Federal Court of Appeal  Cour d'appel fédérale

Date: 20181001

Docket: A-51-16

Citation: 2018 FCA 174

CORAM: **NADON J.A.**
RENNIE J.A.
WOODS J.A.

BETWEEN:

BELL CANADA and BELL MEDIA INC.

Appellants

and

7262591 CANADA LTD. (D.B.A. GUSTO TV), ACCESS COMMUNICATIONS CO-OPERATIVE LIMITED, ALLARCO ENTERTAINMENT INC., ANTHEM MEDIA GROUP, BLUE ANT MEDIA INC., CANADIAN CABLE SYSTEMS ALLIANCE INC., CBC/RADIO-CANADA, COGECO INC., COMPETITION BUREAU, DHX MEDIA LTD., EASTLINK, GROUPE V MÉDIA INC., INDEPENDENT BROADCAST GROUP/LE GROUPE DE DIFFUSEURS INDÉPENDANTS, L'OFFICE DES TÉLÉCOMMUNICATIONS ÉDUCATIVES DE LANGUE FRANÇAISE DE L'ONTARIO (GROUPE MÉDIA TFO), MEDIAMIND DIGITAL, MTS INC., PELMOREX COMMUNICATIONS INC., PUBLIC INTEREST ADVOCACY CENTRE, QUÉBECOR MÉDIA INC., SASKATCHEWAN TELECOMMUNICATIONS, SOGETEL INC., STINGRAY DIGITAL GROUP INC.,STORNOWAY COMMUNICATIONS LIMITED PARTNERSHIP, TEKSAVVY SOLUTIONS INC. AND HASTINGS CABLE VISION LTD., TELUS, TV5 QUÉBEC CANADA, VMEDIA INC. and ZAZEEN INC.

Respondents

Heard at Ottawa, Ontario, on November 14, 2017.

Judgment delivered at Ottawa, Ontario, on October 1, 2018.

REASONS FOR JUDGMENT BY:	WOODS J.A.
CONCURRING REASONS BY:	NADON J.A.
DISSENTING REASONS BY:	RENNIE J.A.

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REASONS FOR JUDGMENT

RENNIE J.A. (dissenting)

I. Introduction

[1] Television services are provided to Canadians through the interaction of two types of commercial entities. Programming undertakings create content, either on their own or under licence from others. They transmit their programs to broadcasting distribution undertakings, which retransmit the programs through their networks, whether cable, satellite or broadband. There is, in effect, a symbiotic relationship between programming undertakings and broadcasting distribution undertakings, the commercial terms of which are negotiated and reflected in "affiliation agreements".

[2] In 2015 the Canadian Radio-television and Telecommunications Commission (CRTC) imposed a policy to govern affiliation agreements, or simply, the contracts, between programming undertakings (PUs) and broadcasting distribution undertakings (BDUs). The CRTC implemented this policy through two decisions: *Broadcasting Regulatory Policy 2015-438* (the 2015 Wholesale Code or the Code), and *Broadcasting Order 2015-439* (the Order). The 2015 Wholesale Code establishes certain parameters on the negotiation and content of affiliation agreements. The Order makes the 2015 Wholesale Code binding on broadcasting distribution undertakings and requires them to distribute programs according to prescribed terms and conditions.

[3] I will turn to the 2015 Wholesale Code and its implications for affiliation agreements shortly, but pause to emphasize that while the Code, via the Order, is expressly binding only on

BDUs (“distribution licensees”), it necessarily affects those that are counter-party to any negotiation and contract with a BDU, namely the programming undertakings.

[4] Bell Canada and Bell Media Inc. appeal these decisions under section 31 of the *Broadcasting Act*, S.C. 1991, c. 11. Bell asserts that the mandate vested in the CRTC by section 3 of the *Broadcasting Act* to implement the Broadcasting Policy for Canada does not authorize the CRTC to interfere in the economic relationship between BDUs and PUs. Its argument is twofold: the 2015 Wholesale Code is not authorized by paragraph 9(1)(*h*) of the *Broadcasting Act* and secondly, the Code violates Bell’s copyright interests guaranteed under paragraph 3(1)(*f*) and subsection 13(4) of the *Copyright Act*, R.S.C. 1985, c. C-42. In consequence, the 2015 Wholesale Code and Order are *ultra vires* the CRTC’s powers.

[5] There is no doubt that the exercise by the CRTC of its authority in respect of BDUs will have effects, both direct and consequential, on PUs. The question in their appeal, however, is whether, given the reach of the Code and its effects, it is “too great a stretch from the core purposes [of] … and from the powers granted to the CRTC under the *Broadcasting Act*” (*Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at para. 33, [2012] 3 S.C.R. 489 (*Cogeco*) per Rothstein J.).

[6] In order to understand the issues in this appeal some context is necessary.

II. Background

[7] The *Broadcasting Information Bulletin CRTC 2015-440* (the Bulletin), released contemporaneously with the Code, explains that the Code and the implementing Order arise from a concern on the part of the CRTC about increasing vertical integration of programming and broadcasting distribution entities and resulting concentration of market power. Beginning in 2011, the CRTC responded to this change in the commercial landscape through measures aimed at ensuring that vertical integration did not occur at the expense of a healthy wholesale market for the sale of program content, programming diversity and consumer choice as to types and combinations of programs they wish to receive and the platform or means by which they would receive programs. Those measures included:

- issuing non-binding guidelines for the negotiation of commercial agreements between PUs and BDUs, such as the *Broadcasting Regulatory Policy CRTC 2011-601* (Ottawa: CRTC, 2011) (amended in 2011-601-1) (the 2011 Wholesale Code or the 2011 Code);

- imposing conditions of licence and group-based licence renewals on a case by case basis; and

- establishing a dispute resolution process to address impasses in negotiations between PUs and BDUs (*Broadcasting Distribution Regulations*, SOR/97-555, ss. 12–15.02).

[8] In 2015 the CRTC replaced the voluntary 2011 Code with the more comprehensive Wholesale Code and, via the 9(1)(*h*) Order, required existing licensees to "abide" by the provisions in the 2015 Wholesale Code.

A. The 2015 Wholesale Code

[9] The Code is divided into five parts:

- Application (sections 1–3);
- Prohibitions (section 4);
- Commercially unreasonable practices (section 5);
- Commercially reasonable practices (sections 6–12); and
- Affiliation agreements (sections 13–15).

[10] The 2015 Wholesale Code applies to "licenced programming and distribution undertakings" (sections 1–3). BDUs and PUs are both defined terms under the *Broadcasting Act*:

Definitions	**Définitions**
2 (1) In this Act,	2 (1) Les définitions qui suivent s'appliquent à la présente loi.
…	[…]
distribution undertaking means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking; (entreprise de distribution)	***entreprise de distribution*** Entreprise de réception de radiodiffusion pour retransmission, à l'aide d'ondes radioélectriques ou d'un autre moyen de télécommunication, en vue de sa réception dans plusieurs résidences permanentes ou temporaires ou locaux d'habitation, ou en vue de sa réception par une autre entreprise semblable. (distribution undertaking)
…	[…]

programming undertaking means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus; (entreprise de programmation)	***entreprise de programmation*** Entreprise de transmission d'émissions soit directement à l'aide d'ondes radioélectriques ou d'un autre moyen de télécommunication, soit par l'intermédiaire d'une entreprise de distribution, en vue de leur réception par le public à l'aide d'un récepteur. (programming undertaking)
…	[…]
[Emphasis added]	[Soulignement ajouté]

[11] In the policy statement accompanying the Code, the CRTC explains that it intends to gradually "impose the Wholesale Code on all licensed [BDUs and PUs] by means of a condition of licence with a view to ultimately repealing the 9(1)(*h*) order" (at para. 137). Indeed, many of the requirements of the Code are already included as conditions in the appellants' licences (see Blue Ant Memorandum of Fact and Law, Appendix B). The Order, which requires licensees to "abide" by the Code, bridges the gap between licence renewals and presumably seeks to ensure some degree of equivalency in licence conditions across the regulated industry.

[12] Section 4 of the Code sets out seven specific terms that are not permitted in affiliation agreements between PUs and BDUs. They include:

(a) terms that prohibit the distribution of programming services on a stand-alone basis;

(b) terms that prohibit the offering of programming services on a build-your-own-package or small package basis;

(c) provisions that unilaterally grandfather distribution on the same terms and conditions as the previously negotiated agreement;

(d) veto rights by PUs of BDU packaging changes;

(e) requirements to mirror existing analog tiers in a digital offering;

(f) most favoured nation (MFN) provisions, or any similarly worded provision that has the effect of guaranteeing terms as favourable as those agreed to with other parties in other affiliation agreements; and

(g) minimum penetration, revenue or subscription levels, except where negotiated by an independent programming service.

[13] Section 5 precludes commercially unreasonable practices, including:

(a) requiring an unreasonable rate (defined as other than fair market value);

(b) requiring an unreasonable volume-based rate card;

(c) requiring an unreasonable penetration-based rate card;

(d) requiring the acquisition of a program or service in order to obtain another program or service (tied-selling);

(e) imposing unreasonable terms and conditions that restrict the ability of a BDU to provide consumer choice; and

(f) imposing unreasonable terms and conditions that restrict a programming service or a BDU from providing programming on multiple distribution platforms.

[14] Section 6 describes what the CRTC considers to be commercially reasonable practices. It mandates that seven factors – 6(a) to 6(g) – be considered during negotiations to establish the fair market value of the wholesale rate for programming. Sections 7 to 12 are aimed at preventing vertically-integrated entities from discriminating against independent programming services. In particular, sections 7 to 10 are aimed at the packaging and marketing of independent programming services, and sections 11 and 12 at ensuring multiplatform access to independent programming services.

[15] Where an affiliation agreement has not been renewed by 120 days before its expiration date and where both parties confirm in writing their intention to renew, the Code requires that the dispute be referred to the CRTC for dispute resolution (section 13). As I will explain, this requirement is a key component of Bell's argument.

[16] Finally, affiliation agreements and all other agreements regarding programming services are to be filed with the CRTC (sections 14–15).

[17] With the context having been set, I turn to the substantive issues.

III. Issues

[18] Bell contends that the Code, and its enabling Order, are *ultra vires* the CRTC's powers insofar as they affect its interests as a programming undertaking. Whether that argument succeeds lies in the answer to three subsidiary questions:

A. Is the decision of the Supreme Court of Canada in *Cogeco* dispositive of the issues in this appeal?

B. If *Cogeco* is not dispositive, is the Code within the power of the CRTC under paragraph 9(1)(*h*) of the *Broadcasting Act*?

C. Does the Code conflict, in operation or purpose, with the *Copyright Act*?

[19] I will address the applicable standard of review in the context of issues B and C. Blue Ant Media, a respondent, raises the additional argument that the Court should, in the exercise of its discretion, bar Bell from any remedy by reason of its conduct. This will be addressed at the end of these reasons.

IV. Analysis

A. Is the decision of the Supreme Court of Canada in Cogeco dispositive of the issues in this appeal?

[20] Bell submits *Cogeco* stands for the principle that the CRTC cannot regulate any aspect of the economic and commercial relationship between PUs and BDUs. Bell contends that as the Code directly interferes in the manner and content of affiliation agreements and effectively limits, dilutes or negates some of its rights under the *Copyright Act*, the Code falls squarely within the scope of the prohibition in *Cogeco*. Bell's argument requires careful consideration of what *Cogeco* decided.

[21] The issue in *Cogeco* was "whether the CRTC ha[d] the jurisdiction to implement the proposed value for signal regime" (VSR) (*Cogeco* at para. 14). The VSR, what it was and what it did, is critical to understanding *Cogeco*.

[22] In 2010, the CRTC was concerned about the economic viability of broadcasters (which, in effect, meant only PUs because BDUs are not included in the definition of "broadcaster" under section 2 of the *Copyright Act*). In order to ensure that the public would continue to benefit from the diversity of programming offered by broadcasters, and relying on subsection 3(1) of the *Broadcasting Act* as the source of its jurisdiction, the CRTC proposed to create the VSR (*Cogeco* at paras. 1, 6–7, 21).

[23] The VSR sought to alleviate the financial challenges faced by broadcasters by granting them new and exclusive rights to control the exploitation of their communication signals or works by retransmission. The VSR allowed broadcasters to negotiate directly with BDUs for the retransmission of all of their signals. When broadcasters were unable to agree with a BDU on compensation for the distribution of their programming services, the VSR would have given broadcasters "deletion rights", thereby preventing their retransmission by BDUs (*Cogeco* at paras. 7, 19, 69).

[24] In so doing, the VSR dealt directly with the subject matter of sections 21 and 31 of the *Copyright Act*. Subsection 21(1) of the *Copyright Act* grants a broadcaster an exclusive, limited copyright in the communication signals it broadcasts, with paragraph (*c*) giving it the sole right to authorize or prohibit the simultaneous retransmission by another broadcaster to the public.

Since BDUs are not considered "broadcasters" under section 2 of the *Copyright Act*, a broadcaster's exclusive copyright under section 21 does not include a right to prohibit a BDU from retransmitting its communication signals (*Cogeco* at paras. 48–50). This is critical, as the salient feature of the VSR was the right of broadcasters to prohibit BDUs from retransmitting their signals (*Cogeco* at paras. 19, 69).

[25] Importantly, paragraph 3(1)(*f*) of the *Copyright Act* protects the right of copyright holders to distribute their work by various means, including telecommunication. However, section 31 of the *Copyright Act* creates a "user right" (or, an exception to copyright infringement) that allows BDUs to retransmit copyright protected works carried in local and distant (over-the-air) signals without the authorization of the copyright holder. The copyright holders in those works do not have the right to block the retransmission by BDUs of local and distant signals carrying their works (*Cogeco* at paras. 56, 58). The decision in *Cogeco* pivots on the CRTC's "creation of exclusive control rights over signals or programs" and the "right" of a broadcaster to require a BDU "to delete any program owned by the broadcaster" (*Cogeco* at paras. 7, 13, 31–33), notwithstanding the rights granted under sections 21 and 31 of the *Copyright Act*.

[26] The Supreme Court held that the VSR was not authorized by any provision in the *Broadcasting Act*, including paragraph 9(1)(*h*), and that it conflicted with the purposes of sections 21 and 31 of the *Copyright Act*. For the Court, Rothstein J. said:

> [13] In my respectful opinion, for two reasons, the provisions of the Broadcasting Act, considered in their entire context, may not be interpreted as authorizing the CRTC to implement the proposed value for signal regime. First, a contextual reading of the provisions of the Broadcasting Act themselves reveals that they were not meant to authorize the CRTC to create exclusive rights for broadcasters to control

> the exploitation of their signals or works by retransmission. Second, the proposed regime would conflict with specific provisions enacted by Parliament in the *Copyright Act*.
>
> (See also para. 68 of *Cogeco*)

[27] With respect to the *Broadcasting Act*, the Court ruled that the broad licensing and regulatory powers in sections 9 and 10 had to be read in light of the *Broadcasting Act* as a whole. It found that not all links, however tenuous, between a licensing requirement and a broadcasting policy objective described in subsection 3(1) were sufficient to establish jurisdiction in the CRTC (*Cogeco* at paras. 25, 28–29).

[28] In its reasoning, the Supreme Court observed that, in contrast to the *Telecommunications Act*, S.C. 1993, c. 38, which expressly granted the CRTC jurisdiction to ensure rates charged by Canadian carriers were just and reasonable, "none of the specific fields for regulation set out in s. 10(1) pertain to the … control [of] the direct economic relationship between the BDUs and the broadcasters [that is, programming undertakings]" (*Cogeco* at paras. 26, 29).

[29] This phrase is the foundation of Bell's argument in this appeal. It submits that none of the specific fields in subsection 9(1) pertain to the control of the direct economic relationship between BDUs and PUs.

[30] Significantly, the passages from *Cogeco* reproduced in paragraphs 78 and 80 of Bell's memorandum omit a key sentence from *Cogeco* (bolded below):

> [30] However, the broadcasters submit that s. 10(1)(*g*), which enables the CRTC to make regulations "respecting the carriage of any foreign or other programming services", and s. 9(1)(*h*), which empowers the CRTC

> to require a licensed BDU "to carry ... programming services specified by the Commission", together with the broad wording of ss. 10(1)(*k*) and 9(1)(*b*)(i), empower the CRTC to "dictate the terms of the carriage relationship between broadcasters and BDUs" (R.F., at para. 65). **Thus, the CRTC would, in their opinion, have jurisdiction to implement the proposed regime.**
>
> [31] I cannot agree. On their face, ss. 9(1)(*h*) and 10(1)(*g*) could, for example, allow the CRTC to require the BDUs to distribute to Canadians certain types of programs, arguably, because they are deemed to be important for the country's cultural fabric. However, it is a far cry from concluding that, coupled with ss. 10(1)(*k*) and 9(1)(*b*)(i), they entitle the CRTC to create exclusive control rights for broadcasters.
>
> [emphasis added]

[31] When read in its context, the Supreme Court's statement "I cannot agree", was in response to the last sentence in paragraph 30. Indeed, as is clear from the last sentence in paragraph 31 of the decision, and the point on which the case turned, was that paragraph 9(1)(*h*) did not "entitle the CRTC to create exclusive control rights".

[32] A reading of *Cogeco*, keeping in mind the particular exclusive control right created by the VSR, reveals that it cannot be interpreted as widely as urged by Bell. The Supreme Court decided whether the CRTC could give PUs "an exclusive right to require deletion of the programming to which they hold exhibition rights from all signals transmitted by the BDU" (*Cogeco* at para. 19), not whether the CRTC can regulate *any* aspect of the economic relationship between PUs and BDUs. In relation to the *latter*, the Supreme Court merely stated that the fields of regulation in subsection 10(1) of the *Broadcasting Act* do not expressly authorize control of "the direct economic relationship between BDUs and the [PUs]" (*Cogeco* at para. 29). This statement has to be read and understood in light of what the VSR attempted to do and the question the Court was asked to decide.

[33] I do not understand the Supreme Court to have concluded that any and all exercises of authority under paragraph 9(1)(*h*), which may have an effect, direct or incidental, on PUs, would be an overreach. In the result, the extent to which paragraph 9(1)(*h*) authorizes the CRTC to impose terms and conditions on the carriage of "programming services" by BDUs, which will incidentally affect PUs, remains an open question. I therefore agree with the respondents that *Cogeco* is not dispositive of whether paragraph 9(1)(*h*) authorizes the CRTC to make the Code binding.

[34] For similar reasons, *Cogeco* is also not determinative of the copyright conflict issue in this appeal. The Supreme Court decided that the CRTC could not, by granting an *exclusive control* right, create a functional equivalent to a copyright for broadcasters (PUs as copyright owners) that was deliberately withheld from the *Copyright Act*. In section 21 of that Act, Parliament set out a carefully tailored regime relating to the specific kind of copyright with respect to communication signals and a specific type of user right with respect to works transmitted in over-the-air signals under section 31 of the *Copyright Act*. The VSR, however, created exclusive control rights "for broadcasters to control the exploitation of their [over-the-air] signals or works by retransmission" (*Cogeco* at paras. 13, 19, 31, 33, 69–70). The VSR, in effect, created new copyright, and conflicted with the purpose of sections 21 and 31 of the *Copyright Act* (*Cogeco* at paras. 13, 62–64, 67–70, 75–76). As I will explain, in contrast to the VSR, the Code does not create a "special right" akin to that contemplated by the VSR.

[35] In considering the effect of *Cogeco*, guidance can be found in the principle expressed in *R. v. Henry*, 2005 SCC 76 at para. 53, [2005] 3 S.C.R. 609 (*Henry*), citing *Quinn v. Leathem*,

[1901] A.C. 495 (H.L.), “that a case is only an authority for what it actually decides”. Of particular resonance in this appeal is Binnie J.’s observation at paragraph 57 that:

> All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative.

[36] Having concluded that *Cogeco* is not dispositive does not mean that it is of no consequence to this appeal. To the contrary, and consistent with *Henry*, the principles of statutory interpretation employed by the Supreme Court of Canada to read the *Broadcasting Act* are binding. I note, in particular, Rothstein J.’s observation at paragraph 23 of *Cogeco* that references to the *Broadcasting Act*’s policy objectives in subsection 3(1) are, without more, insufficient to ground jurisdiction. Of equal force and effect is the Court’s recognition that the property interests created by the *Copyright Act* cannot be constrained or diminished unless authorized by Parliament. This bears on the second branch of Bell’s argument which is founded on its copyright interests.

[37] In conclusion, whether, to borrow the language of Rothstein J., the 2015 Wholesale Code “is too great a stretch from the core purposes intended by Parliament” and from the power granted to the CRTC under the *Broadcasting Act* (*Cogeco* at para. 33) and engages in the direct economic relationship in a manner not contemplated by Parliament remains a live question, the answers to which lie in an understanding of the intention of Parliament in enacting paragraph 9(1)(*h*). Whether the Code diminishes or conflicts with Bell’s copyright interests also remains unsettled.

B. What is the standard of review?

[38] The parties do not agree on the standard of review. Bell contends that the question whether the Code is authorized by paragraph 9(1)(*h*) of the *Broadcasting Act* is jurisdictional and attracts a correctness standard of review. The respondents contend that the question is simply a matter of interpretation of a home statute by a tribunal and that the standard of review is reasonableness. Insofar as the conflict with the *Copyright Act* is concerned, Bell says that this too should be examined through a correctness lens, as that act is not the home statute of the CRTC.

[39] The parties pressed their positions with respect to standard of review. Given the jurisprudence it is easy to understand why that was so. From the respondents' perspective, reasonableness triggers the presumption which requires the Court to defer to the CRTC's interpretation of its home statute. This makes short work of the appeal. A favourable result is virtually assured by the near-irrefutable nature of that presumption. From the appellants' perspective, correctness opens the door, at least a crack, to a closer analysis of the legislation and potentially a different result.

[40] Bell makes a compelling case that this is a jurisdictional question. Parliament made a clear and express choice to limit the CRTC's power to make orders under paragraph 9(1)(*h*) to BDUs and the "programming services" which they carry. In Bell's view, the Code derogates from Bell's rights under the *Copyright Act* and circumvents Parliament's clear language with respect to copyright.

[41] Jurisdictional questions are, however, difficult to identify. We know that a jurisdictional question is one the answer to which must be correct. But this sheds little light on the defining characteristics of a jurisdictional question. As observed by Brown J. in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 (*West Fraser*) "… the distinction between matters of statutory interpretation which implicate truly jurisdictional questions and those going solely to a statutory delegate's application of its enabling statute will be, at best, elusive" (at para. 124). The definitional challenges around jurisdictional questions continue to vex courts, here and abroad.

[42] The distinction between jurisdictional and non-jurisdictional questions has been described by one judge of the High Court of Australia as "chimerical" (*Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*, [2001] HCA 22 at para. 212, 206 C.L.R. 57 (*Ex parte Miah*)), as a "vague and probably undefinable concept" by the New Zealand Court of Appeal (*Bulk Gas Users Group v. Attorney General*, [1983] NZLR 129 (C.A.) at 136) and as a "mirage" by the Supreme Court of the United States (*City of Arlington, Texas v. Federal Communications Commission)*, 569 U.S. 290 (2013) at 5. Academics have been no less restrained in their criticism. Professor Daly notes "the weak theoretical basis for the category and the historical difficulty in applying the concept … in a clear and coherent manner" (Paul Daly, "*Dunsmuir*'s Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58:2 McGill L.J. 483 at 492 (Daly, "*Dunsmuir*'s Flaws Exposed").

[43] The Supreme Court of Canada, echoing the suggestion of the High Court of Australia that the concept be "interred" (*Ex parte Miah* at para. 212) (Kirby J.)), has hinted that it might

"euthanize" this category of review (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at para. 41 (*CHRC*), citing Binnie J. in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 88, [2011] 3 S.C.R. 654 (*Alberta Teachers*)).

[44] That said, the Supreme Court has also confirmed the centrality of jurisdictional issues in ensuring that Parliamentary intention is respected. Even *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 30, [2008] 1 S.C.R. 190 (*Dunsmuir*) notes that "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority" (citing Thomas A. Cromwell, "Appellate Review: Policy and Pragmatism" in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, p. V-12). As Cromwell J. noted in *Alberta Teachers*:

> [94] I agree that the use of the terms "jurisdiction" and "*vires*" have often proved unhelpful to the standard of review analysis. This, however, should not distract us from the fundamental principles: as a matter of either constitutional law or legislative intent, a tribunal must be correct on certain issues in the sense that the courts and not the tribunal have the last word on what is "correct". …

[45] There is also considerable thoughtful and compelling academic commentary in support of the concept (see e.g. T.R.S. Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference" (2006) 65:3 Cambridge L.J. 671). Professor Daly recognizes that the "category" of jurisdictional error could be removed "without undermining the availability of review for correctness …" (Daly, "*Dunsmuir*'s Flaws Exposed" at 492, n. 36). Put otherwise, the problem lies in the category, not with the principles which it embodies.

[46] Thus, as Brown J. observed in *CHRC* at paragraph 110, "[w]hile … one might 'euthanize' *the category* of true jurisdictional questions, it would not follow that *such questions themselves* will disappear". This is because there is a symbiotic relationship between the rule of law and jurisdiction. Jurisdictional issues are a label given to a fundamental principle – that all exercises of power by public authorities must be authorized by law. Parliament is acutely cognizant of this principle. In granting rights of appeal or judicial review, Parliament recognizes the incompatibility of an unfettered discretion in tribunals to decide the scope of their jurisdiction with the fundamentals of the Westminster parliamentary democracy, and mandates the courts to demarcate the boundaries.

[47] The persistency of jurisdictional questions is telling. They have coursed through our jurisprudence for over half a century, playing an integral role in ensuring the rule of law remains more than mere words. Efforts to categorize jurisdiction may have floundered, but this should not be understood either as a problem with the principle or as a rationale for its elimination.

[48] As observed by Brown J. in *CHRC*, despite definitional challenges of jurisdictional questions, the underlying principle that tribunals must remain squarely within the limits of the mandate that *Parliament* (and not the tribunal itself) determined, cannot be erased: "[T]here will remain questions that tend more to the former, including matters which are still widely regarded as jurisdictional by lower courts" (*CHRC* at para. 111). The question as to the CRTC's authority under the *Broadcasting Act* in this appeal is precisely of that nature. It is one that *tends* to the jurisdictional, so much so that there is only one reasonable interpretation.

[49] We do not, however, need to decide whether the question in this appeal is jurisdictional. The standard of review to be applied to orders made under paragraph 9(1)(*h*) has previously been determined by this Court as reasonableness (*Bell Canada and Bell Media Inc. v. Attorney General of Canada*, 2017 FCA 249 at para. 9, 154 C.P.R. (4th) 85 (*NFL*), leave to appeal to S.C.C. granted, 37896 (10 May 2018)). *Stare decisis* requires that it should be followed and applied here (*Miller v. Canada (Attorney General)* 2002 FCA 370, 220 D.L.R. (4th) 149).

[50] That said, reasonableness "is a deceptively simple omnibus term" (*Alberta Teachers* at para. 87 (per Binnie J.)) and, if it is to be applied, it must be given definition and content. The Court should be transparent about what it means when it conducts a reasonableness review, and identify the factors which shape the degree of scrutiny or intensity of review it intends to bring to the question. To that end, I begin with a few observations about reasonableness and deference.

[51] Reasonableness, in its conception, is a highly elastic concept. Notwithstanding rule of law considerations, it tolerates the proposition that different decision makers can reach contradictory interpretations and both be reasonable (*McLean v. British Columbia (Securities Commission*), 2013 SCC 67 at paras. 32-33, [2013] 3 S.C.R. 895 (*McLean*); *CHRC* at para. 52; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 at para. 17, [2016] 1 S.C.R. 770 (per Abella J. (*Wilson*), see also paras. 70-71 wherein McLachlin C.J.C., Karakatsanis, Wagner, Gascon, Cromwell JJ. concurred on this point)). The other end of the spectrum also contemplates circumstances where there can be only one reasonable interpretation, and "no degree of deference can justify [the] acceptance" of any other interpretation (*McLean* at para. 38).

[52] Reasonableness also applies, without differentiation, across a wide range of decisions made by a broad spectrum of decision makers: *ad hoc* arbitrators, quasi-judicial tribunals, permit and licensing authorities and large specialized standing quasi-judicial tribunals supported by professional staff, such as the CRTC, the National Energy Board and the Canadian Transportation Agency, for example. It also applies to ministers of the Crown and the Governor in Council, whether acting under prerogative or statute. Reasonableness also embraces, without distinction, entirely distinct functions and responsibilities. At one end of the continuum stand administrative and adjudicative decisions affecting the interests of a single party on a discrete set of facts. At the other end are highly discretionary, policy-infused decisions, such as those of the Governor in Council as to whether a certain matter is in the public interest. There are many points in between, depending on the legal and factual matrix.

[53] The existing administrative law framework, predicated as it is on categories, forces a choice between reasonableness or correctness review. It assumes that there is a bright line between jurisdictional questions and all other types of decisions. But the line between the two, if there is one, becomes blurred as the range of reasonable outcomes narrows. When it tapers to only one reasonable outcome, correctness and reasonableness review merge and become indistinguishable. This can arise in the context of near-jurisdictional issues (*Wilson* at para. 27) as well as in the context of specific exercises of discretion: *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61.

[54] The challenges inherent with categorization and classification as an over-arching framework were identified as early as 2003. Writing prior to *Dunsmuir*, the Supreme Court

observed that the standard of review should focus on "the polar star of legislative intent" based on "principled analysis rather than categories" (*C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, para. 149, [2003] 1 SCR 539). More recently, in *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58, Stratas J.A. observed:

> [58] Put another way, the issue whether an administrative tribunal is inside or outside the "jurisdictional" fences set up by Parliament is really an issue of where those fences are—in other words, an interpretation of what the legislation says about what the administrative decision-maker can or cannot do.

[55] Stratas J.A. continued and concluded "There comes a point where an administrative decision-maker adopts a view of its statutory powers and the statutory scope of its authority that is neither acceptable nor defensible. When that happens, reviewing courts acting under the reasonableness standard will quash the administrative decision, thereby keeping the administrative decision-maker within its authority."

[56] In sum, the focus of the standard of review analysis should be on discerning legislative intent according to received principles of interpretation – not on choosing categories and applying *a priori* presumptions. If, after considering the statute, a court concludes that the decision was not authorized by the legislation, it cannot stand. The label applied to the exercise – whether unreasonable or jurisdictional – is of no consequence.

[57] As manifested by the arguments in this appeal, the stark choice between reasonableness and correctness has repercussions for both the parties and the courts.

[58] First, as Binnie J. cautioned in *Dunsmuir*, threshold debates about standard of review lead to lengthy and arcane discussions, which have little to do with the merits of the case. This truism has given rise to the contemporary view that the focus of judicial review should be on answering whether the particular power or decision was authorized by law, not on debating the category of review (see generally the contributions listed in Paul Daly, "The Dunsmuir Decade/10 ans de Dunsmuir" (11 January 2018), online: *Administrative Law Matters* <http://www.administrativelawmatters.com/blog/2018/01/11/the-dunsmuir-decade10-ans-de-dunsmuir/>, (*A Decade of Dunsmuir / Les 10 ans de Dunsmuir*, forthcoming CJALP, Fall 2018).

[59] Binnie J. also urged that the courts move the parties away from arguing about tests and back to arguing about the substantive merits of their cases. In collapsing three standards of review into two, Binnie J. wrote "… the result of today's decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense" (*Dunsmuir* at para. 139). This has proven prescient. As noted by Professor D.R. Knight, in *Vigilance and Restraint in the Common Law of Judicial Review* (New York: Cambridge University Press, 2018) at 195 (Knight, *Vigilance and Restraint*), "[j]udicial review doctrines which mostly concentrate on judicial methodology, without strongly elaborating norms for the administration, undermines its effectiveness. Again, the Canadian experience illustrates this criticism …".

[60] The second consequence arising from the stark choice between "categories" is that the compelling points of law and legal policy encompassed by the standard of review that is rejected

are jettisoned, in their entirety (see e.g. dissenting opinions in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para. 63,[2016] 2 S.C.R. 293 (per Côté, Brown JJ., McLachlin C.J.C., Moldaver J. concurring) (*Edmonton East*) and in *West Fraser* at paras. 52–111 (per Côté J.), at paras. 112–125 (per Brown J.); see also the reasons concurring in the result of Côté, Rowe JJ. in *CHRC* at paras. 73–81). The adverse policy consequences of the categorical approach are also detailed by L. Sossin in "Why the Standard of Review Matters (or at least why it should)!" (September 25, 2018): online Sossin's Law Blog <http://sossinblog.osgoode.yorku.ca/2018/09/why-the-standard-of-review-matters-or-at-least-why-it-should/>.

[61] Reasonableness, nevertheless, grants reviewing judges "a broad discretion to choose from a variety of levels of scrutiny from the relatively intense to the not so intense" (*Alberta Teachers* at para. 87 (per Binnie J.)). In *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at paras. 12–14, 444 N.R. 120, Stratas J.A. articulated a number of factors which, while situated comfortably in the context of a deferential application of reasonableness review, nevertheless point to intense scrutiny and narrowing of reasonable outcomes. The most critical of these is whether the decision turned on statutory interpretation, as in this appeal.

[62] Factors both internal and external to the decision under review inform the intensity of scrutiny. The use of these contextual factors has a long provenance. From *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paras. 29–38, 160 D.L.R. (4th) 193 to *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R.

817, 174 D.L.R. (4th) 193 to *Dunsmuir* at paragraphs 62 to 64 to *West Fraser*, contextual factors have been considered constructive in informing the answer to the question as to the role Parliament intended the court to play in relation to any particular decision. While contextualism has its critics, its use has not lead to a proliferation of litigation. To the contrary, it cannot be avoided without turning a blind eye to Parliamentary intention and the stakes at hand for the parties.

[63] There are also other advantages. As noted by Brown J. in *West Fraser* at paragraph 124, the intensity of review allows for "sufficient flexibility to reflect the varied nature of administrative bodies, the question before them, their decisions, their expertise and their mandates". Brown J. continued and noted that an intensity of review approach, which focuses on the language of Parliament and the nature of the issue is consistent "… with the dual constitutional functions performed by judicial review: upholding the rule of law, and maintaining legislative supremacy (Dunsmuir, at paras. 27 and 30)" (*West Fraser*, at para. 124).

[64] This observation reflects an underlying concern, in both the jurisprudence and academic commentary, about the consistency of a binding presumption of deference to tribunal interpretations of statutes with Parliamentary intent reflected in rights of appeal or review, the rule of law and legislative supremacy. I will turn to this issue shortly in the discussion of the degree of deference to be accorded the decision under appeal.

[65] Reasonableness as a standard of review has been described as points on a continuum from reasonable to the unreasonable, as a single standard which applies with increased focus or

scrutiny or, as Professor Knight aptly notes, "[r]easonableness … 'floats' along an infinite spectrum of deference" (Knight, *Vigilance and Restraint* at 206). These metaphors describe that which is a single question – what role did Parliament intend the reviewing court play in relation to the issue before it, and what are the criteria or markers which guide the court in conducting its review? These contextual factors ensure that judicial review does not become an entirely subjective enterprise, with a consequential erosion of predictability and efficacy of administrative bodies.

[66] The legislation is the first and controlling point of reference in answering the question as to the role a court should play in relation to the decision in question. The degree of judicial scrutiny may be calibrated by the existence of a privative clause; whether Parliament granted a right of appeal or a more limited recourse in judicial review; the nature of the decision (the extent to which it is adjudicative as opposed to policy or legislative); the extent of the discretion granted and the degree to which it truly draws on expertise unique to a tribunal; the question before the court and its consequences for the parties; and importantly, rule of law considerations. These are all beacons that guide the answer to the question of the degree of scrutiny with which the decision is to be assessed.

[67] The language of Parliament can inform the intensity of review in another fashion. The legislature may be prescriptive about the decision making process and the factors to be considered by a tribunal. That, along with a grant of judicial oversight, supports close scrutiny. As noted by Stratas J.A. in *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, the more prescriptive and directive Parliament is to the content of

decision making, the lesser the discretion and the greater the scrutiny. In contrast stand cases involving a broad discretion, resulting in a range of possible outcomes and diminished scrutiny.

[68] How then, should the Court consider reasonableness of the decision in this case? What indicia or markers inform the degree of scrutiny the Court should apply to the question whether the 2015 Wholesale Code is authorized by paragraph 9(1)(*h*)?

(1) What Parliament said about the role of the court

[69] The legitimacy of standard of review as doctrine depends on its respect for Parliament's intention. Consequently, any consideration of the standard of review begins with an inquiry into the role Parliament intended the supervisory court to play in relation to any particular decision.

[70] If the standard of review is premised on respect for legislative intention, the words of section 31 of the *Broadcasting Act* must be given meaning. Parliament said that, subject to relevant statutory provisions in the *Broadcasting Act*, decisions of the CRTC are "final and conclusive" (*Broadcasting Act*, s. 31(1)). It also said that appeals lie to this Court on "a question of law or a question of jurisdiction" (*Broadcasting Act*, s. 31(2)). Parliament was concerned about the CRTC and its jurisdiction – so much so that the term appears no fewer than eight times in the *Broadcasting Act*, six of which are relevant for this purpose. (This is not to suggest that the weight of the argument increases with the number of words.)

[71] Although a "privative clause[] deter[s] judicial intervention, a statutory right of appeal may be at ease with it, depending on its terms" (*Canada (Citizenship and Immigration) v. Khosa*,

2009 SCC 12 at para. 55, [2009] 1 S.C.R. 339). In other words, a privative clause is not determinative. It is a factor which must be considered in calibrating the degree of scrutiny.

[72] Section 31 of the *Broadcasting Act* is a clear indication that there are limits to the remit of Parliament's mandate to the CRTC. By these words, Parliament indicated that it wanted the Court to demarcate the borders of the CRTC's jurisdiction as the word is commonly understood. Indeed, to conclude otherwise would be to say that Parliament delegated an unfettered mandate to the agency to decide the scope of its own jurisdiction. Were that the case, section 31 would have been unnecessary.

(2) Nature of the question

[73] The nature of the question will also inform the degree of scrutiny. Questions of law merit close review although the intensity may vary with the nature of the question. Discretionary decisions, which are highly fact based or infused by policy, merit a highly deferential approach. This requires a precise definition of the true question before the Court.

[74] The answer to the question before us is one of statutory interpretation – text, context and purpose. This question is not a specific, narrow question focused on a discrete set of facts, nor does it turn on the understanding of technical matters which would be in the domain of the CRTC; rather the question probes whether paragraph 9(1)(*h*) allows the CRTC to directly or incidentally affect entities not expressly mentioned within paragraph 9(1)(*h*).

[75] Nor does the question ask us to review an adjudicative decision. The Order, and the Code which it mandates, is quasi-legislative in nature. The distinction between the two types of power has been recognized (*United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, at para. 5, [2004] 1 S.C.R. 485; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 at paras. 51-52, [2014] 2 S.C.R. 135). There cannot be two equally reasonable answers where the question asks whether Parliament intended the CRTC to have the power to regulate affiliation agreements. It either did or it did not. It is not possible to have a range of outcomes here.

[76] Bell does not challenge the substantive content of the Order. Its point, and it is an important one, is that it is of no consequence whether the terms of the Code are reasonable – the CRTC has no business imposing conditions on PUs, reasonable or unreasonable. In this regard, "reasonableness" does a disservice to the substance of the argument before the Court. The struggle between the parties over the standard of review is a distraction from the question of legislative intention, and diverts attention to consideration as to whether or not the Code is reasonable – a non-issue. The question of whether the CRTC has the authority to impose the Code cannot depend on the reasonableness of the conditions. The "appropriateness" of the terms of the Code is not the same question as whether the Code can apply to PUs.

[77] *West Fraser*, contrary to the respondents' submissions, does not advance their case. The decision in *West Fraser* did not collapse the question of the authority to make a regulation into the question whether the regulations are a valid exercise of a delegated power. The majority in

West Fraser found that the Board's enactment of the regulation did not involve a question "of *vires* in the traditional sense" (*West Fraser* at para. 23).

[78] Fairly characterized, Bell's argument is not a disguised attempt to challenge the merits of the regulatory scheme encompassed by the Code. The issue before this Court does not go to the reasonableness of the Code, rather it asks whether it has the authority to enact the Code *at all* (*West Fraser* at para. 56 (per Côté J. (dissenting)); *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58 at para. 80). The question is "a broad question of the tribunal's authority" (*Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 at para. 34, [2009] 2 S.C.R. 678) and which, in essence, calls for a determination of Parliament's intent in enacting paragraph 9(1)(*h*).

[79] Thus viewed, the distinction between reasonableness and correctness standards of review is of no consequence. Regardless of the choice of label or category, the answer orbits around the same question of Parliamentary intent. If, following consideration of the statute, Parliament did not authorize the CRTC to affect third party commercial interests, then any decision to the contrary is unreasonable. It is unreasonable because it was not authorized to do so by Parliament. The categorization of the standard of review is of little guidance in circumstances such as this.

(3) The extent of deference

[80] The respondents place great emphasis on the deference accorded to tribunals in the interpretation of home statutes and, in particular, the statement in *Edmonton East*, at paragraph 33, that "expertise is something that inheres in a tribunal itself as an institution". If the CRTC has

discretion to make orders it considers “appropriate”, its expertise extends to determining both the content of the orders, and, importantly for the purposes of this appeal, to whom they should apply.

[81] While deference is a principle of judicial review, its application must be nuanced.

[82] In *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at paras. 21, 27, [2006] 1 S.C.R. 140 (*ATCO*), the Supreme Court held that deference has no role to play in determining the jurisdiction of a tribunal’s mandate and that the expertise of a tribunal is not engaged when deciding the scope of its own powers. This statement has been overtaken by, or subordinated to, the strength of the presumption of deference on which the respondents rely.

[83] Deference informs, but does not determine, the degree of scrutiny. Whether the term or provision being interpreted is truly *sui generis* to the tribunal’s unique expertise, or is equally capable of consideration by courts, is a necessary element in considering the degree or extent of deference to be accorded. The rationale which underlies or is said to justify deference also varies. In the case of highly policy-based, public interest decisions, those of a minister of the Crown or Cabinet, deference is justified on the basis of democratic accountability – Parliamentarians are elected to make these decisions, not judges. At the other end of the spectrum, deference is warranted in highly specialized areas. But under our existing framework, deference is now a presumption, applied across the board, to all decision makers, in all types of decisions. Deference may be the result, but it should arise as a consequence of a close analysis of the statute, the question before the court and its consequences.

[84] Deference plays, without question, a central role in considering the substantive, technical content of the Code. Deference applies to the *how*, the means and measures employed. However, in answering the question *whether* the CRTC can affect PU's under paragraph 9(1)(*h*), there are no indicia that the CRTC has any greater expertise than that of the Court in reading the statute. Deference, according to Professor Daly, is most active where there is choice or ambiguity (Paul Daly "The Scope and Meaning of Reasonableness Review" (2015) 52:4 Alta. L. Rev. 799 at 821). To the same effect, Professor Knight notes, "[t]rue deference only arises where there is a range of outcomes that all meet the test of justification" (Knight, *Vigilance and Restraint* at 215–216); see also *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, 474 N.R. 121). Here, there is no palette fitted with an assortment of hues and colours from which the CRTC may choose – the CRTC either has the authority to affect third parties or it does not.

[85] The argument advanced by the respondents triggers the caution of Cromwell J. writing in *Alberta Teachers*, at paragraph 94, that "the fact that a legislative provision is in a 'home statute' has become a virtually unchallengeable proxy for legislative intent" and poses concerns for both rule of law and legislative supremacy principles. This observation was echoed in *Edmonton East*, at paragraph 85, where the dissenting justices wrote that the assumption of an unlimited inherent expertise, including on matters of interpretation, "… risks transforming the presumption of deference into an irrebuttable rule". Côté and Brown JJ. further noted that "[r]espect for legislative supremacy must leave open to the legislature the possibility of creating a non-expert administrative decision maker, or creating an administrative decision maker with expertise in some areas but not others" (*Edmonton East* at para. 85).

[86] The need for a tailored and nuanced consideration of deference is also demonstrated by Professor Allan, who notes in in his book, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford: Oxford University Press, 2013) at 268–269 (Allan, *The Sovereignty of Law*)):

> The appropriate degree of deference is dictated, in each case, by analysis of the substantive legal issues arising. If properly conducted, the analysis will indicate the correct division of responsibilities between court and agency, making all due allowance for the exercise of administrative discretion and recourse to specialist expertise. That division of responsibilities is itself the *outcome* of legal analysis attuned to the specific questions of legality arising: it cannot determine these questions, *a priori*, on the basis of general features of the separation of powers divorced from the specific constitutional context.

[87] Deference, then, is part of the context, not an *a priori* determination of the outcome. As Professor Allan notes, if deference is viewed as part of the context, rather than as pre-determined rule, it dissolves the antagonism between the rule of law and parliamentary supremacy (Allan, *The Sovereignty of Law* at 228).

[88] The degree of deference owed is gleaned from the statutory interpretation exercise. Consideration should be given to what Parliament has said about the structure of the tribunal or agency, the tenure and mandate of its decision makers, whether it is a large standing body with large professional staff, or individual *ad hoc* decision makers. Subordinating a statute to a broad and uncritical presumption of expertise in all aspects of a tribunal's mandate, with the consequential displacement of Parliament's express expectation that the courts are to perform a role in demarcating the boundaries of its legislation, lies at the heart of much of the tension in the current jurisprudence.

[89] Failing to consider whether there are parameters on the presumption of expertise has consequences. If the presumption of expertise-based deference extends to the determination, by the tribunal itself, of the limits of its jurisdiction, then paragraph 9(1)(*h*) amounts to an unfettered discretion. Rothstein J. noted the point in *Cogeco* at paragraphs 27–28:

> [27] This broad, express grant of jurisdiction authorized the CRTC to create and use the deferral accounts at issue in [*Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764]. This stands in marked contrast to the provisions on which the broadcasters seek to rely in this case, which consist of a general power to make regulations under s. 10(1)(*k*) and a broad licensing power under s. 9(1)(*b*)(i). Jurisdiction-granting provisions are not analogous to general regulation making or licensing authority because the former are express grants of specific authority from Parliament while the latter must be interpreted so as not to confer unfettered discretion not contemplated by the jurisdiction-granting provisions of the legislation.
>
> [28] That is the fundamental point. Were the only constraint on the CRTC's powers under s. 10(1) to be found in whether the enacted regulation goes towards a policy objective in s. 3(1), the only limit to the CRTC's regulatory power would be its own discretionary determination of the wisdom of its proposed regulation in light of any policy objective in s. 3(1). This would be akin to unfettered discretion. Rather,
>
> > discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation. (citing *ATCO* at para. 50).

[90] Deference, which originated in the *application* of the law has migrated to the *interpretation* of the law. The application of the presumption of deference to the interpretation of statutes by decision makers of all types, including decisions of the executive, has implications for rules of law and legislative supremacy. In effect, the twin rationales which underlie a presumption of deference in the interpretation of the law (a high degree of specialization for

technical matters or democratic accountability for public interest decisions), have been extended, effectively, to the legal advice given by public servants to tribunals or ministers.

[91] Deference must be calibrated to the circumstances. Although speaking in the context of the Charter, Iacobucci J.'s observation in *M. v. H.* [1999] 2 SCR 3, at para. 79 is equally apposite in this context: "The question of deference, …, is intimately tied up with the nature of the particular claim or evidence at issue and not in the general application of the s. 1 test; it can only be discussed in relation to such specific claims or evidence and not at the outset of the analysis."

[92] Academics, reflecting on the Canadian jurisprudence, have expressed a well-founded concern that "a doctrine of deference will collapse in practice into a doctrine of non-justiciability, leaving regions of governmental decision-making invulnerable to legal challenge" (Allan, *The Sovereignty of Law*, at 274). Jurists have also observed that uncritical presumptions of expertise and deference, when coupled with the broad-church doctrine of reasonableness, is inconsistent with the purported objective of sustaining legislative supremacy (see, for example, *Garneau Community League v. Edmonton (City)* 2017 ABCA 374 per Slatter J. at paras. 93–95, per Watson J. at paras. 59–74; see also e.g. Mark Mancini, "Dark Art of Deference: Dubious assumptions of expertise on home statute interpretation" (6 March 2018), Double Aspect, online: <https://doubleaspect.blog/2018/03/06/the-dark-art-of-deference/> ; Peter A. Gall QC, "Dunsmuir: Reasonableness and the Rule of Law" (6 March 2018), Administrative Law Matters, online: <https://www.administrativelawmatters.com/blog/2018/03/06/dunsmuir-reasonableness-and-the-rule-of-law-peter-a-gall-qc/>). On this view, the requirement to defer should not be based on "abstracted notions of expertise", but only when and to the extent that the statute

indicates that such deference is, in fact, warranted. That analysis necessarily encompasses, and gives considerable weight to, provisions granting recourse by way of appeal or judicial review to a court on questions of law, jurisdiction or otherwise.

[93] These observations, however, must be set aside. The law on the question of presumed expertise and which we are required to follow, is clear (*Edmonton East* at para. 33).

[94] The unilateral application of the presumption, de-contextualized from the nature of the decision maker, the nature of the question and in particular, what Parliament has said about rights of appeal or review, may erode, rather than sustain, the rule of law. The point was made by Mainville J.A. (then of this Court), in *Canada (Minister of Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40 at para. 98, [2013] 4 F.C.R. 155, where he wrote that the presumption that the executive's interpretation of the law prevails unless the citizen can discharge an onus on him or her to prove that it is unreasonable (something which in practice is not easily done) "harks back to the time before the *Bill of Rights* of 1689 where the Crown reserved the right to interpret and apply Parliament's laws to suit its own policy objectives".

[95] In sum, justifications for the presumption untethered from a close examination of the statute and in particular, whether Parliament has granted a right of appeal or review, as it has here, must lie elsewhere than in sustaining the rule of law. To be faithful to the principle of respecting Parliamentary intent, any weight given to a presumption must be tailored, nuanced or situated in light of the statutory scheme in question. The point was made in *Pham v. Secretary of*

State for the Home Office, 2015 UKSC 19 at para. 107. After noting that "the question of balance" is for the decision maker, Lord Sumption continued:

> It is for the court to assess how broad the range of rational decisions is in the circumstances of any given case. That must necessarily depend on the significance of the right interfered with, the degree of interference involved, and notably the extent to which, even on a statutory appeal, the court is competent to reassess the balance which the decision-maker was called on to make given the subject-matter.

[96] Nor is the presumption of deference to tribunal interpretations an easy fit in circumstances such as this where the decision maker has provided no reasons. If there are no reasons, there is nothing to be deferred to (see *West Fraser* at para. 69 (per Côté J.)). In imposing the Code, the CRTC was exercising a non-adjudicative function. It gave no reasons as to why it had the authority to impose the Code on PUs when paragraph 9(1)(*h*) refers only to BDUs. Nor is this a case where a court can supplement an otherwise deficient set of reasons (*Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at para. 23, 416 D.L.R. (4th) 579). Deference here would require a court to assume that the CRTC, if asked, could write a set of reasons which this Court would find compelling. Bodies acting in a regulatory or legislative capacity seldom explain why they have the authority to act – they simply do, with the result that the tools of justification, transparency and intelligibility, which function best in an adjudicative setting, are of limited utility.

(4) Prior decisions on standard of review

[97] The Supreme Court framed the issue in *Cogeco* as "whether the CRTC ha[d] the *jurisdiction* to implement the proposed value for signal regime" (*Cogeco* at paras. 1, 14 (emphasis added)). While it did not make an express determination on the applicable standard of review, it is evident that it adopted a correctness approach. The exercise in which it engaged was

one of pure statutory interpretation of the text of paragraph 9(1)(*h*) when situated in the context of the *Broadcasting Act*. The language of reasonableness plays no role in the Court's analysis.

[98] The issues before this Court are a mirror image of *Cogeco*. Arguably, the substantive question before this Court does not change simply because, as a matter of procedure, it arose in the former case as a reference and in the present case as an appeal. On the other hand, it could be pointed out that the Governor in Council did not ask the Court to address the standard of review. But this preferences form and procedure over the substantive question.

[99] These considerations, and consistent with this Court's previous rulings, all weigh in favour of the conclusion that whether the Code is authorized by paragraph 9(1)(*h*) is a "reasonableness" exercise for which there can be only one answer. The answer to the question depends on an analysis of the statute according to received legal principles of statutory interpretation and in respect of which the regulator has no particular advantage over that of the court. It raises, at its core, a question of the scope of Parliament's remit to the CRTC. Rule of law considerations weigh in the equation.

(5) *Copyright Act* and *Broadcasting Act* conflict

[100] Insofar as the conflict between the *Copyright Act* and the *Broadcasting Act* is concerned, the standard of review is, again, consistent with precedent, correctness.

[101] The *Copyright Act* is not the constituent statute of the CRTC (*NFL* at para. 38). The *Canadian Radio-television and Telecommunications Commission Act*, R.S.C. 1985, c. C-22, the

Broadcasting Act and the *Telecommunications Act* are the CRTC's home statutes. Importantly, aside from ephemeral recordings, the only point of intersection between the *Copyright Act* and the *Broadcasting Act* is that considered in *Cogeco*: the carve-out for retransmission of works in local and distant signals under the *Copyright Act*. This single point of intersection, discrete and limited, and in any event irrelevant to the issues raised here, does not make the *Copyright Act* the home statute of the CRTC.

[102] This appeal necessitates that a line of demarcation be drawn between the nature and extent of Bell's legal rights and interests under the *Copyright Act*, and a determination whether the Code and Order trench on those rights. While this is not a question of competing tribunals, it is a question of competing or conflicting legislative schemes. Correctness governs the question whether the exercise of paragraph 9(1)(*h*) conflicts with the *Copyright Act* as it did in *Cogeco*. This was also the conclusion of this Court in *NFL*.

*C. Is the Code within the power of the CRTC under paragraph 9(1)(*h*) of the Broadcasting Act?*

[103] This appeal pivots on the intention of Parliament and whether Parliament intended, through paragraph 9(1)(*h*), to give the CRTC jurisdiction to enact measures directly affecting PUs.

[104] There are two competing interpretations. Bell says that the power in paragraph 9(1)(*h*) is narrow, confined to requiring the carriage of specific programs, and that it provides no legislative basis for intruding into "the economic terms of the carriage relationship" between BDUs and

PUs. The respondents say that the textual and contextual readings of the provision support the Code. Both sides rely on the same principles of interpretation and both muster legislative history in support.

[105] To interpret paragraph 9(1)(*h*), we need to consider it in its "entire context and in [its] grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 154 D.L.R. (4th) 193, citing Elmer Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87). The exercise is one of text, context and purpose.

[106] I begin with the principles relevant to the interpretation of a general statutory power, such as the one contained in paragraph 9(1)(*h*), that is to be exercised in the furtherance of the objects established in the encompassing statute.

[107] Rothstein J. in *Cogeco* made clear that while the policy objectives set out in subsection 3(1) of the *Broadcasting Act* function to constrain the CRTC's administrative decisions in that the CRTC must act with a view to implementing those objectives (*Cogeco* at paras. 22, 25), it was not the case that any link, however tenuous, between a proposed action under section 9 and a policy objective in subsection 3(1) would suffice (*Cogeco* at para. 25). If the only constraint on the CRTC's licensing powers was whether the CRTC's action goes towards a broadcasting policy objective identified in subsection 3(1), "[t]his would be akin to unfettered discretion" (*Cogeco* at para. 28). As Bastarache J. stated in paragraph 50 of *ATCO*, an administrative decision maker's discretion is:

> … to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation (see Sullivan, at pp. 154-55). …

[108] If a reading of "the *Broadcasting Act* in its entire context reveals that the [Wholesale Code] is too great a stretch from the core purposes intended by Parliament and from the powers granted to the CRTC under the *Broadcasting Act*" (*Cogeco* at para. 33), then the Wholesale Code must be found to be *ultra vires*. However, the Supreme Court has also emphasized that while "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" (*ATCO* at para. 50 citing *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at 1756, 60 D.L.R. (4th) 682 (*Bell Canada* (1989)).

[109] Applying these principles, I have concluded that the Order, and the Code which it makes binding, are not "too great a stretch" from what Parliament intended, but in fact are directly within its contemplation.

[110] Paragraph 9(1)(*h*) provides:

General Powers	**Pouvoirs généraux**
Licences, etc.	**Catégories de licences**
9 (1) Subject to this Part, the Commission may, in furtherance of its objects,	**9 (1)** Sous réserve des autres dispositions de la présente partie, le Conseil peut, dans l'exécution de sa mission :

…	[…]
(h) require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission.	**h)** obliger ces titulaires à offrir certains services de programmation selon les modalités qu'il précise.

[111] Although the power in paragraph 9(1)(*h*) must only be exercised in furtherance of its objects, this does not expand its reach. However broad the objects may be, the provision only authorizes the CRTC to order BDUs "to carry programming services" on certain terms and conditions. Those terms and conditions, contained in the Code, are circumscribed or constrained by the necessary requirement that they relate to the carriage of programming services.

[112] Paragraph 9(1)(*h*) does not expressly grant authority to the CRTC to impose terms and conditions on the negotiation of affiliation agreements and their content. This much is clear. On an ordinary and literal reading of the text, paragraph 9(1)(*h*) only authorizes the CRTC to impose terms and conditions in respect of programming services upon BDUs, which are expressly mentioned, and not on PUs which are not mentioned.

[113] This does not end the analysis. The context is also to be considered. A provision which confers jurisdiction cannot be read in isolation (*Cogeco* at para. 29).

[114] Paragraph 9(1)(*h*) begins with "[s]ubject to this Part, the Commission may, in furtherance of its objects [perform the actions set out in subsection 9(1)]". The CRTC's objects, which are expressly set out in subsection 5(1), include "regulat[ing] and supervis[ing] all aspects of the

Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)". Given that paragraph 9(1)(*h*) and subsection 5(1) are both located in Part II: "Objects and Powers of the Commission in Relation to Broadcasting" and that paragraph 9(1)(*h*) is located under the heading of "General Powers", it is fair to conclude one of the purposes of paragraph 9(1)(*h*) is to grant the CRTC a power that will facilitate or enable it to discharge the objects under subsection 5(1). One of those objects is to implement the broadcasting policy defined by Parliament in subsection 3(1).

[115] When paragraph 9(1)(*h*) is situated in the context of the *Broadcasting Act* and the express linkages Parliament made between BDUs and PUs, the ability of the CRTC to regulate their interrelationships becomes apparent.

[116] Support for this can be found in various provisions of the *Broadcasting Act*, beginning with the definitions in subsection 2(1):

distribution undertaking means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking; (entreprise de distribution)	***entreprise de distribution*** Entreprise de réception de radiodiffusion pour retransmission, à l'aide d'ondes radioélectriques ou d'un autre moyen de télécommunication, en vue de sa réception dans plusieurs résidences permanentes ou temporaires ou locaux d'habitation, ou en vue de sa réception par une autre entreprise semblable. (distribution undertaking)
programming undertaking means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of	***entreprise de programmation*** Entreprise de transmission d'émissions soit directement à l'aide d'ondes radioélectriques ou d'un autre moyen de télécommunication, soit par l'intermédiaire d'une entreprise de distribution, en vue de leur réception

broadcasting receiving apparatus; (entreprise de programmation)	par le public à l'aide d'un récepteur. (programming undertaking)

[117] These definitions tell us that PUs are the source of the "programming services" which the BDUs distribute. They also tell us that a BDU retransmits programming which it receives. A BDU does not produce programming services, otherwise it would be a PU.

[118] The conclusion which can be drawn from these definitions is that Parliament understood the interrelationship between a BDU and a PU and that, as the "carriage" of "programming services" always depends on a PU, there will, of necessity, be consequences for PUs. The terms and conditions on which BDUs carry "programming services" directly and indirectly shape, and in some cases dictate, the content of affiliation agreements with the consequence that any order directed at the carriage of programing services by BDUs necessarily will affect PUs. It is impossible for it to be otherwise.

[119] Other provisions of the *Broadcasting Act* also demonstrate Parliament's understanding of the necessary interrelationship between the broadcasting policy, BDUs and PUs in respect of programming services. Subparagraph 3(1)(*t*)(iii) is instructive. It reflects Parliaments' appreciation of the necessary, practical interaction between the two entities:

3 (1) It is hereby declared as the broadcasting policy for Canada that	**3 (1)** Il est déclaré que, dans le cadre de la politique canadienne de radiodiffusion :
…	[…]
(t) distribution undertakings	**t)** les entreprises de distribution :

…	[…]
(iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and	**(iii)** devraient offrir des conditions acceptables relativement à la fourniture, la combinaison et la vente des services de programmation qui leur sont fournis, aux termes d'un contrat, par les entreprises de radiodiffusion,
…	[…]

[120] In the same vein, paragraph 10(1)(*g*) authorizes the CRTC to make regulations "respecting the carriage of any foreign or other programming services by distribution undertakings". Paragraph 10(1)(*k*) provides that the CRTC may make regulations "respecting such other matters as it deems necessary for the furtherance of its objects". Subparagraph 9(1)(*b*)(i) and paragraphs 9(1)(*a*) and 9(1)(*c*) give the CRTC broad authority to issue licences subject to such conditions "as the Commission deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1)", to establish classes of licences and to amend conditions thereof. The broad discretion granted under both the licensing and regulation making sections of the *Broadcasting Act* reinforces the importance that paragraph 9(1)(*h*) not be given an overly technical interpretation of the kind the Supreme Court has cautioned against (*Bell Canada* (1989) at 1756).

[121] The appellants and respondents both point to the legislative history of paragraph 9(1)(*h*) to support their positions. Bell says that the paragraph was enacted for a narrow purpose – to prevent cable companies from acting as gatekeepers and thwarting the objectives of the *Broadcasting Act* (House of Commons Standing Committee on Communications and Culture,

Sixth Report to the House: Recommendations for a New Broadcasting Act (Hull, Quebec: Queen's Printer for Canada, 1987) at 77). As noted by the Department of Communications during clause by clause review before the Committee:

> … This is one of the clauses in which the "cable-as-gatekeeper" problem is addressed. It ensures that the cable industry cannot frustrate the licensing of new satellite to cable services simply by refusing to carry them.

[122] The Standing Committee also observed that the clause would "enable the CRTC to ensure equitable treatment for all licensed services in those situations where a cable company [i.e., a BDU] is allowed to invest in certain programming services and allegations are made that the cable company is giving its services preferential treatment". The Committee also recommended that:

> The CRTC should be given the power to arbitrate the terms and conditions contained in affiliation agreements between distribution undertakings and network operators.

[123] This recommendation was ultimately adopted in the form of paragraph 10(1)(*h*) which demonstrates Parliament's intention to give the CRTC authority to regulate aspects of the commercial relationship between PUs and BDUs.

[124] I accept that the purpose of paragraph 9(1)(*h*) is to address the role of a BDU as gatekeeper. But a "gatekeeper" some thirty years ago was markedly different and wonderfully simple compared to today. As the Code explains, in considerable detail, "programming services" can be affected by a range of issues, particularly in the context of vertical integration of BDUs

and PUs and in an era where there are multiple modes or platforms by which programming services can be delivered.

[125] I do not accept, therefore, Bell's argument that the legislative history demonstrates that paragraph 9(1)(*h*) is limited to an ability to direct a BDU to carry a specific channel. Situating paragraph 9(1)(*h*) in its context, and giving it a large, liberal and purposive interpretation as consistent with the objects of the *Broadcasting Act*, I conclude that it encompasses the Order and measures in the Code. The respondents' interpretation of paragraph 9(1)(*h*) freezes the language as the industry and technology in 1985.

[126] I have concluded, on the basis of the context within which paragraph 9(1)(*h*) is situated, that the Order and the Code which it implements, are within the CRTC's jurisdiction. Also, I find that the power to regulate programming undertakings is necessarily implied in the express language of the provision.

[127] Paragraph 9(1)(*h*) "can be understood to include 'by necessary implication' all that is needed to enable the [CRTC] to achieve the purpose for which the power was granted", and that "[l]egislative silence with respect to a matter does not necessarily amount to a gap in the legislative scheme" (Ruth Sullivan, *Sullivan on the Construction of Statutes* (Markham: LexisNexis Canada Inc., 2014) at 298, 386 (Sullivan)). As Bastarache J. observed in *ATCO* at paragraph 51, the "doctrine of jurisdiction by necessary implication" functions to ensure that:

> … the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object

> intended to be secured by the statutory regime created by the legislature
> …

[128] Notwithstanding these broad statements of principle, it is axiomatic that the doctrine of necessary implication can only be employed where it is consistent with Parliament's intention. The doctrine cannot be applied where the power is useful, beneficial, or "nice to have"; rather, it is triggered only where the Court is satisfied that, based on the authority granting provisions of the legislation, it is a power that Parliament intended the CRTC to have. I have found that reading the *Broadcasting Act*, in accordance with the governing principle, Parliament intended paragraph 9(1)(*h*) to affect, directly and incidentally, the interests of PUs.

[129] Parliament has stated that the purpose of paragraph 9(1)(*h*) is to enable the CRTC to fulfill its statutory mandate under subsection 5(1). Since the terms and conditions of affiliation agreements directly dictate the terms on which consumers are offered programming services, by necessary implication paragraph 9(1)(*h*) must include the ability to affect affiliation agreements.

[130] Thus, the question is whether the power to regulate affiliation agreements is "practically necessary for the accomplishment of the object intended to be secured by the statutory regime by the legislature" (*ATCO* at para. 51). In paragraph 77 of *ATCO*, the Supreme Court suggested an evidentiary requirement to a finding of necessary implication. The evidence should be sufficient to conclude that the measures in the Code are "practical necessities" for the CRTC to achieve the objectives in subsections 3(1) and 5(1) through its ability to impose terms and conditions on programming services.

[131] Of this, there is ample. The dialogue between the CRTC, BDUs and PUs began in 2013, when a multi-year consultation (*Lets Talk TV*) was launched. At the conclusion of the process the CRTC observed:

> [V]ertically integrated entities have insisted on provisions in affiliation agreements that preclude a BDU from being able to offer programming services on an individual basis or in small packages. … [C]ontract renewals with such entities have included restrictive packaging and pricing demands. … As a result, changes to the [2011] Wholesale Code are required to ensure that affiliation agreements cannot be used to insulate services from choice and flexibility within the retail market. Changes to the [2011] Wholesale Code are also required to ensure that all services, including independent services, are discoverable and able to make their programming available on fair terms, thus fostering greater diversity within the system and ultimately greater choice for Canadians.

[132] Limiting paragraph 9(1)(*h*) to BDUs or, hermetically sealing it such that the exercise of that power could have no consequence on PUs would trigger the well-established category of absurdity or of frustrating Parliament's purpose (Sullivan at 288, 320). It would defeat the purpose of ensuring the broadcasting industry is regulated according to the policies set out in subsection 3(1) and by a single regulator (*Genex Communications Inc. v. Canada (Attorney General)*, 2005 FCA 283 at para. 72, [2006] 2 F.C.R. 199). The CRTC could not effectively impose broadcasting policy on the distribution of programming services without regulating affiliation agreements, either through a mechanism like the Wholesale Code or through conditions of licence. The jurisdiction therefore necessarily extends to both participants in the carriage relationship because there must always be a PU which generates the content of "programming services".

D. Does the Code conflict, in operation or purpose, with the Copyright Act?

[133] Bell asserts a dual violation of the *Copyright Act*. It contends that the Code precipitates an operational conflict with paragraph 3(1)(*f*) and subsection 13(4) of the *Copyright Act*. Bell also says that the Code intrudes on its sole, unfettered rights under these provisions to telecommunicate or to authorize telecommunication of its works and to set the terms and conditions under which it will consent to the telecommunication of its works.

[134] The second arrow in Bell's quiver is that the Code conflicts with the purpose of the *Copyright Act* and the carefully balanced regime contained within by creating a new user right for BDUs that Parliament specifically withheld from subsection 31(2).

[135] To elaborate, subsection 31(2) of the *Copyright Act* limits the user right of BDUs to retransmit works without the authorization of the copyright owner only if the works are carried in local or distant (that is, over-the-air) signals. In other words, subsection 31(2) of the *Copyright Act* provides an exception to copyright infringement for a BDU to retransmit a work only if the communication is a retransmission of a local or distant signal. Thus, by creating the functional equivalent of a user right to retransmit programs carried on pay and specialty signals, the Code upsets the balance between copyright holders and users on which Parliament has settled.

[136] I turn to Bell's first argument, that of an operational conflict with respect to paragraph 3(1)(*f*) and subsection 13(4).

[137] An operational conflict arises where there is an impossibility of compliance between two applicable laws. Mere overlap is insufficient and, as a matter of principle, a court will seek to interpret legislation such that conflict is avoided. This flows from the imperative that legislation is to be interpreted so as to achieve consistency and coherence between laws. In consequence, operational conflicts will be rare (*Thibodeau v. Air Canada*, 2014 SCC 67 at paras. 92–96, [2014] 3 S.C.R. 340).

[138] Paragraph 3(1)(*f*) of the *Copyright Act* provides that "copyright" includes:

3(1) For the purposes of this Act, copyright, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right	**3(1)** Le droit d'auteur sur l'oeuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'oeuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'oeuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :
…	[…]
(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,	**f)** de communiquer au public, par télécommunication, une oeuvre littéraire, dramatique, musicale ou artistique;
…	[…]
and to authorize any such acts.	Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

[139] Subsection 13(4) of the *Copyright Act* provides further rights to the copyright holder:

13(4) The owner of the copyright in any work may assign the right, either wholly or partially, and either	**13(4)** Le titulaire du droit d'auteur sur une oeuvre peut céder ce droit, en totalité ou en partie, d'une façon

generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent.	générale ou avec des restrictions relatives au territoire, au support matériel, au secteur du marché ou à la portée de la cession, pour la durée complète ou partielle de la protection; il peut également concéder, par une licence, un intérêt quelconque dans ce droit; mais la cession ou la concession n'est valable que si elle est rédigée par écrit et signée par le titulaire du droit qui en fait l'objet, ou par son agent dûment autorisé.

[140] Bell contends that through paragraph 3(1)(*f*) and subsection 13(4) of the *Copyright Act*, Parliament gave to it, as the owner of copyright in its programs, exclusive rights which the Code fetters or negates. Bell states this gives rise to an operational conflict because the CRTC has "set itself up as the ultimate arbitrator of the price and commercial terms of carriage" which means that Bell, as a PU, is unable to exercise its "sole right" to telecommunicate or to authorize telecommunication of its works and to license the use of its works with limitations, including rates, as it sees fit – rights provided to Bell as a copyright holder under paragraph 3(1)(*f*) and subsection 13(4).

[141] Bell also points to paragraph 3(1)(*f*) and subsection 13(4) of the *Copyright Act* to argue that the Code, in restricting the commercial terms and prohibitions permitted in affiliation agreements and requiring that others be included, fetters, binds or derogates from the copyright holder's "sole right" to authorize the use of its work and to set the terms and conditions of any assignment or licence for its use.

[142] Bell puts considerable emphasis on the loss of control it has over the price it receives for the use of its works. It claims that the dispute resolution mechanism by which the CRTC sets the rate Bell receives for the use of its copyright conflicts with its exclusive right as the owner. This argument depends on the accuracy of Bell's characterization of the dispute resolution mechanism contained in the Code and whether it in fact trenches on the clear right of the owner to set the terms and conditions, including price, of use.

[143] While Bell is correct that the 2015 Wholesale Code has a direct impact on the content and terms of affiliation agreements, Bell's understanding of the Code and of the dispute resolution mechanism is incorrect. The Code does not allow the CRTC to set the specific rates and *specific terms* of affiliation agreements contrary to the wishes of a PU. While demanding "an unreasonable rate" is a commercially unreasonable practice under subsection 5(a), the only *terms* the 2015 Wholesale Code *requires* in affiliation agreements are: (i) that BDUs provide comparable marketing support to programming services as is given to similar or related services (section 10); and (ii) that related PUs and BDUs offer independent programming services and other BDUs "reasonable terms based on fair market value" in relation to multiplatform distribution rights (sections 11 and 12).

[144] Further, the only time the CRTC establishes a *specific rate* is when it chooses one of the parties' final offers in accordance with the dispute resolution procedure set out in the *Broadcasting Distribution Regulations*. This arises, however, only after *both* of the parties have agreed to renew an agreement, but cannot agree on price. Section 13 of the Code provides:

> 13. If a BDU has not renewed an affiliation agreement to which it is a party with a programming service by 120 days preceding the expiry date

> of the agreement and if **both parties have** confirmed in writing **their** intention to renew the agreement, the parties shall refer the matter to the Commission for dispute resolution under sections 12 to 15 of the *Broadcasting Distribution Regulations*.
>
> [emphasis added]

[145] Moreover, choosing a specific rate only arises after the parties have been unsuccessful in non-binding staff-assisted mediation (*Broadcasting Distribution Regulations*, s. 12(4), 15) and after the CRTC has ensured that the parties have submitted comparable offers (*Broadcasting and Telecom Information Bulletin CRTC 2013-637* (Ottawa: CRTC, 2013) at paras. 12–26).

[146] Accordingly, the 2015 Wholesale Code does not permit the CRTC to fix the price nor does it authorize a BDU to retransmit a program *without the consent of a PU*. While the terms of the affiliation agreement are circumscribed by the 2015 Wholesale Code, the PU must still consent to enter into an agreement with a BDU or consent to renew an existing agreement that authorizes the telecommunication of the content.

[147] To conclude, some provisions of the Wholesale Code constrain how the copyright holder may exercise its copyright by limiting some of the terms and conditions it is allowed to include in the affiliation agreement. This does not violate paragraph 3(1)(*f*) or subsection 13(4). The Code preserves the copyright holder's right to choose *whether* to communicate its work or not. The PU is free to reject the terms offered at any time. The PU is not compelled to enter into an affiliation agreement and retains control over how and when its works will be used. Bell retains its right to exclude anyone from using its works if it chooses to do so. Thus, adherence to both

the Code and the *Copyright Act* is possible, and there is, therefore, no operational conflict between the Code and paragraph 3(1)(*f*) or subsection 13(4) of the *Copyright Act*.

[148] In broad terms, Bell's argument proceeds from a misconception of the nature of copyright protection. Intellectual property rights exclude or prevent others from copying artistic creation or, in the case of patents, practicing an intention. The holder of a copyright or owner of a patent is not immune or exempt from laws of general application. While they enjoy the benefit of market exclusivity, they must nevertheless abide the rules governing the particular market in which they have chosen to participate.

[149] Support for this, if more is needed, can be found in *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42 at para. 23, [2014] 2 S.C.R. 197. There the Court considered whether the *Status of the Artist Act*, S.C. 1992, c. 33, which permitted collective bargaining by artists for a minimum fee, conflicted with the *Copyright Act*. The Court concluded that establishing a minimum fee for the use of copyright did not affect the rights conferred on copyright holders under section 3 of the *Copyright Act*, as the decision of whether or not to allow the use of an artistic work remained with the copyright holder.

[150] The rights granted under the *Copyright Act*, in paragraph 3(1)(*f*) and subsection 13(4) are not unequivocal. They may be conditioned by other legislation with which the copyright intersects. Just as a patent owner has the right to exclude others from practicing the invention, patent owners are nonetheless governed by all other relevant laws (*Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76 at para. 64, [2002] 4 S.C.R. 45). The price at which

patented pharmaceuticals are sold is regulated (see, for example, the Patented Medicine Prices Review Board, established under the *Patent Act* (R.S.C., 1985, c. P-4) ss. 78–103). Another example of a limitation on intellectual property rights is found in section 32 of the *Competition Act*, R.S.C. 1985, c. C-34. It is not a defence to an allegation of anti-competitive conduct to assert that one is simply exercising an intellectual property right. The "sole right" of use (*Copyright Act*, s. 3(1)) does not confer an immunity from other legislation.

[151] Bell also argues that a purpose conflict arises.

[152] A purpose conflict arises where, while it is possible to comply with the letter of both provisions, "applying one provision would frustrate the *purpose* intended by Parliament in another" (*Cogeco* at para. 44). As the Supreme Court in *Cogeco* stated at paragraph 45, "… the CRTC may not choose means … which would be incompatible with the purposes of [the *Copyright Act*]".

[153] It is well-established that the purpose of the *Copyright Act* is to provide a "balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator" (*Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 at para. 30, [2002] 2 S.C.R. 336).

[154] To achieve this goal, the *Copyright Act* creates a statutory monopoly which prevents the exploitation of work in specified ways without the copyright holder's consent. As noted above,

paragraph 3(1)(*f*) recognizes the sole right to authorize the use of its work, and includes the sole right to exploit the full value of the work.

[155] Bell argues that the Code creates a functional equivalent of a user right for BDUs to retransmit programs in pay and specialty signals, and that this frustrates Parliament's purpose in creating a carefully balanced copyright regime. It draws a parallel to *Cogeco*. There, it will be recalled, the CRTC sought to give broadcasters (that is, programming undertakings) the right to prohibit the retransmission of work carried in any signal, a right that was deliberately withheld from section 21 of the *Copyright Act*. Analogous to *Cogeco*, Bell submits the Code creates a user right deliberately withheld from subsection 31(2) of the *Copyright Act*.

[156] I disagree. A corollary to the conclusion above that PUs must consent to the use of its work and the terms and conditions of the affiliate agreement is that the Code does not confer on BDUs a user right to retransmit programs in pay and specialty signals. The consensual nature of this mechanism makes it difficult to characterize the Code as "effectively overturn[ing]" a copyright holder's "sole right" to determine the terms under which it will sell or license the use of its work. Nor can a copyright holder be dragged into arbitration without consent under the Code. Therefore, no user right deliberately withheld from the *Copyright Act* in subsection 31(2) is created by the Code.

[157] I also accept the argument of the respondents that the Code does not upset the balance of rights of copyright holders and rights of users or frustrate Parliament's purpose. The Code does not purport to regulate, directly or indirectly, copyright interests of the PUs. Rather, the Code

establishes minimum terms and conditions governing the affiliation agreements, which only exist where a PU has decided that it wishes to license the use of its copyright. It preserves the right of a PU to refuse the telecommunication of their copyright protected programs without their consent.

E. Is Bell barred from a judicial review remedy by reason of its conduct?

[158] Blue Ant Media contends that Bell's appeal should be dismissed on the basis that, by virtue of its conduct, it is estopped from seeking equitable relief. It relies on the principle that:

> It is settled law that estoppel cannot confer jurisdiction. However, there is a complementary principle that: "no one has a right so to conduct himself before a tribunal as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him, to turn around and say, 'You have no jurisdiction.' You ought not to lead a tribunal to exercise jurisdiction wrongfully." This is known as the rule in *Ex parte Pratt*.
>
> (Blue Ant Media's Memorandum of Fact and Law at para. 86 (footnotes omitted))

[159] The facts that trigger the application of this principle are said to lie in two events.

[160] First, in seeking the CRTC's approval of its acquisition of Astral in 2013, Bell accepted, as a condition of licence, the obligations of the predecessor 2011 Wholesale Code. In approving Bell's acquisition the Commission noted that "… but for these safeguards … it would not have been persuaded that the present transaction is in the public interest and would not have approved it" (*Broadcasting Decision CRTC 2013-310* (Ottawa: CRTC, 2013)). Blue Ant Media also points to the fact that Bell voluntarily accepted the imposition of the 2015 Wholesale Code as a condition of licence for several BDUs without raising any jurisdictional objection.

[161] In light of the disposition of the appeal, this argument need not be addressed. There is no remedy which Bell should be denied on discretionary grounds. I will, nevertheless, observe that Bell's conduct did not "lead" the CRTC to do anything. The CRTC assumed in both circumstances, that it had the authority to impose the requirements that it did. Nor, in acquiescing to that authority, did Bell waive or relinquish any right it had to advance arguments in the future to the CRTC's jurisdiction. Jurisdiction cannot arise from waiver or acquiescence. Further, given the nature of the issues raised by Bell and their consequences across a spectrum of industry and public interests, certainty and predictability of the CRTC's jurisdiction are important counter-veiling considerations. Had Bell succeeded, I would not have denied it the relief it sought on this basis.

[162] For the foregoing reasons, I find that the Order was within the authority of the CRTC under paragraph 9(1)(*h*) of the *Broadcasting Act* and that it does not conflict with the *Copyright Act*, either by operation or in purpose.

V. Conclusion

[163] I would dismiss the appeal, with costs.

"Donald J. Rennie"

J.A.

WOODS J.A.

[164] I agree with the reasons of my colleague, Justice Rennie, with the exception of his finding that the CRTC reasonably concluded that paragraph 9(1)(*h*) of the *Broadcasting Act* enables the CRTC to issue the 2015 Wholesale Code and the Order.

[165] By way of background, the Order was issued under paragraph 9(1)(*h*) to enable the CRTC to enforce parts of the 2015 Wholesale Code. This includes regulating the terms and conditions of carriage of programming services. The 2015 Wholesale Code was not issued pursuant to paragraph 9(1)(*h*) and is not itself an enforceable instrument.

[166] Accordingly, the issue to be decided is whether the CRTC reasonably concluded that it has the power under paragraph 9(1)(*h*) to issue the Order, and by implication the power to enforce the 2015 Wholesale Code to the extent that its terms are encompassed by the Order. The CRTC did not provide reasons for this conclusion.

[167] In my view, it is not reasonable to interpret paragraph 9(1)(*h*) as granting the CRTC a general power to regulate the terms and conditions of affiliation agreements. This interpretation goes far beyond the ordinary meaning of the language in paragraph 9(1)(*h*) and is not reasonably supported by a textual, contextual and purposive interpretation of the legislation.

[168] By its terms, paragraph 9(1)(*h*) provides the CRTC with the power to require a licensee to carry specified programming services, and if so required, it provides an additional power to

mandate such terms and conditions of carriage of those services as the Commission deems appropriate. This is reflected in the French and English versions below:

9 (1) Subject to this Part, the Commission may, in furtherance of its objects,	**9 (1)** Sous réserve des autres dispositions de la présente partie, le Conseil peut, dans l'exécution de sa mission :
…	[…]
(*h*) require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission.	**(*h*)** obliger ces titulaires à offrir certains services de programmation selon les modalités qu'il précise.

[169] The ordinary meaning of this provision does not encompass a general power to regulate the terms and conditions of carriage. Such regulation must relate to terms and conditions of programming services that the CRTC specifies and requires to be provided by a licensee.

[170] My colleague suggests that a broader meaning of paragraph 9(1)(*h*) is demonstrated by a contextual and purposive interpretation. The context and purpose of the legislation is important, but in my view they do not reasonably support an interpretation that the ordinary meaning of paragraph 9(1)(*h*) cannot bear.

[171] My colleague has applied the doctrine of necessary implication to expand the language of paragraph 9(1)(*h*) to include powers that are necessary to fulfill the CRTC's mandate in subsection 5(1) of the *Broadcasting Act*. However, the general objectives in subsection 5(1) are

subject to other provisions of the *Broadcasting Act*. This is apparent from the emphasized words below:

5 (1) Subject to this Act and the *Radiocommunication Act* and to any directions to the Commission issued by the Governor in Council under this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2).	**5 (1)** Sous réserve des autres dispositions de la présente loi, ainsi que de la *Loi sur la radiocommunication* et des instructions qui lui sont données par le gouverneur en conseil sous le régime de la présente loi, le Conseil réglemente et surveille tous les aspects du système canadien de radiodiffusion en vue de mettre en œuvre la politique canadienne de radiodiffusion.

[172] In my view, it is not reasonable to apply the doctrine of necessary implication in this case. The general objectives set out in subsection 5(1) are subject to the specific powers granted to the CRTC in other parts of the legislation, which include paragraph 9(1)(*h*).

[173] As this appeal only concerns paragraph 9(1)(*h*), I express no view as to whether the CRTC's objective in issuing the Order could have been achieved by some other means.

[174] For these reasons, I would conclude that the interpretation of paragraph 9(1)(*h*) that is reflected in the Order is unreasonable. I would allow the appeal, set aside the Order, and award one set of costs to the appellants.

"J. Woods"

J.A.

NADON J.A. (concurring)

[175] I agree with Woods J.A. that paragraph 9(1)(*h*) of the *Broadcasting Act* does not allow the CRTC to enact the Order so as to give effect to the *2015 Wholesale Code*.

[176] Both Rennie and Woods JJ.A., conclude that the question of whether paragraph 9(1)(*h*) of the *Broadcasting Act* confers authority to the CRTC to issue the Order must be decided on the standard of reasonableness. In my respectful opinion, the applicable standard is correctness.

[177] At paragraph 97 of his reasons, Rennie J.A. points out that although the Supreme Court in *Cogeco* did not say in express terms what standard it was applying, it cannot be doubted that correctness was the standard applied. In the words of Rennie J.A.:

> The exercise in which it [the Supreme Court] engaged was one of pure statutory interpretation of the text of paragraph 9(1)(*h*) when situated in the context of the *Broadcasting Act*. The language of reasonableness plays no role in the Court's analysis.

[178] At paragraph 98 of his reasons, Rennie J.A. makes the point, with which I agree, that the standard applicable to the question of whether paragraph 9(1)(*h*) confers authority on the CRTC to enact the order should not "change simply because, as a matter of procedure, it arose in the former case as a reference and in the present case as an appeal". How is it that the issue now before us, identical in substance to the issue in *Cogeco*, stands to be decided on a different standard of review because it comes to the Court by way of a different process? That, in my respectful opinion, cannot be. Consequently, unless I am misreading *Cogeco*, the standard applied by the Supreme Court in that case is binding upon us and is therefore the standard that

should be applied in the present matter (see also *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*], at paragraph 62).

[179] Were it not for *Cogeco*, I concede that I would be bound to conclude, for the reasons given by Rennie J.A., that the reasonableness standard is applicable. However, were it open to me, I would gladly follow the dissenting judgment of Côté J. in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal*, 2018 SCC 22, [2018] 6 W.W.R. 211, [*West Fraser Mills*].

[180] In *West Fraser Mills*, in concluding that section 26.2(1) of the *Occupational Health and Safety Regulation*, B.C. Regulations 296/97 was beyond the authority of the Workers' Compensation Board of British-Columbia (the Workers' Compensation Board) and thus *ultra vires*, Côté J. made a distinction between acts of an administrative body pertaining to its adjudicative functions and those pertaining to its legislative functions (*West Fraser Mills* at paragraph 59). This led her to say that "[t]he scope of the body's regulation-making authority is a question of pure statutory interpretation: Did the legislature permit that body to enact the regulation at issue, or did the body exceed the scope of its powers?"

[181] At paragraph 66, Côté J. concluded that the powers that the Workers' Compensation Board could exercise were those granted to it by the legislature of British Columbia. Hence, in her view, correctness ensured the Workers' Compensation Board remained "within the boundaries" of the authority given to it and that it did not "aggrandize its regulation-making power against the wishes of the province's elected representatives."

[182] In paragraphs 67 and 68, Côté J. accepted that courts were to give a broad and purposive interpretation to legislation authorizing an administrative body to enact regulations, adding, however, that it was an entirely different matter to defer or give way to such a body's incorrect conclusion regarding the authority given to it by the legislature.

[183] In concluding that correctness was the applicable standard, Côté J. said that the majority's rationale in support of the standard of reasonableness "escaped [her]" (paragraph 70). I agree entirely with her view of the majority's reasons and, as I indicated earlier, were it open to me to decide otherwise, I would conclude, without having to rely on *Cogeco*, that the correctness standard was the standard upon which the present decision of the CRTC should be reviewed.

[184] I should also refer to Brown J.'s dissenting judgment in *West Fraser Mills* where he says, at paragraph 114, that the issue before the Court "does not go to the *reasonableness* of the Board's decision to adopt s. 26.2(1), but rather to its *authority* to do so" (emphasis in the original). Brown J.'s remarks are entirely apposite to the question now before us in this appeal. In other words, the question before us is whether the CRTC, acting in its legislative capacity, as was the case for the Workers' Compensation Board in *West Fraser Mills*, is empowered by paragraph 9(1)(*h*) of the *Broadcasting Act* to enact the Order. Surely, in my respectful opinion, that cannot be a matter to be determined on the standard of reasonableness.

[185] In further support of this view is paragraph 110 of Brown J.'s concurring reasons in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 [*Canadian Human Rights Commission*] where he reminds the majority that in *Dunsmuir*, the

Supreme Court, at paragraph 30 of its reasons, approved the words of Cromwell J. to the effect that "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority;[…]": "Appellate Review: Policy and Pragmatism" in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, p. V-12. See also *ProLife Alliance v. British Broadcasting Corporation*, 2003 UKHL 23, [2004] A.C. 185 at para. 75.

[186] Before concluding, I also wish to make the following additional remarks regarding the standard of review.

[187] First, there can be no doubt that there are some in the judiciary and in the academy who are dissatisfied with the present state of judicial review in this country. Judicial review, to put it mildly, is in an incoherent and confused state which undermines the predictability of outcomes and, in my respectful opinion, undermines the rule of law. How can counsel advise their clients in this area of the law when the state of judicial review always seems to be is in a continual state of construction and reconstruction? Counsel, in my respectful opinion, are placed in an impossible situation. They can only speculate as to what the possible outcome might be in any given case. (P. Daly, "The Signal and the Noise in Administrative Law" (January 2017, Cambridge University Legal Studies Research Paper Series); M. Lewans, "Administrative Law and Judicial Deference" (Bloomsbury: Hart Studies in Comparative Public Law); M. Mancini, "Not Just a Pillowfight: How the S.C.C. Has Muddied the Standard of Review" in Advocates for the Rule of Law (blog) (online: http://www.ruleoflaw.ca/not-just-a-pillowfight-how-the-scc-has-muddied-the-standard-of-review/); David Stratas, "Looking Past Dunsmuir: Beginning Afresh"

in Double Aspect (blog) (online: https://doubleaspect.blog/2018/03/08/looking-past-dunsmuir-beginning-afresh/).

[188] The Supreme Court's recent judgments in Canadian Human Rights Commission; West Fraser Mills; Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd., 2016 SCC 47, [2016] 2 S.C.R. 293 [East Edmonton Mall], Canada (Public Safety and Emergency Preparedness) v. Tran, 2015 FCA 237, [2016] 2 F.C.R. 459 serve as good examples to support the above proposition.

[189] My colleague, Rennie J.A., with whom I cannot agree with respect to the standard applicable to the CRTC's interpretation of paragraph 9(1)(*h*) and hence its meaning, has nonetheless written excellent reasons. His reasons, which I have read in draft, comprise 163 paragraphs of which 64 (paragraphs 38 to 102) deal with the standard of review. His extensive discussion of the standard of review is made necessary by reason of the Supreme Court's jurisprudence. I do not exaggerate when I say that that question has almost taken precedence over the substantial issues which courts are called upon to decide and, in this case, namely whether or not the CRTC under paragraph 9(1)(*h*) has the authority to do what it purports to do. Our efforts in this case should not be focussed on determining what the applicable standard of review is but on discovering the true meaning of paragraph 9(1)(*h*) of the *Broadcasting Act*, *i.e.* whether or not the CRTC has the authority to enact the Order.

[190] In my opinion, it should be self-evident that such a question should be decided on the standard of correctness, more so considering that Parliament has clearly said, by way of

subsection 31(2) of the *Broadcasting Act*, that appeals on questions of law or jurisdiction are to be taken to this Court upon leave. Thus, Parliament has sent an unequivocal signal that questions of law or of jurisdiction, arising from decisions made by the CRTC, are to be determined by this Court, which, in my view, can only mean on a standard of correctness.

[191] The existence of subsection 31(1) of the *Broadcasting Act* to the effect that the CRTC's orders are final and conclusive does not, in any way, detract from the foregoing proposition. Thus, subject to an appeal under subsection 31(2), decisions of the CRTC are indeed final and conclusive. However, if an appeal is taken to this Court under subsection 31(2), then that appeal is to be determined by this Court on the standard of correctness. There is nothing in either subsection 31(1) or in subsection 31(2) which would lead a fair reader of the provisions to conclude that Parliament intended for this Court to defer on questions of law or of jurisdiction. For the sake of completeness, I hereby reproduce subsections 31(1) and 31(2) of the *Broadcasting Act*:

31(1) Except as provided in this Part, every decision and order of the Commission is final and conclusive.	**31(1)** Sauf exceptions prévues par la présente partie, les décisions et ordonnances du Conseil sont définitives et sans appel.
31(2) An appeal lies from a decision or order of the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction if leave therefor is obtained from that Court on application made within one month after the making of the decision or order sought to be appealed from or within such further time as that Court under special circumstances allows.	**31(2)** Les décisions et ordonnances du Conseil sont susceptibles d'appel, sur une question de droit ou de compétence, devant la Cour d'appel fédérale. L'exercice de cet appel est toutefois subordonné à l'autorisation de la cour, la demande en ce sens devant être présentée dans le mois qui suit la prise de la décision ou ordonnance attaquée ou dans le délai supplémentaire accordé par la cour dans des circonstances particulières.

[192] Notwithstanding the Supreme Court's decision in *East Edmonton Mall*, with which I do not agree but which is binding upon me, I have never understood why reviewing courts must defer to administrative bodies on questions of law where Parliament itself does not so require. As I have already indicated, the only possible interpretation of subsection 31(2) of the *Broadcasting Act*, and similar clauses in other statutes, is that Parliament intended that courts provide the answers to the questions of law raised before them. To say that this Court must defer to the CRTC's interpretation of paragraph 9(1)(*h*) requires us to disregard clear legislative intent. Otherwise, subsection 31(2) is pointless. If Parliament intends for this Court to defer to the CRTC's interpretation of the law, Parliament can easily say so. It is not up to the courts to presume such an intention when Parliament has not, by any words found in the *Broadcasting Act*, required deference. In my view, the proper approach should be to defer only whenever Parliament expressly or impliedly wishes us to defer to an administrative body's interpretation of the law. Section 31 of the *Broadcasting Act* is not to that effect.

[193] In *East Edmonton Mall*, in concluding her reasons for the majority concerning the applicable standard of review, Karakatsanis J. indicates, at paragraph 35 that "[t]he contextual approach can generate uncertainty and endless litigation concerning the standard of review". In her view, the solution to this problem is for Parliament and the provincial legislatures to make clear in the legislation what standard of review they prefer. That, in my respectful opinion, is the legal world upside down.

[194] Although trite, it is important to keep in mind that legislation enacted by Parliament or by the provincial legislatures has only one meaning. There are no multiple answers to the meaning

of legal provisions, notwithstanding that there may be ambiguity. This is why, in applying the standard of reasonableness to an administrative body's interpretation of legal provisions, no judge would ever write that although a board's interpretation is incorrect, its interpretation still passes muster because it is a possible interpretation of the legal provision at issue. The Supreme Court's direction that courts must apply the standard of reasonableness to administrative bodies' interpretation of the law has led some judges to express the view that, in most cases, there is usually only one possible reasonable interpretation of the legal provisions at issue (David Stratas: "The Canadian Law of Judicial Review: Some Doctrine and Cases", Sept. 18, 2018 at page 85, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924049).

[195] All of this strongly suggests that judges are ill at ease, as they should be, of sanctioning legal interpretations which, in their view, are incorrect. Some commentators have even suggested that, in the end, the Supreme Court itself, without so saying, is in fact applying a correctness standard under the guise of reasonableness (Paul Daly: "Uncovering Disguised Correctness Review? *Wilson v. British Columbia (Superintendant of Motor Vehicles)*, 2015 SCC 47" , (https://www.administrativelawmatters.com/blog/2015/10/28); Hon. Joseph T. Robertson: "Dunsmuir's Demise & The Rise of Disguised Correctness Review" (https://www.administrativelawmatters.com/blog/2015/02/15); David Stratas: "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42 Queen's L.J. 27, note 39.

[196] Because in most cases there are no multiple possible answers with regard to the meaning of legislation, a reasonable interpretation must be correct. If it is not correct, it surely must be

unreasonable because Parliament did not intend courts to sanction incorrect interpretations of its legislation. Consequently, I am satisfied that Parliament did not intend for the CRTC to interpret paragraph 9(1)(*h*) in a manner which is not in accordance with its intent. Parliament's intent with regard to paragraph 9(1)(*h*) can only be determined by this Court. By that, I mean that it is this Court's responsibility to determine whether or not the CRTC's view of paragraph 9(1)(*h*) is the correct view. If it is not, then the Order cannot stand.

[197] To conclude, the rules concerning the standard of review should not be in constant flux: they should be clear. If Parliament sends a clear message that we are to defer to an administrative body's interpretation of the law or of its jurisdiction, then we should give effect to Parliament's direction, subject to constitutional requirements. However, when Parliament, as it has done here with subsection 31(2) of the *Broadcasting Act*, sends a message directing this Court to provide answers to legal questions arising from decisions made by the CRTC, we should do what courts have been doing for a very long time and that is to determine, on a correctness standard, what the answers are to the legal questions. It seems to me, with respect, that deferring to an administrative body's interpretation of the law is, in the circumstances which I have set out above, an abandonment of our judicial role, more so considering that expounding the law is the *raison d'être* of our existence.

[198] I will end these remarks by quoting with approval from pages 1 and 2 of an article entitled, "10 Things I Dislike About Administrative Law", where the author, Mark Mancini writes the following:

> One's personal list of problems with administrative law will inevitably reflect one's views of what administrative law *is* and *should be*, and

> indeed, what law *is* and *should be*. Reasonable people will disagree on this, but perhaps we could agree on two fundamental starting points (even if we disagree on their interaction). First is the idea that absent constitutional objection, legislative delegation to administrative decision-makers should be respected, and courts should give effect to legislative language using the ordinary tools of statutory interpretation (set out in cases like *Rizzo*, *Canada Trustco*). Second is the Rule of Law; courts must survey the statutory boundaries of inferior tribunals to determine (1) the level of deference owed and (2) whether the decision is legal. On this account, administrative law can be understood as a form of control over the diffused form of decision-making the administrative state has wrought.
>
> As I hope to show (quite tentatively, I might add), the Supreme Court has moved away from these first principles, often at the expense of the Rule of Law. The main point of the Supreme Court's administrative law doctrine is an acceptance of deference of the "unrestricted" power of administrative decision-makers (see *West Fraser* at para 11). By limiting the circumstances in which courts can review the propriety of the administrative state, the Court has "read in" a doctrine of deference that may not be prescribed by the enabling statute or the role of courts to enforce constitutional precepts as "guardians of the Constitution" (*Hunter v. Southam*). The Court has constructed its own administrative law rules to operationalize its vision of deference. [Emphasis in the original]
>
> (Mark Mancini: "10 Things I Dislike About Administrative Law" in Double Aspect (blog) (online: https://doubleaspect.blog/2018/09/10/10-things-i-dislike-about-administrative-law/).

[199] Therefore, I would allow the appeal with costs and set aside the CRTC's Order for the reasons given by Woods J.A.

"M. Nadon"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM BROADCASTING ORDER 2015-439 OF THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION DATED SEPTEMBER 24, 2015

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STYLE OF CAUSE:	BELL CANADA and BELL MEDIA INC. v. 7265921 CANADA LTD. et al
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 14, 2017
REASONS FOR JUDGMENT BY:	WOODS J.A.
CONCURRING REASONS BY:	NADON J.A.
DISSENTING REASONS BY:	RENNIE J.A.
DATED:	OCTOBER 1, 2018

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