[16] In *Broadcasting Regulatory Policy CRTC 2015-513*, issued on November 19, 2015 (the Second Policy), the Commission announced the enactment and coming into force of the *Simultaneous Programming Service Deletion and Substitution Regulations*, S.O.R./2015-240 (the *Substitution Regulations*) which implemented a regime to address substitution errors. The relevant provisions read as follows:

Decision by Commission	**Décision du Conseil**
4(3) A licensee must not delete a programming service and substitute another programming service for it if the Commission decides under subsection 18(3) of the *Broadcasting*	4(3) Le titulaire ne peut retirer un service de programmation et y substituer un autre service de programmation si le Conseil rend une décision, en vertu du paragraphe 18(3)

Act that the deletion and substitution are not in the public interest.	de la *Loi sur la radiodiffusion*, portant que le retrait et la substitution ne sont pas dans l'intérêt public.
Compensation	**Indemnisation**
5(2) A licensee must provide compensation to its customers if the Commission decides under subsection 18(3) of the *Broadcasting Act* that the licensee deleted and substituted a programming service in a manner that, through its own actions, resulted in recurring substantial errors and did not establish that it exercised due diligence to avoid those errors.	5(2) Le titulaire doit indemniser ses clients dans les cas où le Conseil rend une décision, en vertu du paragraphe 18(3) de la *Loi sur la radiodiffusion*, portant que le retrait et la substitution entraînent, en raison des agissements du titulaire, des erreurs substantielles récurrentes et que celui-ci n'a pas démontré avoir fait preuve de diligence afin de les éviter.

[17] With respect to the loss of the right to request simultaneous substitution provided at subsection 4(3) of the *Substitution Regulations*, the Commission noted that it already had the power under the previous simultaneous substitution regime to order that simultaneous substitution not be performed where it is not in the public interest. On compensatory rebates under subsection 5(2) of the *Substitution Regulation*, the Commission noted that this provision does not create a new power, but simply makes necessary amendments to ensure that the regime continues to fulfill its policy objectives. The Commission stated that this provision was remedial, and not equivalent to administrative monetary penalties. Finally, the Commission stated its intention to issue an order under paragraph 9(1)(*h*) of the *Broadcasting Act* to exclude the Super Bowl from the simultaneous substitution regime.

[18] After being granted leave, the NFL and Bell each filed appeals of the Second Policy, on February 24, 2016 (file number A-63-16) and February 29, 2016 (file number A-67-16) respectively. In these appeals, it is argued that the decision to prohibit simultaneous substitution

at the Super Bowl by order is beyond the scope of the Commission's jurisdiction under paragraph 9(1)(*h*) of the *Broadcasting Act* and conflicts with the *Copyright Act*, R.S.C. 1985, c. C-45 and a number of international treaties. They also made additional arguments regarding the Commission's lack of jurisdiction to enact the *Substitution Regulations*. As previously mentioned, all three appeals were consolidated on April 12, 2016. Telus Corporation was granted limited participation rights as respondent in the consolidated appeal based on its participation in the underlying consultation process before the Commission.

[19] On February 3, 2016, the Commission issued Broadcasting *Notice of Consultation CRTC-2016-37* (*Notice 2016-37*) inviting comments on a proposed distribution order to be made under paragraph 9(1)(*h*) of the *Broadcasting Act* that would prohibit simultaneous substitution for the Super Bowl, beginning with the 2017 broadcast of the Super Bowl.

II. Issues

[20] The parties have submitted a number of issues with respect to both policies. In the first appeal, the Attorney General had submitted that the First Policy was not a "decision or order" within the scope of section 31 of the *Broadcasting Act*, pursuant to which an appeal lies only from a decision or order, and that the appeal was premature. As part of the Second Policy, the *Substitution Regulations* have been promulgated and the Commission has thereby rendered a final decision encompassing the form and substance of its policy determinations to implement a penalty and rebate regime for simultaneous substitution errors. Accordingly, the Attorney General has not raised in A-67-16 dealing with the Second Policy, a preliminary argument with respect to the remedial regime.

[21] The remaining issues to be decided in this appeal, therefore, can be framed as follows:

A. Is the appeal of the policy determination to eliminate simultaneous substitution for the Super Bowl and for specialty services premature?

B. Does the Commission lack jurisdiction to enact a remedial regime for simultaneous substitution errors?

III. Analysis

A. *Is the appeal of the policy determination to eliminate simultaneous substitution for the Super Bowl and for specialty services premature?*

[22] Pursuant to subsection 31(2) of the *Broadcasting Act*, an appeal to this Court lies only from a "decision or order" of the Commission. The Attorney General submits that the two policies, insofar as they pertain to disallow simultaneous substitution for the Super Bowl effective in 2017, are in the nature of statements of intent to exercise statutory powers in the future. As such, it is argued that they do not qualify as decisions or orders within the meaning of subsection 31(2). I agree.

[23] Bell contends that the Commission made a final and binding decision to disallow simultaneous substitution for the Super Bowl effective in 2017 and that such a decision is not open to reconsideration. It relies for that proposition on the wording used by the Commission, referring to that policy change as a "decision". Under the heading "Implementation", for instance, the Commission states in its First Policy that it will issue a notice of consultation "seeking comment on the text of proposed amendments to the Regulations required to enact the policy changes in this decision" (see First Policy; Joint Appeal Book, vol. 2, Tab 3, p. 243 at

para. 23). Bell also noted in reply to the Attorney General's argumentation on prematurity in A-231-15 that the Commission has not asked for comments on the substantive decision to disallow simultaneous substitution for the Super Bowl, but only on the text of proposed amendments to the *Distribution Regulations* required to implement its decision. In its latest *Notice 2016-37*, issued on February 3, 2016, the Commission initiated its *Call for comments on a proposed distribution order prohibiting simultaneous substitution for the Super Bowl* (*Call for comments on the Super Bowl*) and again reiterated that the proposed order would implement a Commission policy "decision" (*Notice 2016-37*, Joint Appeal Book, vol. 1, Tab F, p. 37).

[24] These arguments are far from determinative, for several reasons. First of all, the Commission also refers to the proposed change as a "statement of intent" or a "policy determination" (see, for example, the Second Policy, Joint Appeal Book, vol. 1, Tab G, pp. 47-49 at paras. 20 and 27). More importantly, it is the substance and the effect of the impugned "decision" that is of relevance, as opposed to the choice of words used by the Commission to refer to it.

[25] It is interesting to note that the Commission itself considered the arguments made by the NFL in response to its *Call for comments on the proposed Simultaneous Programming Service Deletion and Substitution Regulations* (*Call for comments on the Substitution Regulations*) to be premature, to the extent that it had not yet issued an order excluding the Super Bowl from the simultaneous substitution regime (Second Policy, Joint Appeal Book, vol. 1, Tab G, p. 48 at para. 26). As a matter of fact, the policy reform proposed by the Commission has no direct, immediate or legal effect on the appellants unless and until they are formally implemented

through regulation or order. The *Broadcasting Act* clearly stipulates that statements and guidelines made by the Commission on any matter within its jurisdiction are not binding on the Commission (*Broadcasting Act*, s. 6). This is to be contrasted with section 7 of the same *Act*, according to which directions of general application on broad policy matters issued by the Governor in Council are binding on the Commission.

[26] This Court has held in a previous decision that policy guidelines issued by the Commission, albeit in the context of the *Telecommunications Act*, S.C. 1993, c. 38 (the *Telecommunications Act*), cannot be assimilated to "decisions" (see *Canadian Institute of Public and Private Real Estate Co. v. Bell Canada*, 2004 FCA 243, [2004] F.C.J. No. 1103 [*Canadian Institute*]). In that case, the Commission imposed a condition on all local exchange carriers providing local telephone services to customers in multi-dwelling units (MDU), but expressly declined to impose such conditions on the private owners of MDUs. Instead, it set out guidelines that should assist parties in their negotiation of access arrangements on the basis of just and expedient conditions, and stated that if negotiations did not succeed it would take such further action as is appropriate, and if necessary make an order. The Court agreed with the respondents that policy guidelines issued by the Commission are not "decisions" within the meaning of subsection 64(1) of the *Telecommunications Act*, which is substantially to the same effect as subsection 31(2) of the *Broadcasting Act*. The Court wrote:

> Subsection 64(1) of the Act provides a right of appeal from a "decision" of the CRTC on questions of law or jurisdiction with the leave of this Court. The Order of this Court granting leave to appeal was made without prejudice to the respondents' right to argue that this Court does not have the jurisdiction to hear the appeal and that the appeal was premature. In our opinion, this Court does not have the jurisdiction to hear this appeal because the statements by the CRTC regarding its jurisdiction in future cases do not constitute a "decision" within the meaning of subsection 64(1) of the Act. The CRTC has not imposed any binding

> conditions or orders affecting the legal rights of private owners of MDUs. (…) It has simply stated, that, depending on the circumstances, it would be prepared to make such an order in the future. It did not articulate in which circumstances an order would be appropriate nor the terms that would be included in a particular order.
>
> *Canadian Institute*, para. 5

[27] Counsel for Bell submits that the case at bar can be distinguished from *Canadian Institute* because the Commission itself has stated that it has made a decision on the matters that are the subject of the appeal. It is true that the Commission appears to have made up its mind and to be set on implementing its policy decision. Until it has done so, however, it is of no consequence with respect to this proceeding. The Commission itself has made it very clear on more than one occasion that its policy determinations will be implemented through regulation or order (see, for example, *Notice 2015-330*, Joint Appeal Book, vol. 1, Tab H at pp. 54 and 56; *Bulletin 2015-329*, Joint Appeal Book, vol. 1, Tab I at pp. 65 and 69).

[28] The rationale underlying *Canadian Institute* is that, at least for the purposes of subsection 64(1) of the *Telecommunications Act* (and, by extension, of subsection 31(2) of the *Broadcasting Act*), a decision is characterized by the imposition of "binding conditions or orders affecting the legal rights" of a party. Put otherwise, a statement about how an administrative decision-maker intends to act in the future has no legal effect. The cases relied upon by Bell in support of its argument do not detract from that principle and indeed underscores the general rule that decisions and orders must be final in nature to be considered by courts of law (see *Brink's Canada Ltd. v. Canada (Human Rights Commission)*, [1996] 2 F.C.R. 113at paras. 46 and 51, 105 F.T.R. 215 (F.C.T.D.); *Ipsco Inc. v. Sollac, Aciers d'Usinor*, 1999 CarswellNat 1026 at para. 4, 1999 CanLII 8080 (F.C.A.); *Wilson v. Atomic Energy of Canada* Limited, 2015 FCA 17 at

paras. 24-41, [2015] 4 F.C.R. 467; *Tomen v. Ontario Teachers' Federation*, 1994] O.J. No. 1585 at para. 26, 19 O.R. (3d) 371 (Gen. Div.). In fact, policy "decisions" of the Commission, like the First Policy, share many of the characteristics of White Papers, whereby governments present their policy preferences before tabling legislation and seek reactions from stakeholders and all those affected by the contemplated policy change. These are clearly not justiciable, and the same goes for the impugned policies of the Commission insofar as they have not been implemented by regulation or order.

[29] There are also sound policy reasons for this Court not to intervene at such an early stage of the process. First, as submitted by the respondent, the Court does not have the full record to assess the scope of the Commission's authority. It is to be expected that the Commission, as a result of its *Call for comments on the Super Bowl* under *Notice 2016-37*, will refine its analysis and offer its rationale to support whatever order it may come up with after considering the appellants' arguments. This Court should defer to Commission's expertise, experience and reasoning before coming to its own conclusions on the validity of such an order (see *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245 at paras. 42-44, [2015] 4 F.C.R. 75). The process should follow its course and the appellants should not be allowed to sidestep it by bringing what amounts for all intents and purposes to a request for a judicial opinion. The Commission has the authority pursuant to section 17 of the *Broadcasting Act* to determine questions of law, which extends to resolving questions about its own jurisdiction. I would therefore agree with the respondent that this Court should have before it the Commission's own analysis of the appellants' arguments for the proper exercise of its appellate functions.

[30] Moreover, the history of this proceeding shows that much could still happen before the Commission actually implements its policy decision. As previously mentioned, the Commission first announced its intention to eliminate simultaneous substitution for the Super Bowl by way of an amendment to the *Distribution Regulations* (see First Policy, Joint Appeal Book, vol. 2, Tab 3, p. 243 at paras. 22-23). Then, the Commission reversed its course and announced that simultaneous substitution would be eliminated for the Super Bowl through an order pursuant to paragraph 9(1)(*h*) of the *Broadcasting Act* (see Second Policy, Joint Appeal Book, vol. 1, Tab G, p. 48 at para. 27).

[31] Counsel for Bell counters that the Commission has not sought comments on the substantive decision that it made, but only on the text of the proposed distribution order regarding simultaneous substitution for the Super Bowl. While this is no doubt true, strictly speaking, it would not preclude the Commission from deciding not to pursue its course of action, or alternatively from altering the order to either broaden its scope (e.g., to capture other types of events) or to make it effective only at the expiry of the agreement between the NFL and Bell. The result of the consultation should not be prejudged, and the administrative process should follow its course before the Court is called upon to adjudicate what may well turn out to be a moot issue. This is not only more respectful of the specialized body put in place by Parliament to oversee the regulatory regime applying to a complex field of activity, but it is also a better use of scarce judicial resources.

[32] Bell also submitted that the appellants will be left without any effective means of challenging the policy decisions of the Commission if this appeal is dismissed for being

premature. Again, this argument is premised on the notion that there are two distinct decisions being made by the Commission, the first one being the policy determination and the second one being its implementation by order or otherwise. Yet, as I have tried to demonstrate in the preceding paragraphs of these reasons, this is all part of an ongoing process that will eventually culminate with the enactment of an order. I fail to see how Bell could be estopped from appealing such an order, should one come to be made, especially in light of this appeal being dismissed (with respect to the simultaneous substitution for the Super Bowl) on the basis of it being premature.

[33] The NFL also argued that this appeal will be moot if the validity of an order prohibiting simultaneous substitution for the Super Bowl is not decided before the next Super Bowl in February 2017. It is obviously in the interest of all potentially affected parties that the Commission arrives at a final decision long before February 2017 to allow for a timely application for leave to appeal. In any event, and as conceded by counsel for the NFL, a motion for a stay and for an expedited hearing could be filed before this Court if time was of the essence.

[34] For all of the foregoing reasons, I am of the view that an appeal does not lie pursuant to subsection 31(2) of the *Broadcasting Act* with respect to what was, at the time of the hearing, an anticipated proposed distribution order or regulation prohibiting simultaneous substitution for the Super Bowl. The Court has been informed that, subsequent to the hearing of this matter, the Commission released on August 19, 2016 its *Broadcasting Regulatory Policy CRTC 2016-334* and *Broadcasting Order CRTC 2016-335*. Pursuant to paragraph 9(1)(*h*) of the *Broadcasting Act*, the Commission issued a distribution order through which simultaneous substitution will no

longer be authorized for the Super Bowl, effective January 1, 2017. The panel, however, is not seized of that Order and ought not to express any views as to its legality.

[35] The same reasoning applies with even more strength concerning the policy determination to disallow simultaneous substitution for the benefit of specialty channels. In its Notice of Appeal in file number A-231-15, Bell submits that it was denied procedural fairness as a result of the Commission's failure to give it notice of the prohibitions that it proposed to implement with respect to specialty channels and its after-the-fact imposition of a burden of proof on broadcasters and BDUs to show that simultaneous substitution continues to have merit. I note that this ground of appeal was not raised by Bell in file number A-67-16.

[36] It would be most inappropriate to assess the adequacy of a consultation process before it has even been completed. In its First Policy, the Commission disclosed its view that BDUs should no longer be allowed to provide simultaneous substitution for specialty services, and indicated that it will amend the *Distribution Regulations* accordingly (First Policy, Joint Appeal Book, vol. 2, Tab G, p. 47 at para. 18). Under the heading "Implementation", it also stated that it will issue a notice of consultation seeking comment on the text of proposed amendments to the *Distribution Regulations* required to enact the policy changes in that decision. As mentioned previously, a *Call for comments on the Super Bowl* was eventually made on a proposed distribution order prohibiting simultaneous substitution for the Super Bowl, but no such consultation has been launched so far with respect to proposed amendments to the *Distribution Regulations* designed to implement a policy change relating to simultaneous substitution for specialty channels. As a result, we are even further removed from the implementation of this

policy change than we are from the implementation of an order prohibiting simultaneous substitution for the Super Bowl.

[37] In any event, although this is not strictly necessary given my views on prematurity, I would venture to add that there has been no breach of procedural fairness by the Commission. Applying the factors developed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 23-28, 174 D.L.R. (4th) 193 to determine the content of procedural fairness obligations in a particular context, I am of the view that the requirements are minimal in the circumstances of the present case. The "decision" to be made by the Commission is in the nature of a policy "decision", which calls for the exercise of considerable discretion and the consideration of multiple polycentric factors. This is not the kind of decision that typically attracts a high level of procedural fairness. Bell was entitled to have its views heard and taken into account, but had no legitimate expectation of a particular outcome.

[38] Having carefully reviewed the record, it is clear that Bell was given fair notice that the entire practice of simultaneous substitution was up for discussion, and was made aware of the concerns raised by Canadians during Phase I and II of the Let's Talk TV consultation process. Prior to the public hearing that commenced on September 8, 2014, the Commission summarized those concerns and specifically referenced Canadians' preference for seeing American commercials during the Super Bowl (see *Notice 2014-190* at paras. 54-61). With respect to the elimination of simultaneous substitution for specialty services and to the institution of a remedial regime, it appears from the transcript that the issue was specifically raised by the Commission during Bell's presentation (see Transcript of Bell's Oral Submissions, paras. 5329-5341 and

5358, Joint Appeal Book, vol. 11, Tab 69, pp. 3392-3393). It cannot be said, therefore, that Bell was not given notice of the issues examined by the Commission and of the potential remedies that were being considered. Bell was provided every opportunity to make representations and to alert the Commission of the foreseeable impacts of its decision, and was in no way precluded from doing so merely because the Commission did not spell out all the conceivable outcomes of the consultation.

B. *Does the Commission lack jurisdiction to enact a remedial regime for simultaneous substitution errors?*

[39] Turning to the second appeal of Bell concerning the promulgation of the *Substitution Regulations*, it is well established that regulations, just like statutes, benefit from a presumption of validity. As a result, it is for the appellants to demonstrate the invalidity of the challenged regulation, and the Court will prefer, to the extent possible, the construction of the regulation that will render it *intra vires* (see *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64at paras. 25-26, [2013] 3 S.C.R. 810; John Mark Keyes, *Executive Legislation*, 2d ed. (Markham: LexisNexis, 2010), at pp. 544-550 [Keyes, *Executive Legislation*]; Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Cavasback Publishing, 2009) at 15:3200 and 15:3230. Needless to say, the economic or political underpinnings of a regulation do not form part of the inquiry to be conducted by this Court in assessing its validity, nor does the likelihood of its success in achieving its stated objectives (*Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106 at pp. 112-113, 143 D.L.R. (3d) 577; *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2 at p. 12, 90 D.L.R. (3d) 1 [*CKOY*]; Keyes, *Executive Legislation* at p. 266).

[40] Bell argues that the Commission has no jurisdiction to impose penalties or require the payment of monetary rebates to compensate for errors made during the simultaneous substitution process. The Attorney General has conceded that subsection 18(3) of the *Broadcasting Act*, pursuant to which the Commission may "issue any decision (…) in connection with any complaint or representation made to the Commission or in connection with any other matter within its jurisdiction under [the] Act" is not sufficient to ground the validity of the remedial regime enacted by the Commission. This type of "basket clause" is informed by the statutory context in which it is found, as submitted by Bell; although section 18 addresses hearings and procedure before the Commission, it has nothing to do with penalties or rebates. A matter must otherwise be within the jurisdiction of the Commission before it can exercise its authority to hear and decide a complaint.

[41] Bell further contends that the power to impose remedies such as penalties and rebates must be conferred explicitly by Parliament to the Commission, as is the case in the *Telecommunications Act* at sections 72-001 to 72.2. No such power is found in the *Broadcasting Act*, according to Bell. Pursuant to section 12 of the *Broadcasting Act*, the Commission is only empowered to issue an order requiring or forbidding a person to do any act or thing that the person is required or forbidden to do under the *Act*; such an order may be made and enforced as an order of the Federal Court or of any superior court of a province, and is enforceable in the same manner as an order of that court (see s. 13 of the *Broadcasting Act*). The contravention of a regulation or an order is also a summary conviction offence pursuant to subsection 32(2) of the *Broadcasting Act*. These are the only penalties explicitly provided for in the *Act*.

[42] Whether the Commission has the authority to enact the remedial regime at stake in the case at bar is to be decided on a standard of reasonableness. Despite Bell's argument to the contrary, it is beyond dispute, in my view, that deference is owed to an administrative body's interpretation of its home statute. Not only has this principle been firmly established by the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 54, [2009] 1 S.C.R. 190 and reiterated ever since (see, for example, *Smith v. Alliance Pipeline Ltd*, 2011 SCC 7 at para. 28, [2011] 1 S.C.R. 160; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 30, [2011] 3 S.C.R. 654; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para 33, [2013] 3 SCR 895), but this Court has confirmed in *Bell Canada v. Amtelecom Limited Partnership*, 2015 FCA 126 at paras. 37-39 that the expertise of the Commission extends to the delineation of its own jurisdiction in applying its home statutes. Accordingly, this Court shall only intervene if the Commission's construction of its delegated powers falls outside the range of possible and acceptable outcomes.

[43] There is a long-standing principle that a pecuniary burden cannot be imposed on a person except upon clear and distinct legal authority (*Liverpool Corp. v. Arthur Maiden Ltd.*, [1938] 4 All E.R. 200; *Canadian Cable Television Association v. American College Sports Collective of Canada Inc.*, [1991] 3 F.C. 626, [1991] F.C.J. No. 502 (F.C.A.). This is precisely why administrative monetary penalties schemes, such as the one found in the *Telecommunications Act* at sections 72.001 to72.2, are explicitly authorized by statute (see generally Law Reform Commission of Saskatchewan, *Administrative Penalties: A Consultation Paper* (June 2009), citing a number of pieces of legislation containing such schemes, including *The Securities Act*, 1988, S.S. 1988-89, c. S-42.2; *Securities Act*, R.S.O. 1990, c. S.5; *The Saskatchewan Insurance*

Act, R.S.S. 1978, c. S-26; *The Trust and Loan Corporations Act, 1997*, S.S. 1997, c. T-22.2; and *The Alcohol and Gaming Regulation Act*, 1997, S.S. 1997, c. A-18.011).

[44] The Commission, in its various decisions, and the Attorney General, in its written and oral submissions, contend that the remedial regime set out in its *Substitution Regulations* is not punitive but rather aims only to serve the public interest and to further the policy objectives of the *Broadcasting Act*. In *Bulletin 2015-329*, the Commission stated that the forthcoming amendments to the simultaneous substitution regime were meant "to ensure that the policy objectives of the Act continue to be achieved", and that they were "not intended to be punitive". It added that "their sole purpose is to provide a remedy to particular members of the broadcasting system in order to make sure that the system, as a whole, continues to achieve the objectives of the Act…" (see *Bulletin 2015-329*, Joint Appeal Book, vol. 1, Tab I, pp. 66-67).

[45] In its Second Policy announcing that it had made the *Substitution Regulations*, the Commission reiterated that the simultaneous substitution regime generally fulfills an important role in achieving the policy objectives of the Act, and added that recurring substantial errors in the manner in which the regime is carried out "jeopardize[s] the integrity of the simultaneous substitution regime as a whole" along with "its ability to contribute to the policy objectives of the Act as a whole". It added:

> With respect to section 4(3) of the Regulations regarding the loss of the right to request simultaneous substitution, as noted earlier the current simultaneous substitution regime already includes the provision that the Commission may order that simultaneous substitution not be performed where it finds that to do so would not be in the public interest.
>
> As regards section 5(2) of the Regulations relating to compensation for customers, this requirement is necessary to ensure that the harm to the broadcasting system can be remedied. Therefore, by making these Regulations, the Commission is not

> creating a new power or imposing a new rule. Instead, it is simply modifying the existing simultaneous substitution regime where necessary to ensure that it continues to fulfill the policy objectives of the Act. The revisions are remedial and are not equivalent to AMPs [administrative monetary penalties].
>
> Second Policy, Joint Appeal Book, vol. 1, Tab G, p.48 at paras. 24-25

[46] Are these statements a sham or a smoke-screen? I do not believe so. Courts ought to presume that an administrative and regulatory body like the Commission is genuine and transparent in publicly stating the rationale behind the exercise of its purported powers. In the case at bar, there is nothing to suggest that the Commission is trying to achieve through the back door what it could not do explicitly or more directly. Moreover, the removal of a broadcaster's simultaneous substitution privileges and the amount of compensation to be paid by a BDU to its customers will be determined in an administrative and regulatory context, in the course of a proceeding under subsection 18(3) of the *Broadcasting Act*, and not in a criminal or quasi-criminal setting. As this Court has indicated in *Genex Communications Inc. v. Canada (A.G.)*, 2005 FCA 283 at para. 166, [2005] F.C.J. No. 1440, the purpose of a public hearing conducted pursuant to subsection 18(3) is not to determine for punitive purposes whether a licensee has committed one or more offences, but rather to find out whether it is appropriate to take one of the courses of action enumerated in subsection 18(1) (which includes the making of an order under subsection 12(2)), in the public interest and in compliance with Charter values and the implementation of broadcasting policy in Canada. It is also to be noted that monetary rebates that BDUs may be ordered to make as compensation are to be paid to the customers, and not to the regulator or to the government. I agree with the Attorney General that this indicia supports the conclusion that the measure is remedial as opposed to punitive.

[47] At the end of the day, I am of the view that the remedial regime put in place by the Commission is more properly characterized as a necessary adjunct or an implied complement to the broad powers bestowed upon it to accomplish Parliament's objectives. Indeed, a careful reading of the *Broadcasting Act* confirms the broad scope and the wide discretion of the powers conferred on the Commission to implement Canadian broadcasting policy. As the Supreme Court stated in *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at para. 15, [2012] 3 S.C.R. 489 [*Reference re Broadcasting*]:

> There is no doubt that the licensing and the regulation-making powers granted to the CRTC are broad. The *Broadcasting Act* describes the mission of the CRTC as regulating and supervising "all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)"(s. 5(1))".

[48] Viewed in that perspective, the powers of the Commission are indeed as broad as they can be. The policy objectives listed under subsection 3(1) of the *Broadcasting Act*, although focused on the content of programming, also capture a number of economic considerations, especially as they relate to BDUs. That being said, and as broad as they are, these policy objectives cannot be the test for the Commission's jurisdiction and will not be sufficient in and of themselves to ground a regulation. Responding to an argument made in reliance of a statement in *CKOY* according to which the validity of a regulation must be assessed by determining whether it deals with a class of subjects referred to in section 3 of the *Broadcasting Act*, the Supreme Court had this to say:

> …*CKOY* cannot stand for the proposition that establishing any link, however tenuous, between a proposed regulation and a policy objective in s. 3 of the Act is a *sufficient* test for conferring jurisdiction on the CRTC. Such an approach would conflict with the principle that policy statements circumscribe the discretion granted to a subordinate legislative body.
>
> *Reference re Broadcasting* at para. 25 [emphasis in the original]

[49] It is therefore to section 10 of the *Broadcasting Act*, which grants the Commission its delegated authority to make regulations, that the Court must turn to in order to assess the validity of any given regulation adopted by the Commission. This is not to say that the broadcasting policies and objectives enumerated at section 3 of the *Broadcasting Act* must be totally disregarded and cannot be taken into account in determining the breadth of the regulatory powers conferred upon the Commission; as the Supreme Court recognized in *Reference re Broadcasting*, Parliament must be presumed to have empowered the Commission to work towards implementing these objectives. When all is said and done, the challenge for the Court is always to breathe flexibility into the regulation-making powers of the Commission while avoiding to broaden them beyond Parliament's intent. As the Supreme Court aptly cautioned in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at p. 1756, 60 D.L.R. (4th) 682:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.
>
> See also *ATCO Gas & Pipelines Ltd v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at paras. 50-51 and 73, [2006] 1 S.C.R. 140; *R. v. 974649 Ontario Inc.*, 2001 SCC 81 at para. 70, [2001] 3 S.C.R. 575

[50] I agree with counsel for the Attorney General that paragraphs 10(1)(*c*) and 10(1)(*g*) of the *Broadcasting Act* provide a clear legal foundation for the remedial regime implementing consequences for disruptive simultaneous substitution errors. Pursuant to these provisions, the Commission has the authority to enact regulations "respecting" standards of programs and the carriage of programming services by BDUs. The *Broadcasting Act* couches these powers

broadly, thereby empowering the Commission to ensure that the objectives set out in section 3 will be met. It is not too great a stretch to consider that if programming is not provided to subscribers in a manner that allows them to view that programming in its entirety and free from repetition errors, the Canadian broadcasting system will not achieve its stated purposes, which call upon the Commission to "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada" (*Broadcasting Act*, subpara. 3(1)(*d*)(i)) and to "provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost" (*Broadcasting Act*, subpara. 3(1)(*t*)(ii)).

[51] As if this was not sufficient, Parliament has expanded even more broadly the scope of the Commission's regulatory powers by enacting that it may make regulations "respecting such other matters as it deems necessary for the furtherance of its objects" (*Broadcasting Act* at para. 10(1)(*k*)). This subjective language clearly signals Parliament's intent to confer upon the Commission a wide margin of appreciation and discretion in its regulation-making function, and courts have consistently held that such language significantly narrows down the scope of judicial intervention. As Elmer A. Driedger wrote:

> A wider authority is conferred if a subjective test of necessity is prescribed. Thus, power may be conferred on the Governor in Council to make *such regulations as he deems necessary (advisable, expedient) for carrying out the purposes* of the Act. In such a case, … the regulation-making authority is the sole judge of necessity and the courts will not question his decision, except possibly if bad faith were established. There is, therefore, a vast difference between the two following examples in the extent of the power conferred:
>
> > May make such regulations *as may be necessary* for carrying out the provisions of this Act. May make such regulations *as he deems necessary* for carrying out the provisions of this Act.
>
> …

> Even greater authority is conferred by authorizing a delegate to make such regulations *as he deems necessary* for a stated purpose…
>
> Elmer A. Driedger, "Subordinate Legislation" (1960) 38 Can. B. Rev. 1 at pp. 28-29 [emphasis in the original], as quoted in *Aves v. Nova Scotia (Public Utilities Board)* (1973), 39 D.L.R.(3d) 266 at paras. 25-26, 5 N.S.R. (2d) 370(N.S. C.A.). See also: *Apotex Inc. v. Canada (Attorney General)*, [2000] 4 F.C. 264 at para. 66, [2000] F.C.J. No. 634(F.C.A.); *Teal Cedar Products (1977) Ltd. v. Canada (C.A.)*, [1989] 2 F.C. 158 at paras. 15-16, 13 A.C.W.S. (3d) 140 (F.C.A.); Keyes, *Executive Legislation* at pp. 322 and 328

[52] I am mindful of the fact that, broad as it may be, the regulation enacted pursuant to paragraph 10(1)(*k*) must have a rational and plausible connection with the objectives of the *Broadcasting Act*. In the case at bar, I am prepared to accept that such a link has been established. The regulation adopted to address issues relating to simultaneous substitution comes as a result of an extensive consultation with Canadians. As reported by the Commission, there appears to be ongoing frustration with the frequency of errors made during the simultaneous substitution process. While recognizing that this process is still of significant benefit to Canadian broadcasters, allowing them to benefit from a greater return on their programming rights and thereby to invest more in the production of Canadian programming, the Commission determined that some measures had to be taken to ensure the integrity of the simultaneous substitution regime itself and the fulfillment of the policy objectives of the *Broadcasting Act* as a whole. There is nothing in this rationale that strikes me as being too far removed from the true objectives of the *Broadcasting Act*; quite to the contrary, the remedial regime appears to be a calibrated response to what the Commission found to be a real deficiency in the broadcasting system, and it therefore falls squarely within the ambit of its regulation-making authority pursuant to paragraph 10(1)(*k*) of the *Broadcasting Act*.

[53] Furthermore, I agree with Bell that a broadly drafted basket clause such as paragraph 10(1)(*k*), cannot be read in isolation, but rather must be taken in context with the rest of the section in which it is found, as stated by the Supreme Court in *Reference re Broadcasting* at paragraph 29. However, the case at bar may be distinguished from that decision of the Supreme Court in that a number of the specific fields for regulation set out in subsection 10(1) do pertain to simultaneous substitution and the creation of an afferent enforcement regime. In my view, the Supreme Court's statement in *Reference re Broadcasting* should not be read as voiding of any meaning all open-ended provisions such as paragraph 10(1)(*k*). It simply stood for the proposition that a provision "is enriched by the rest of the section in which it is found", which is a simple restatement of the modern interpretive approach. In a case such as the present, where other sections can be read as supporting an administrative decision-maker's authority to enact envisaged measures, a basket clause should only reinforce such authority.

IV. Conclusion

[54] For all of the foregoing reasons, I am therefore of the opinion that the remedial regime set out in the Second Policy has been validly adopted, and that the appeals should be dismissed.

[55] The parties have advised the Court that they are not seeking costs.

"Yves de Montigny"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-231-15
STYLE OF CAUSE:	BELL CANADA et al v. ATTORNEY GENERAL OF CANADA et al
AND DOCKET:	A-63-16
STYLE OF CAUSE:	NATIONAL FOOTBALL LEAGUE et al v. ATTORNEY GENERAL OF CANADA
AND DOCKET:	A-67-16
STYLE OF CAUSE	BELL CANADA et al v. ATTORNEY GENERAL OF CANADA et al
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JUNE 20, 2016
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	GAUTHIER J.A. BOIVIN J.A.
DATED:	SEPTEMBER 2, 2016

APPEARANCES:

John B. Laskin Vitali Berditchevski	FOR THE APPELLANTS BELL CANADA AND BELL MEDIA INC.
Neil Finkelstein Steven Mason Brandon Kain Richard Lizius Adam Goldenberg	FOR THE APPELLANTS AND INTERVENERS NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC AND NFL PRODUCTIONS LLC

Michael H. Morris Roger Flaim Laura Tausky	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA
Christopher Rootham Stephen Schmidt	FOR THE RESPONDENT TELUS CORPORATION

SOLICITORS OF RECORD:

Torys LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPELLANTS BELL CANADA AND BELL MEDIA INC.
McCarthy Tétrault LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPELLANTS AND INTERVENERS NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC AND NFL PRODUCTIONS LLC
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA
Nelligan O'Brien Payne LLP Barristers and Solicitors Ottawa, Ontario	FOR THE RESPONDENT TELUS CORPORATION