

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20110228

Docket: A-113-10

Citation: 2011 FCA 64

**CORAM: NADON J.A.
SHARLOW J.A.
LAYDEN-STEVENSON J.A.**

**IN THE MATTER OF
*THE BROADCASTING ACT, S.C. 1991, C. 11;***

**AND IN THE MATTER OF
THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS
COMMISSION'S BROADCASTING REGULATORY POLICY CRTC 2010-167 AND
BROADCASTING ORDER CRTC 2010-168;**

**AND IN THE MATTER OF AN APPLICATION BY WAY OF A REFERENCE
TO THE FEDERAL COURT OF APPEAL PURSUANT TO SECTIONS 18.3(1) AND 28(2)
OF THE *FEDERAL COURTS ACT, R.S.C. 1985, C. F-7.***

Heard at Toronto, Ontario, on September 13 and 14, 2010.

Judgment delivered at Ottawa, Ontario, on February 28, 2011.

REASONS FOR JUDGMENT BY:

SHARLOW J.A.

CONCURRED IN BY:

LAYDEN-STEVENSON J.A.

DISSENTING REASONS FOR JUDGMENT BY:

NADON J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] In Broadcasting Order CRTC 2010-168, the Canadian Radio-Television and Telecommunications Commission referred the following question to this Court pursuant to subsections 18.3(1) and 28(2) of the *Federal Courts Act*:

Is the Commission empowered, pursuant to its mandate under the *Broadcasting Act*, to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations?

Le Conseil a-t-il la compétence, en vertu du mandat que lui confère la *Loi sur la radiodiffusion*, pour établir un régime permettant aux stations privées de télévision locale de choisir de négocier avec les entreprises de distribution de radiodiffusion une juste valeur en échange de la distribution des services de programmation diffusée par ces stations de télévision locales?

Background

[2] The regime to which this question refers is sometimes called the “value for signal” regime. In general terms, a value for signal regime would permit a private local television station to negotiate with cable television service providers (referred to as “broadcast distribution undertakings” or “BDUs”) for an arrangement under which the BDUs provide consideration to the television station for the right to retransmit its signals.

[3] The operators of private local television stations generally favour the proposed value for signal regime. A number of them, namely CTVglobemedia Inc., V Interactions Inc., Newfoundland Broadcasting Co. Ltd. and Canwest Television Limited Partnership, submitted at the hearing of this reference that the Commission has the statutory authority to implement such a regime.

[4] BDUs generally do not favour the proposed value for signal regime. A number of BDUs, namely Bell Canada, Bell Aliant Regional Communications, Cogeco Cable Inc., Rogers Communications Inc., Shaw Communications Inc. and Telus Communications Co., submitted at the hearing of this reference that the Commission does not have the statutory authority to implement a value for signal regime.

[5] Under the current regime, BDUs pick up the over-the-air signals of private local television stations and retransmit them to their subscribers for a fee. The Commission requires BDUs to provide the following benefits to private local television stations for those signals:

- (a) *Mandatory carriage:* A BDU must distribute a local station's signals to the BDU's subscribers in that station's local market.
- (b) *Preferential channel placement:* A BDU must put the local station's signal on a channel more likely to be selected by subscribers.
- (c) *Simultaneous distribution:* If a BDU is retransmitting a program from a local station at the same time as it is retransmitting the same program from an American station on a different channel, the BDU must substitute the local station's advertisements in place of those appearing on the American station.
- (d) *Local programming improvement fund:* Pursuant to a 2008 initiative of the Commission, a BDU must contribute 1.5% of its gross revenues to a local programming improvement fund accessible by local stations in non-metropolitan markets.
- (e) *Payments for carriage of distant signals:* Pursuant to another 2008 initiative of the Commission, effective August 31, 2011, a BDU wishing to distribute a local television station's signal outside of that station's local market must obtain, through a free market negotiation that may involve the payment of compensation, the consent of the station. For example, a BDU would require the consent of a Toronto local station to transmit that station's signal to BDU subscribers in Halifax.

[6] The Commission has concluded that the existing regulatory model does not adequately deal with recent changes to the broadcasting business environment. Among the changes noted by the Commission are the development of direct-to-home satellite television services, the development of speciality television channels that are permitted to receive fees directly from BDUs that carry them, and the widespread adoption of alternative media platforms. These changes have caused advertising revenues for private local television stations to fall while the revenues of BDUs have increased, resulting in a significant shift in their relative market positions and a financial crisis for the private local television stations. The Commission has concluded that this financial crisis may be averted by adopting a value for signal regime that invokes market forces.

[7] The proposed value for signal regime is fully described in Broadcasting Regulatory Policy CRTC 2010-167 entitled “*A group-based approach to the licensing of private television services*”, issued on March 22, 2010 (which I refer to for convenience as the “2010 Policy” or *la « Politique 2010 »*).

[8] The relevant portions of the 2010 Policy are quoted below, but at this point it is useful to summarize the main features of the proposed value for signal regime:

- A private local television station would have the right to choose to negotiate with BDUs for compensation for the right to retransmit the station’s signals. If no agreement is reached, the station could prevent the BDUs from retransmitting its signals.

- A private local television station that chooses to participate in the value for signal regime would forego all existing regulatory protections, including mandatory distribution, priority channel placement and simultaneous substitution.
- The regulatory protections (as in place from time to time) would continue to benefit any private local television station that chooses not to participate in the value for signal regime.
- The Commission would be involved in the negotiation of agreements under the value for signal regime only if the parties do not negotiate in good faith or if the parties ask the Commission to arbitrate.

[9] Simply stated, the BDUs' legal objection to the proposed value for signal regime is based on the following reasoning. The *Copyright Act* is the only statute that can govern the right of a broadcaster to control the retransmission of its signals. The *Copyright Act* precludes a private local television station from demanding that a BDU pay a royalty for the right to retransmit the station's signals. Therefore, BDUs have a statutory user right to retransmit the signals of a private local television station without paying a royalty. It necessarily follows that the statutory authority of the Commission under the *Broadcasting Act* should not be interpreted in a manner that would permit a private local television station to block retransmission by a BDU that refuses to pay compensation for a retransmission right.

[10] The private local television stations argue that this legal argument has no merit and that the *Copyright Act* does not preclude the Commission from implementing a value for signal regime.

Procedural history

[11] The legal debate now before this Court arose in the context of proceedings before the Commission that resulted in its adoption of the 2010 Policy. In the 2010 Policy, the Commission makes a number of policy decisions relating to the licensing of private local television services.

[12] In the 2010 Policy, the Commission determined among other things that a value for signal regime is necessary to ensure the fulfilment of the policy objectives set out in subsection 3(1) of the *Broadcasting Act*. The 2010 Policy also states the main elements of the value for signal regime that the Commission proposes to implement if it is found to have the statutory authority to do so.

[13] Paragraphs 151 to 168 of the 2010 Policy contain the analysis and conclusions of the Commission that are relevant to the value for signal issue. Those paragraphs read as follows (footnotes omitted):

151. In Broadcasting Public Notice 2008-100, the Commission considered whether or not to grant a fee for carriage to conventional television broadcasters, and elected not to do so. However, the question considered in the current proceeding is a substantially different one. In exploring the issue of a negotiated fair value for signals, the Commission is considering whether market forces can be invoked to resolve what has now become a long standing area

151. Dans l'avis public de radiodiffusion 2008-100, le Conseil s'est penché sur le bien-fondé d'accorder un tarif de distribution aux télédiffuseurs traditionnels et a décidé de ne pas le faire. Cependant, la question à considérer dans le cadre de la présente instance est considérablement différente. Le Conseil, examinant la question de la juste valeur négociée, s'interroge sur la possibilité de recourir aux forces du marché pour résoudre ce qui est

of tension between conventional television broadcasters and BDUs.

152. In approaching the issue, the Commission has been guided by specific provisions of the Act. Section 3(1)(e) states that "each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming," while section 3(1)(f) states that "each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian ... resources"

153. With respect to the public broadcaster, the Commission notes that section 3(1)(m)(vii) of the Act states that the programming provided by the CBC should "be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose." As explained further below, the regime foreseen by the Commission would allow broadcasters to require program deletion when negotiating for a fair value for the distribution of their programming services. In light of the objective above, the Commission considers that it would be inconsistent to permit the CBC to require deletion of its programming from a BDU and hence prevent the public from receiving its programming. Moreover, during its appearance at the hearing, the CBC indicated that it fully understands the importance of its mandate and clearly agrees with the Commission's position in that regard, as it spontaneously stated that it would not "play with threatening to pull our signal or having our signal not

devenu une source permanente de friction entre les télédiffuseurs traditionnels et les EDR.

152. Le Conseil s'est inspiré, dans son approche de la question, de certaines dispositions précises de la Loi. L'article 3(1)e) stipule que « tous les éléments du système doivent contribuer, de la manière qui convient, à la création et la présentation d'une programmation canadienne »; l'article 3(1)f), que « toutes les entreprises de radiodiffusion sont tenues de faire appel au maximum, et dans tous les cas au moins de manière prédominante, aux ressources [...] canadiennes [...] ».

153. En ce qui a trait au télédiffuseur public, le Conseil note que l'article 3(1)m)(vii) de la Loi prévoit que la programmation de la SRC devrait « être offerte partout au Canada de la manière la plus adéquate et efficace, au fur et à mesure de la disponibilité des moyens. » Tel qu'expliqué ci-dessous, le régime envisagé par le Conseil permettrait aux télédiffuseurs d'exiger la suppression d'émissions lors de leurs négociations pour la valeur juste de la distribution de leurs services de programmation. Le Conseil estime que de permettre à la SRC d'exiger d'une EDR la suppression de sa programmation, et d'ainsi empêcher le public de recevoir sa programmation, n'irait pas dans le sens de l'objectif ci-dessus. De plus, lors de sa comparution à l'audience, la SRC a indiqué qu'elle comprend tout à fait l'importance de son mandat et qu'elle est entièrement d'accord avec l'opinion du Conseil à cet égard, en affirmant spontanément qu'elle [traduction] « ne menacerait pas de retirer son signal ou de laisser son signal non

negotiated or not carried by the BDU." Accordingly, the Commission has determined that the market-based regime set out below will apply only to private local television stations. The distinctive situation and needs of the CBC will be addressed in the context of the public broadcaster's next licence renewal.

154. The Commission reiterated in Broadcasting Public Notice 2008-100 that where regulation is necessary it should be as targeted as possible and impose the least burdensome constraints; that industry solutions should be preferred to regulatory intervention; and that the broadcasting system, as a whole, should be calibrated such that no single player or group of players can exercise undue influence.

155. The portion of this regulatory policy that has dealt with group-based licensing has focused on the effective continuation of vibrant and effective Canadian programming in the context of the larger groups that now make up the Canadian broadcasting landscape. It now remains to determine whether each element of the broadcasting system is contributing in an appropriate way, and whether, in light of the enormous and accelerating changes in the system, it is appropriate to view the relationship between BDUs and broadcasters in a way that differs from that which has become established.

156. In 1971 the Commission published its Policy Statement on Cable Television, entitled, appropriately, "Canadian broadcasting – 'A single system'." A key policy principle set out in that report was that "television stations are the suppliers,

négocié ou non distribué par l'EDR ». Par conséquent, le Conseil conclut que le régime par marchés énoncé ci-dessous ne s'appliquera qu'aux stations privées de télévision locale. La question de la situation et des besoins uniques de la SRC sera traitée dans le cadre du prochain renouvellement de la licence du télédiffuseur public.

154. Dans l'avis public de radiodiffusion 2008-100, le Conseil a rappelé que la réglementation, lorsqu'elle était nécessaire, devrait être aussi ciblée que possible et imposer les restrictions les moins contraignantes, qu'il faudrait préférer à une intervention réglementaire les solutions de l'industrie, et enfin calibrer l'ensemble du système de radiodiffusion de telle sorte qu'aucun joueur ou groupe de joueurs ne puisse exercer une influence indue.

155. La partie de la politique réglementaire qui traite de l'attribution de licences par groupe s'est concentrée sur le maintien efficace d'une programmation canadienne vibrante et efficace dans le contexte des grands groupes qui forment aujourd'hui le paysage de la radiodiffusion canadienne. Reste à voir si tous les éléments du système de radiodiffusion contribuent à celui-ci de façon appropriée et si, compte tenu des changements gigantesques et accélérés du système, il vaut la peine de voir la relation entre les EDR et les télédiffuseurs avec un recul qui offrirait une autre vision de ce qui a été établi.

156. En 1971, le Conseil a publié un énoncé de politique sur la télévision par câble intitulé à juste titre « La radiodiffusion canadienne, "un système unique" ». Un des principes politiques les plus importants parmi ceux énoncés dans

and cable television systems are the users. Thus the basic principle involved is: one should pay for what he uses to operate his business." While this policy was not implemented for conventional television in 1971 or in the years following, the principle remains valid today.

157. The other policies adopted in the 1971 report and implemented in the context of the technology and industrial structure that then existed have formed the basis of the relationship between BDUs and broadcasters from that time forward. Forty years is a very long time in the broadcasting world. The concepts of mandatory carriage, preferential channel placement, community access, and simultaneous substitution were articulated in that statement and have been developed and modified thereafter.

158. But while some features have remained, enormous changes have also occurred, and continue to occur. Direct-to-home (DTH) satellite services were licensed in 1995 and 1996, with operations beginning in 1997. Specialty services were first licensed in 1984 and digital Category 1 specialty services in 2000. To protect and promote the growth of these nascent specialty services, they were licensed with "genre protection," which ensured that they had their own space, essentially free of direct competition, in which to grow. They were also given guaranteed carriage by BDUs. Very significantly, they were granted the right to receive wholesale fees from the BDUs that carried them. The system thus moved into

ce rapport indique que « les stations de télévision sont les fournisseurs et les systèmes de télévision par câble sont les usagers. Le principe fondamental en jeu ici est le suivant : chacun doit payer pour ce qu'il utilise dans l'exploitation de son entreprise ». Bien que cette politique n'ait pas été mise en œuvre à l'égard de la télévision traditionnelle en 1971 ou au cours des années suivantes, ce principe demeure valide aujourd'hui.

157. Les politiques adoptées dans le rapport de 1971 et mises en oeuvre dans le contexte de la structure technologique et industrielle de l'époque ont inspiré depuis et nourri la relation entre les EDR et les télédiffuseurs. Quarante ans sont une éternité dans le monde de la radiodiffusion. Les concepts de distribution obligatoire, d'attribution de canaux préférentielle, d'accès communautaire et de substitution de signaux identiques ont tout d'abord été formulés dans cet énoncé, puis retravaillés et modifiés par la suite.

158. Bien que certains éléments de cet énoncé demeurent valides, plusieurs changements radicaux sont survenus depuis et continuent à survenir. Les services par satellite de radiodiffusion directe (SRD) autorisés en 1995 et en 1996 ont commencé leurs activités en 1997. Les premiers services spécialisés ont été autorisés en 1984 et les services spécialisés numériques de catégorie 1, en 2000. Pour protéger et promouvoir la croissance de ces services spécialisés embryonnaires, ceux-ci ont eu droit à une « protection de genre » qui leur assurait leur propre espace de développement, essentiellement libre de toute concurrence directe, et à une distribution garantie par les EDR. Fait très révélateur, ils ont obtenu le droit de

the multi-channel universe with different rules applying to different programming services depending, to a considerable degree, on when they had begun broadcasting. Category 2 specialty services, it is to be noted, were provided limited genre protection and were not given guaranteed carriage by BDUs, but were given the right to receive wholesale fees.

159. Many specialty services have enjoyed large popularity with Canadian audiences. As noted above, increasing fragmentation has had the obvious negative effect of reducing the profitability of conventional television broadcasters. Further, very large fragmentation continues as alternative new media platforms become widely adopted. Consequently, there has been a reduction in the ability of conventional television broadcasters to meet their obligations effectively, under the Act, to contribute to the creation and presentation of Canadian programming of a high standard.

160. While the recent economic climate, in which advertising revenues have suffered, has not been favourable for private conventional television broadcasters, BDU revenues have, since 1971, continued to grow at a far greater rate than those of television stations. In that year, private television revenues were \$115.8 million, which compared very favourably with cable revenues of \$66.6 million. In 2009, the positions had become reversed. Cable BDU basic and non-basic revenues were \$5.1 billion, and DTH and multipoint distribution system basic and non-basic revenues were a further \$2.2 billion, for a

recevoir des tarifs de gros des EDR qui les distribuait. Ainsi le système a-t-il évolué vers un univers multicanal où différentes règles s'appliquaient à différents services de programmation surtout en fonction de la date de leur mise en exploitation. Il convient de noter que les services spécialisés de catégorie 2 ont eu droit à une protection de genre limitée, mais pas à une distribution garantie par les EDR, et qu'ils ont eu le droit de recevoir des tarifs de gros.

159. Plusieurs services spécialisés ont été très appréciés des auditoires canadiens. Tel que noté plus haut, l'accroissement de la fragmentation a malheureusement entraîné une baisse évidente du rendement des télédiffuseurs traditionnels. De plus, cette très grande fragmentation se poursuit alors que d'autres nouvelles plateformes médiatiques font fureur. Les télédiffuseurs en direct ont donc moins réussi à respecter efficacement les obligations qui leur avaient été fixées en vertu de la Loi de « contribuer à la création et à la présentation d'une programmation canadienne » de qualité.

160. Alors que la récente situation économique et les baisses des recettes publicitaires ont affaibli les télédiffuseurs traditionnels privés, les revenus des EDR ont continué de croître beaucoup plus rapidement que ceux des stations de télévision depuis 1971. Au cours de cette année, les revenus de la télévision privée ont totalisé 115,8 millions de dollars, une somme qui se compare très avantageusement avec les revenus du câble qui se sont établis à 66,6 millions de dollars. En 2009, ces chiffres étaient inversés : les revenus de base et supplémentaires des EDR par câble ont

total of \$7.3 billion. Private television revenues trailed far behind at \$2.2 billion. Revenue figures do not tell the complete story, but the dramatic change in proportions indicates a significant shift in market positions.

161. A large piece of the puzzle is that private conventional television broadcasters, unlike specialties, are not paid for their signals by the BDUs that carry those signals. At the hearing, a frequently repeated position by BDUs was that, since they could now receive and disseminate those services for free, they had no intention of negotiating a fair value or paying for those services, notwithstanding that they constitute part of the single Canadian broadcasting system, as provided in section 3(2) of the Act. And, as noted earlier, private conventional television broadcasters pay large amounts, not just for Canadian programs, but for foreign programs as well. The Commission has repeatedly been told that broadcasting such foreign programs is essential to the financial viability of conventional television broadcasters, and has accepted that position.

162. When broadcasters acquire program rights, those rights are, almost invariably, territorial. That is, a broadcaster pays for the exclusive right to broadcast a specific program in a defined territory for a defined period of time. Of course, the terms of such agreements are the focus of strong commercial attention, and there is no uniformity of result. But whatever the

totalisé 5,1 milliards de dollars et ceux des services par SRD et des systèmes de distribution multipoint ont augmenté de 2,2 milliards de dollars supplémentaires, atteignant un total de 7,3 milliards de dollars. Les revenus de la télévision privée faisaient piètre figure avec 2,2 milliards de dollars. Ces chiffres ne présentent pas l'historique complet, mais la remarquable évolution des proportions trahit un changement marqué des forces du marché.

161. L'une des pièces importantes de ce casse-tête est que les EDR ne paient pas les signaux des télédiffuseurs traditionnels privés qu'elles distribuent alors qu'elles paient ceux des services spécialisés. À l'audience, les EDR ont souvent répété que même si elles font partie du système canadien unique de radiodiffusion tel que précisé à l'article 3(2) de la Loi, elles n'avaient pas l'intention de payer ces services ou de négocier leur juste valeur puisqu'elles pouvaient maintenant les recevoir et les diffuser gratuitement. Or, comme noté plus haut, les télédiffuseurs traditionnels privés consacrent de fortes sommes à l'acquisition d'émissions tant canadiennes qu'étrangères. Le Conseil a toujours entendu dire que la diffusion d'émissions étrangères était vitale pour les télédiffuseurs traditionnels, et il a fait sienne cette position.

162. Les droits de diffusion qu'acquièrent les télédiffuseurs sont presque toujours des droits territoriaux. Autrement dit, le télédiffuseur paie les droits exclusifs de diffuser une émission donnée, dans un territoire donné, pour une période de temps donnée. Certes, les modalités de ces ententes font l'objet d'une grande attention commerciale, et les résultats ne sont pas

terms negotiated by the broadcaster, BDUs are currently permitted to carry the broadcasters' programming services without paying for the right to distribute them. BDUs, however, are obligated to provide broadcasters with benefits such as priority carriage and simultaneous substitution. Nevertheless, the system is not working well in 2010 in ensuring that conventional television broadcasters have the means to continue to meet their obligations under the Act.

163. As noted above, as set out in Broadcasting Public Notice 2008-100, the Commission was not prepared to impose a fee for carriage. However, the Commission finds that, in order to fulfil the policy objectives set out in section 3(1) of the Act, the system needs revision so as to permit privately-owned television broadcasters to negotiate with BDUs to establish the fair value of the product provided by those broadcasters to BDUs. The system should be such that privately-owned broadcasters that own programs or have paid for the exclusive right to disseminate programs can negotiate for payment with BDUs, which, in turn, further disseminate those programs. By establishing a regime in which market forces can function effectively, the broadcasting system will benefit through the recognition of the fair value of programming services. This approach is consistent with the market-based negotiations that increasingly prevail on all other platforms, including discretionary services, VOD, and online and mobile platforms.

uniformes. Toutefois, quelles que soient les conditions négociées, les EDR ont actuellement le droit de distribuer les services de programmation des télédiffuseurs sans payer de droits de diffusion. Les EDR, cependant, sont obligées de fournir aux télédiffuseurs des avantages comme la distribution prioritaire et la substitution simultanée. Néanmoins, en 2010, ce système ne contribue guère à s'assurer que les télédiffuseurs traditionnels aient les moyens de continuer à respecter leurs obligations en vertu de la Loi.

163. Tel que note plus haut et énoncé dans l'avis public de radiodiffusion 2008-100, le Conseil n'était pas prêt à imposer un tarif de distribution. Le Conseil conclut néanmoins qu'afin d'atteindre les objectifs de politique énoncés à l'article 3(1) de la Loi, il faut corriger ce système pour permettre aux télédiffuseurs privés de négocier avec les EDR une juste valeur pour le produit qu'ils offrent aux EDR. Il faudrait un système où les télédiffuseurs privés qui détiennent des émissions ou ont payé des droits exclusifs de diffusion doivent pouvoir négocier des ententes de paiement avec les EDR qui pourront, à leur tour, distribuer ces émissions. Le système de radiodiffusion a tout à gagner d'un système qui permettrait aux forces du marché de fonctionner efficacement en reconnaissant la juste valeur des services de programmation. Cette approche est compatible avec les ententes commerciales qui prévalent de plus en plus sur toutes les autres plateformes, y compris les services facultatifs, les services de VSD et les plateformes en ligne et mobiles.

164. The regime that the Commission would propose to implement is set out below.

1. Licensees of private local television stations would choose whether i) they will negotiate with BDUs for the value of the distribution of their programming services, failing which they will be able to require deletion of the programming they own, or for which they have the exhibition rights, from all signals distributed in their market, or ii) they will continue to benefit from existing regulatory protections.

2. Licensees of private local television stations would make their choice by a date set by the Commission, and this choice would be valid for a fixed term of three years.

3. If a licensee of a private local television station chose option i):

a) It would forego all existing regulatory protections related to the distribution of local television signals by BDUs, whether imposed by regulation or by condition of licence, including mandatory distribution and priority channel placement on analog basic, and simultaneous substitution.

b) BDUs would be required, at the request of private local television stations, to delete any program owned by the licensee of that local television station or for which it has acquired exclusive contractual exhibition rights.

164. Le système que le Conseil propose de mettre en œuvre est décrit ci-dessous.

1. Les titulaires des stations privées de télévision locale pourront choisir soit i) de négocier avec les EDR la valeur de la distribution de leurs services de programmation, faute de quoi elles pourront exiger de retirer les émissions qu'elles détiennent, ou dont elles ont acquis les droits de diffusion, de tous les signaux distribués dans leur marché, soit ii) de continuer à bénéficier des protections réglementaires actuelles.

2. Les titulaires des stations privées de télévision locale prendront leur décision à une date choisie par le Conseil, et leur choix sera valide pour une période de trois ans.

3. Si la titulaire d'une station privée de télévision locale opte pour l'option i) :

a) Elle renonce à toutes les protections réglementaires actuelles à l'égard de la distribution des signaux de télévision locale par les EDR, qu'elles soient imposées par voie réglementaire ou par conditions de licence, y compris à la distribution obligatoire et l'alignement des canaux prioritaires au service de base analogique, ainsi quela substitution simultanée.

b) Les EDR doivent, à la demande des stations privées de télévision locale, retirer toute émission détenue par la titulaire d'une station de télévision locale ou pour laquelle elle aurait acquis les droits contractuels exclusifs de diffusion.

c) Deletions would be exercised against the signal of any programming undertaking distributed by the BDU, whether foreign or domestic, affiliated or not, including that of the private local television station making the request.

d) It could negotiate with a BDU for a fair value in exchange for the distribution of its programming service in lieu of the deletion rights set out in b) and c). This compensation could be monetary, non-monetary (e.g., simultaneous or non-simultaneous substitution, carriage arrangements, marketing and promotion), or both, and could be negotiated on an individual station basis or as part of a broader negotiation with entire ownership groups.

e) Parties to the negotiation would be given a fixed period after the date on which the licensee of a private local television station chose option i) to conclude negotiations, during which the existing regulatory protections would continue to apply. This period could be shortened or extended by agreement between the parties.

f) The Commission would minimize its involvement in the terms and conditions of the resulting agreements, intervening only in cases where there is evidence parties are not negotiating in good faith, and would consider acting as arbitrator only where both parties make a request.

c) Les retraits visent le signal de toute entreprise de programmation, canadienne ou étrangère, affiliée ou non, distribué par l'EDR, y compris celui de la station privée de la télévision locale à l'origine de la demande.

d) La titulaire peut négocier avec une EDR la juste valeur d'échange pour la distribution de son service de programmation au lieu des droits de retrait énoncés en b) et c). Cette compensation peut être financière, ou non (p. ex., la substitution simultanée ou non, les ententes de distribution, le marketing et la promotion), ou les deux, et peut être négociée soit sur une base individuelle, par station, soit lors de négociations élargies avec tous les groupes de propriété.

e) Lors de négociations, les parties disposent d'une période de temps fixe après la date à laquelle une station privée de télévision locale a choisi l'option i) pour conclure une entente. Au cours de cette période, les protections existantes de réglementation continuent à s'appliquer. Cette période peut être abrégée ou prolongée après entente entre les parties.

f) Le Conseil réduit sa participation dans l'élaboration des modalités et des conditions des ententes ainsi négociées. Il n'intervient que s'il existe une preuve de mauvaise foi dans les négociations, et peut alors jouer un rôle d'arbitrage, mais uniquement à la demande des deux parties.

4. If the licensee of a private local television station chose option ii), all regulatory protections for private local television stations in force at the time the choice is made, and as amended during the term in which that choice is valid, would remain in force. These would include, where provided by regulation or by condition of licence: mandatory carriage, priority channel placement on analog basic, program deletion, simultaneous or non-simultaneous substitution, and any payments to individual stations or funds approved by the Commission in lieu of these obligations, including payments for carriage of distant signals as provided for in Broadcasting Public Notice 2008-100.

4. Si la titulaire d'une station privée de télévision locale opte pour l'option ii), toutes les protections réglementaires des stations privées de télévision locale en vigueur au moment où elle fait ce choix, et modifiées pendant la durée de leur décision, demeurent en vigueur. Lorsqu'elles sont assurées par voie réglementaire ou par condition de licence, ces protections comprennent notamment la distribution obligatoire, l'alignement des canaux prioritaires au service de base analogique, le retrait d'émissions, la substitution simultanée ou non et toute somme versée à des stations individuelles ou à des fonds approuvés par le Conseil en remplacement de ces obligations, y compris des paiements pour la distribution de signaux éloignés tel que prévu dans l'avis public de radiodiffusion 2008-100.

165. There is, however, a significant potential impediment to the implementation by the Commission of this market-based resolution. In response to Broadcasting Notice of Consultation 2009-411, the Commission was presented with two legal opinions, both worthy of consideration. One submitted that the Commission had the requisite authority to introduce a regime of broadcast regulation that would have the effect of requiring appropriate negotiation, such as those described above, between broadcasters and BDUs; the other took the position that BDUs have a continuing right to disseminate the broadcaster's over-the-air signal without negotiation or remuneration by virtue of the provisions of the *Copyright Act*.

165. Un obstacle de taille risque cependant d'entraver la mise en œuvre par le Conseil de cette décision basée sur les forces du marché. En réponse à l'avis de consultation de radiodiffusion 2009-411, le Conseil a reçu deux avis juridiques qui valaient tous deux la peine d'être étudiés. L'un soutenait que le Conseil avait la compétence nécessaire pour mettre en oeuvre un système de réglementation de radiodiffusion ayant pour effet d'obliger les télédiffuseurs et les EDR à négocier des ententes appropriées, telles que celles décrites précédemment; l'autre, que les EDR avaient des droits continus de diffusion des signaux des télédiffuseurs en direct sans négociation ou contrepartie financière, en vertu des dispositions de la *Loi sur le droit d'auteur*.

166. While the Commission has found that it is necessary to provide the licensees of private local television stations with the right to negotiate a fair value for the distribution of their programming services by BDUs, it recognizes that there is a valid dispute between parties over the Commission's legal authority to impose such a regime. Therefore, given the importance of the question to the ability of the Commission to ensure that the objectives of the Act are met, and given the continuing need for certainty in dealing with the approaching group licensing renewals, the Commission has decided to refer the question of its jurisdiction to the Federal Court of Appeal (the Court). The Commission will request disposition of the issue on an expedited basis.

167. The question to be put to the Court, in general terms, will be the following:

Is the Commission empowered, pursuant to its mandate under the *Broadcasting Act*, to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations?

168. In Broadcasting Order 2010-168, also issued today, the Commission refers this question to the Court for expedited hearing and determination.

166. Bien que le Conseil ait conclu qu'il y avait lieu d'accorder aux titulaires de stations privées de télévision traditionnelle locale le droit de négocier une juste valeur pour la distribution de leurs services par les EDR, il reconnaît qu'il existe un différend valide entre les parties quant à sa compétence légale d'imposer un tel système. Par conséquent, compte tenu de l'importance de la question de la compétence du Conseil à s'assurer que les objectifs de la Loi sont atteints, et compte tenu du besoin constant de certitude à l'avènement du traitement des renouvellements de licences selon une approche par groupe, le Conseil a décidé de référer de la question de sa compétence légale à la Cour d'appel fédérale (la Cour). Le Conseil demandera de traiter de la question dans des délais aussi brefs que possible.

167. En termes généraux, la question soumise à la Cour sera la suivante :

Le Conseil a-t-il la compétence, en vertu de son mandat énoncé dans la *Loi sur la radiodiffusion*, de mettre en œuvre un système permettant aux stations privées de télévision locale d'opter pour la négociation avec les entreprises de distribution de radiodiffusion d'une juste valeur en retour de la distribution des services de programmation diffusés par ces stations de télévision locale?

168. Dans l'ordonnance de radiodiffusion 2010-168, également publiée aujourd'hui, le Conseil renvoie cette question à la Cour pour audition et jugement dans des délais aussi brefs que possible.

[14] Broadcasting Order 2010-168, referred to in paragraph 168 of the 2010 Policy, provides the following additional information:

Introduction

1. Section 3(2) of the *Broadcasting Act* (the Act) states that the Canadian broadcasting system constitutes a single system that is to be regulated by a single independent public authority, the Canadian Radio-television and Telecommunications Commission. Section 5(1) of the Act requires the Commission to "regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) of the Act."

2. The Commission is given broad powers under the Act to fulfill its mandate, including the power to issue broadcasting licences on such conditions as it deems appropriate for the implementation of the broadcasting policy set out in section 3(1) of the Act and to require broadcasting distribution undertakings (BDUs) to carry, on such terms and conditions as it deems appropriate, programming services specified by the Commission. The Commission is also given the power by section 10 of the Act to make regulations respecting a number of subjects including: the carriage of any foreign or other programming services by distribution undertakings; the resolution, by way of mediation or otherwise, of any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertaking; and such other matters as it

Introduction

1. En vertu de l'article 3(2) de la *Loi sur la radiodiffusion* (la Loi), le système canadien de radiodiffusion constitue un système unique dont la réglementation doit être confiée à un seul organisme public autonome, le Conseil de la radiodiffusion et des télécommunications canadiennes. L'article 5(1) de la Loi enjoint au Conseil de « réglemente[r] et surveille[r] tous les aspects du système canadien de radiodiffusion en vue de mettre en œuvre la politique canadienne de radiodiffusion. »

2. En vertu de la Loi, le Conseil est investi de pouvoirs étendus pour remplir son mandat, y compris le pouvoir d'attribuer des licences de radiodiffusion sous des conditions qui semblent appropriées en vue de mettre en œuvre la politique canadienne de radiodiffusion énoncée à l'article 3(1) de la Loi et d'obliger les entreprises de distribution de radiodiffusion (EDR) à offrir, selon des modalités et conditions qu'il juge appropriées, les services de programmation précisés par le Conseil. L'article 10 de la Loi permet également au Conseil d'adopter des règlements sur divers sujets, dont la fourniture par les entreprises de distribution des signaux étrangers et autres services de programmation, la résolution par la médiation ou autrement de différends concernant la fourniture de programmation et survenant entre les entreprises de programmation qui la transmettent et les

deems necessary for the furtherance of its objects.

3. In fulfilling this mandate, the Commission has created a comprehensive regulatory regime to ensure that each part of the broadcasting industry contributes to the fulfillment of the policy objectives in the Act. For example, the Commission has:

- imposed a series of obligations on programming undertakings, including quotas for the exhibition of, or expenditure on, Canadian programming;
- constructed rules regarding what programming services BDUs are required or permitted to distribute, including a requirement that certain BDUs distribute local television stations and other services as part of the basic package provided to all customers (i.e., mandatory carriage);
- mandated wholesale fees for the distribution of particular specialty services, with a rate that is, in some cases, set by the Commission or, in other cases, negotiated between the parties; and
- created a system to protect the exclusive broadcast rights of local television stations in their markets by requiring a BDU to delete a programming service it distributes that is comparable to that of the local television station (i.e., program deletion) and, in some circumstances, substitute the

entreprises de distribution, ainsi que toute autre question qu'il estime nécessaire à l'exécution de sa mission.

3. Pour remplir ce mandat, le Conseil a créé un régime de réglementation global afin de s'assurer que chaque secteur de l'industrie de la radiodiffusion contribue à l'atteinte des objectifs de politique énoncés dans la Loi. Par exemple, le Conseil a :

- imposé une série d'obligations aux entreprises de programmation, dont des quotas pour la diffusion, ou les dépenses, à l'égard de la programmation canadienne;
- élaboré des règles pour définir quels services de programmation les EDR ont l'obligation ou l'autorisation de distribuer, y compris l'obligation pour certaines EDR de distribuer des stations de télévision locales et d'autres services dans le service de base qu'elles offrent à tous les consommateurs (soit la distribution obligatoire);
- imposé un tarif de gros pour la distribution de certains services spécialisés, dont le taux est fixé par le Conseil, dans certains cas, ou négocié entre les parties, dans d'autres cas;
- créé un système pour protéger les droits exclusifs de radiodiffusion des stations de télévision locales dans leurs marchés en exigeant d'une EDR la suppression de tout service de programmation qu'elle distribue qui est comparable à celui d'une station locale de télévision (soit la suppression d'émissions) et, dans

comparable programming of the local television station being broadcast simultaneously over the deleted signal (i.e., simultaneous substitution).

certain cas, la substitution de la programmation comparable de la télévision locale diffusée simultanément sur le signal supprimé (soit la substitution simultanée).

4. The Commission applies these existing regulatory obligations to a different extent in different circumstances in a manner that is fluid and continues to adapt to changing circumstances. For example, the Commission has permitted parties, by conditions of licence, to negotiate alternative solutions to the program deletion obligations, which have been incorporated into the regulatory regime.

4. Le Conseil applique ces obligations réglementaires actuelles avec souplesse, à des degrés divers selon les cas, en s'ajustant aux circonstances particulières. Par exemple, le Conseil a permis aux parties, par condition de licence, de négocier d'autres solutions relatives aux obligations de suppression d'émissions qui ont été intégrées au régime de réglementation.

The Proceeding

5. In *Policy proceeding on a group-based approach to the licensing of television services and on certain issues relating to conventional television*, Broadcasting Notice of Consultation CRTC 2009-411, 6 July 2009 (as revised by Broadcasting Notice of Consultation CRTC 2009-411-3, 11 August 2009), the Commission initiated a proceeding to examine a group-based approach to the licensing of television services, including an examination of whether or not a negotiated solution for the compensation for the fair value of local conventional television signals is appropriate. In the course of the proceeding, the Commission received 289 comments addressing these issues. The Commission also received approximately 12,000 comments as part of a campaign organized by Rogers Communications Inc.

L'instance

5. Dans *Instance de politique portant sur une approche par groupe de propriété à l'égard de l'attribution de licences à des services de télévision et sur certaines questions relatives à la télévision traditionnelle*, avis de consultation de radiodiffusion CRTC 2009-411, 6 juillet 2009 (avis de consultation de radiodiffusion 2009-411), tel que révisé par l'avis de consultation de radiodiffusion 2009-411-3, 11 août 2009, le Conseil a entrepris une instance en vue d'étudier une approche par groupe à l'égard de l'attribution de licences à des services de télévision, y compris un examen sur la pertinence de mettre en œuvre ou non une solution négociée pour la compensation de la juste valeur des signaux locaux de télévision traditionnelle privée. Dans le cadre de ce processus, le Conseil a reçu 289 observations qui traitaient de ces questions. Le Conseil a également reçu environ 12 000 observations dans le cadre

de la campagne organisée par Rogers Communications Inc.

6. Among the issues raised during the proceeding was whether the Commission has the jurisdiction under the Act to implement a negotiated solution for compensation for the fair value of private local conventional television signals. BDUs presented a legal opinion that such a regime would establish a new copyright in the signals of private local television stations and is therefore *ultra vires* the powers of the Commission. Local television stations presented legal opinions that such a regime falls within the Commission's jurisdiction under the Act to supervise and regulate the broadcasting system.

Paragraph 7 omitted; it repeats paragraph 164 of the 2010 Policy

8. In Broadcasting Regulatory Policy 2010-167, the Commission did not determine the legal issue as to whether or not it has the jurisdiction under the Act to implement such a regime. Rather, the Commission stated that it would refer the matter to the Federal Court of Appeal for determination. Consequently, the decision to implement the regime will only be concluded after the Court has ruled on this reference.

6. Parmi les questions soulevées lors de l'instance, l'une consiste à savoir si le Conseil a la compétence en vertu de la Loi de mettre en oeuvre une solution négociée pour la compensation de la juste valeur des signaux locaux de télévision traditionnelle privée. Les EDR ont présenté un avis juridique qui indique que ce régime établira un nouveau droit d'auteur sur les signaux des stations locales de télévision privée et sera donc *ultra vires* relativement aux pouvoirs du Conseil. D'après les opinions juridiques déposées par les stations de télévision locales, un tel régime relève de la compétence légale du Conseil de superviser et de réglementer le système de radiodiffusion.

[Paragraphe 7 omis; une répétition du paragraphe 164 de la Politique 2010.]

8. Dans la politique réglementaire de radiodiffusion 2010-167, le Conseil n'a pas statué sur la question de savoir s'il a la compétence en vertu de la Loi d'instaurer un tel régime. En revanche, le Conseil a déclaré qu'il porterait cette affaire devant la Cour d'appel fédérale pour jugement. Par conséquent, la décision d'instaurer le régime ne pourra être prise avant que la Cour ne se soit prononcée.

Statutory mandate of the Commission

[15] Parliament has given the Commission the mandate to regulate and supervise all aspects of the Canadian broadcasting system. That mandate is set out in subsection 5(1) of the *Broadcasting Act*, which reads as follows:

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 oeuvre la politique canadienne de radiodiffusion.

[16] The phrase “Canadian broadcasting system” is not defined in the *Broadcasting Act*, but its meaning can be inferred from terms that are given a statutory definition. “Broadcasting” and “program” are defined in subsection 2(1) of the *Broadcasting Act* as follows:

“broadcasting” means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place.

« radiodiffusion » Transmission, à l’aide d’ondes radioélectriques ou de tout autre moyen de télécommunication, d’émissions encodées ou non et destinées à être reçues par le public à l’aide d’un récepteur, à l’exception de celle qui est destinée à la présentation dans un lieu public seulement.

“program” means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined

« émission » Les sons ou les images — ou leur combinaison — destinés à informer ou divertir, à l’exception des images, muettes ou non, consistant essentiellement en des lettres ou des chiffres.

with sounds, that consist predominantly of alphanumeric text.

[17] “Radio waves” and “other means of telecommunication” are defined in subsections 2(1) and (2) of the *Broadcasting Act* as follows:

2.(1)...

“radio waves” means electromagnetic waves of frequencies lower than 3 000 GHz that are propagated in space without artificial guide.

....

2. (2) For the purposes of this Act, “other means of telecommunication” means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system.

2.(1)[...]

« ondes radioélectriques » Ondes électromagnétiques de fréquences inférieures à 3 000 GHz transmises dans l'espace sans guide artificiel.

[....]

2. (2) Pour l'application de la présente loi, sont inclus dans les moyens de télécommunication les systèmes électromagnétiques — notamment les fils, les câbles et les systèmes radio ou optiques —, ainsi que les autres procédés techniques semblables.

[18] Programs are broadcast in Canada by “broadcasting undertakings”. According to subsection 2(1) of the *Broadcasting Act*, a broadcasting undertaking may be a “distribution undertaking”, a “programming undertaking”, or a “network”. Those terms are defined in subsection 2(1) of the *Broadcasting Act* as follows:

“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

« 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

dwelling unit or to another such undertaking.

temporaires ou locaux d'habitation, ou en vue de sa réception par une autre entreprise semblable.

“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 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.

“network” includes any operation where control over all or any part of the programs or program schedules of one or more broadcasting undertakings is delegated to another undertaking or person.

« réseau » Est assimilée à un réseau toute exploitation où le contrôle de tout ou partie des émissions ou de la programmation d'une ou plusieurs entreprises de radiodiffusion est délégué à une autre entreprise ou personne.

[19] Reading these statutory definitions together, I infer that any broadcasting activity in Canada by a distribution undertaking, a programming undertaking, or a network is part of the Canadian broadcasting system and therefore is subject to the regulation and supervision of the Commission pursuant to subsection 5(1) of the *Broadcasting Act*. There is no doubt that this would include the broadcasting activities in Canada of any private local television station (programming undertaking) and any BDU (distribution undertaking) that would be subject to the proposed value for signal regime if it is adopted.

[20] Although the statutory mandate of the Commission as stated in subsection 5(1) of the *Broadcasting Act* is broad and comprehensive, it is expressly limited in a number of respects. First, subsection 5(1) requires the Commission to act in accordance with the *Broadcasting Act*, the

Radiocommunication Act, and any directions to the Commission issued by the Governor in Council under the *Broadcasting Act*. (There are no provisions of the *Radiocommunication Act* and no Governor in Council directions that are relevant to this reference.)

[21] Second, subsection 5(1) requires the Commission to act with a view to implementing the broadcasting policy set out in subsection 3(1) of the *Broadcasting Act*, which reads as follows:

3. (1) It is hereby declared as the broadcasting policy for Canada that

(a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;

(b) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;

(c) English and French language broadcasting, while sharing common aspects, operate under different conditions and may have different requirements;

(d) the Canadian broadcasting system should

(i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,

(ii) encourage the development of Canadian expression by providing a wide range of programming that

3. (1) Il est déclaré que, dans le cadre de la politique canadienne de radiodiffusion :

a) le système canadien de radiodiffusion doit être, effectivement, la propriété des Canadiens et sous leur contrôle;

b) le système canadien de radiodiffusion, composé d'éléments publics, privés et communautaires, utilise des fréquences qui sont du domaine public et offre, par sa programmation essentiellement en français et en anglais, un service public essentiel pour le maintien et la valorisation de l'identité nationale et de la souveraineté culturelle;

c) les radiodiffusions de langues française et anglaise, malgré certains points communs, diffèrent quant à leurs conditions d'exploitation et, éventuellement, quant à leurs besoins;

d) le système canadien de radiodiffusion devrait :

(i) servir à sauvegarder, enrichir et renforcer la structure culturelle, politique, sociale et économique du Canada,

(ii) favoriser l'épanouissement de l'expression canadienne en proposant une très large programmation qui

reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,

(iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and

(iv) be readily adaptable to scientific and technological change;

(e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;

(f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;

traduise des attitudes, des opinions, des idées, des valeurs et une créativité artistique canadiennes, qui mette en valeur des divertissements faisant appel à des artistes canadiens et qui fournisse de l'information et de l'analyse concernant le Canada et l'étranger considérés d'un point de vue canadien,

(iii) par sa programmation et par les chances que son fonctionnement offre en matière d'emploi, répondre aux besoins et aux intérêts, et refléter la condition et les aspirations, des hommes, des femmes et des enfants canadiens, notamment l'égalité sur le plan des droits, la dualité linguistique et le caractère multiculturel et multiracial de la société canadienne ainsi que la place particulière qu'y occupent les peuples autochtones,

(iv) demeurer aisément adaptable aux progrès scientifiques et techniques;

e) tous les éléments du système doivent contribuer, de la manière qui convient, à la création et la présentation d'une programmation canadienne;

f) toutes les entreprises de radiodiffusion sont tenues de faire appel au maximum, et dans tous les cas au moins de manière prédominante, aux ressources — créatrices et autres — canadiennes pour la création et la présentation de leur programmation à moins qu'une telle pratique ne s'avère difficilement réalisable en raison de la nature du service — notamment, son contenu ou format spécialisé ou l'utilisation qui y est faite de langues autres que le français ou l'anglais — qu'elles fournissent, auquel cas elles devront faire appel aux

- (g) the programming originated by broadcasting undertakings should be of high standard;
- (h) all persons who are licensed to carry on broadcasting undertakings have a responsibility for the programs they broadcast;
- (i) the programming provided by the Canadian broadcasting system should
- (i) be varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes,
 - (ii) be drawn from local, regional, national and international sources,
 - (iii) include educational and community programs,
 - (iv) provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern, and
 - (v) include a significant contribution from the Canadian independent production sector;
- (j) educational programming, particularly where provided through the facilities of an independent educational authority, is an integral part of the Canadian broadcasting system;
- (k) a range of broadcasting services in English and in French shall be extended
- ressources en question dans toute la mesure du possible;
- g) la programmation offerte par les entreprises de radiodiffusion devrait être de haute qualité;
- h) les titulaires de licences d'exploitation d'entreprises de radiodiffusion assument la responsabilité de leurs émissions;
- i) la programmation offerte par le système canadien de radiodiffusion devrait à la fois :
- (i) être variée et aussi large que possible en offrant à l'intention des hommes, femmes et enfants de tous âges, intérêts et goûts une programmation équilibrée qui renseigne, éclaire et divertit,
 - (ii) puiser aux sources locales, régionales, nationales et internationales,
 - (iii) renfermer des émissions éducatives et communautaires,
 - (iv) dans la mesure du possible, offrir au public l'occasion de prendre connaissance d'opinions divergentes sur des sujets qui l'intéressent,
 - (v) faire appel de façon notable aux producteurs canadiens indépendants;
- j) la programmation éducative, notamment celle qui est fournie au moyen d'installations d'un organisme éducatif indépendant, fait partie intégrante du système canadien de radiodiffusion;
- k) une gamme de services de radiodiffusion en français et en anglais

to all Canadians as resources become available;

(l) the Canadian Broadcasting Corporation, as the national public broadcaster, should provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains;

(m) the programming provided by the Corporation should

(i) be predominantly and distinctively Canadian,

(ii) reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions,

(iii) actively contribute to the flow and exchange of cultural expression,

(iv) be in English and in French, reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French linguistic minorities,

(v) strive to be of equivalent quality in English and in French,

(vi) contribute to shared national consciousness and identity,

(vii) be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose, and

doit être progressivement offerte à tous les Canadiens, au fur et à mesure de la disponibilité des moyens;

l) la Société Radio-Canada, à titre de radiodiffuseur public national, devrait offrir des services de radio et de télévision qui comportent une très large programmation qui renseigne, éclaire et divertit;

m) la programmation de la Société devrait à la fois :

(i) être principalement et typiquement canadienne,

(ii) refléter la globalité canadienne et rendre compte de la diversité régionale du pays, tant au plan national qu'au niveau régional, tout en répondant aux besoins particuliers des régions,

(iii) contribuer activement à l'expression culturelle et à l'échange des diverses formes qu'elle peut prendre,

(iv) être offerte en français et en anglais, de manière à refléter la situation et les besoins particuliers des deux collectivités de langue officielle, y compris ceux des minorités de l'une ou l'autre langue,

(v) chercher à être de qualité équivalente en français et en anglais,

(vi) contribuer au partage d'une conscience et d'une identité nationales,

(vii) être offerte partout au Canada de la manière la plus adéquate et efficace, au fur et à mesure de la disponibilité des moyens,

(viii) reflect the multicultural and multiracial nature of Canada;

(n) where any conflict arises between the objectives of the Corporation set out in paragraphs (l) and (m) and the interests of any other broadcasting undertaking of the Canadian broadcasting system, it shall be resolved in the public interest, and where the public interest would be equally served by resolving the conflict in favour of either, it shall be resolved in favour of the objectives set out in paragraphs (l) and (m);

(o) programming that reflects the aboriginal cultures of Canada should be provided within the Canadian broadcasting system as resources become available for the purpose;

(p) programming accessible by disabled persons should be provided within the Canadian broadcasting system as resources become available for the purpose;

(q) without limiting any obligation of a broadcasting undertaking to provide the programming contemplated by paragraph (i), alternative television programming services in English and in French should be provided where necessary to ensure that the full range of programming contemplated by that paragraph is made available through the Canadian broadcasting system;

(r) the programming provided by alternative television programming services should

(i) be innovative and be complementary to the programming provided for mass audiences,

(ii) cater to tastes and interests not adequately provided for by the

(viii) refléter le caractère multiculturel et multiracial du Canada;

n) les conflits entre les objectifs de la Société énumérés aux alinéas l) et m) et les intérêts de toute autre entreprise de radiodiffusion du système canadien de radiodiffusion doivent être résolus dans le sens de l'intérêt public ou, si l'intérêt public est également assuré, en faveur des objectifs énumérés aux alinéas l) et m);

o) le système canadien de radiodiffusion devrait offrir une programmation qui reflète les cultures autochtones du Canada, au fur et à mesure de la disponibilité des moyens;

p) le système devrait offrir une programmation adaptée aux besoins des personnes atteintes d'une déficience, au fur et à mesure de la disponibilité des moyens;

q) sans qu'il soit porté atteinte à l'obligation qu'ont les entreprises de radiodiffusion de fournir la programmation visée à l'alinéa i), des services de programmation télévisée complémentaires, en anglais et en français, devraient au besoin être offerts afin que le système canadien de radiodiffusion puisse se conformer à cet alinéa;

r) la programmation offerte par ces services devrait à la fois :

(i) être innovatrice et compléter celle qui est offerte au grand public,

(ii) répondre aux intérêts et goûts de ceux que la programmation offerte au

programming provided for mass audiences, and include programming devoted to culture and the arts,

(iii) reflect Canada's regions and multicultural nature,

(iv) as far as possible, be acquired rather than produced by those services, and

(v) be made available throughout Canada by the most cost-efficient means;

(s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,

(i) contribute significantly to the creation and presentation of Canadian programming, and

(ii) be responsive to the evolving demands of the public; and

(t) distribution undertakings

(i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,

(ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,

(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

grand public laisse insatisfaits et comprendre des émissions consacrées aux arts et à la culture,

(iii) refléter le caractère multiculturel du Canada et rendre compte de sa diversité régionale,

(iv) comporter, autant que possible, des acquisitions plutôt que des productions propres,

(v) être offerte partout au Canada de la manière la plus rentable, compte tenu de la qualité;

s) les réseaux et les entreprises de programmation privés devraient, dans la mesure où leurs ressources financières et autres le leur permettent, contribuer de façon notable à la création et à la présentation d'une programmation canadienne tout en demeurant réceptifs à l'évolution de la demande du public;

t) les entreprises de distribution :

(i) devraient donner priorité à la fourniture des services de programmation canadienne, et ce en particulier par les stations locales canadiennes,

(ii) devraient assurer efficacement, à l'aide des techniques les plus efficaces, la fourniture de la programmation à des tarifs abordables,

(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,

(iv) may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities.

(iv) peuvent, si le Conseil le juge opportun, créer une programmation — locale ou autre — de nature à favoriser la réalisation des objectifs de la politique canadienne de radiodiffusion, et en particulier à permettre aux minorités linguistiques et culturelles mal desservies d'avoir accès aux services de radiodiffusion.

[22] The statement of Canadian broadcasting policy set out in subsection 3(1) of the *Broadcasting Act* must be read with subsection 3(2) which reads as follows:

3. (2) It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

3. (2) Il est déclaré en outre que le système canadien de radiodiffusion constitue un système unique et que la meilleure façon d'atteindre les objectifs de la politique canadienne de radiodiffusion consiste à confier la réglementation et la surveillance du système canadien de radiodiffusion à un seul organisme public autonome.

[23] Subsection 5(1) of the *Broadcasting Act* also requires the Commission to have regard to the regulatory policy set out in subsection 5(2) of the *Broadcasting Act*, which reads as follows:

5. (2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that

(a) is readily adaptable to the different characteristics of English and French language broadcasting and to the different conditions under which broadcasting undertakings that provide

5. (2) La réglementation et la surveillance du système devraient être souples et à la fois :

a) tenir compte des caractéristiques de la radiodiffusion dans les langues française et anglaise et des conditions différentes d'exploitation auxquelles sont soumises les entreprises de radiodiffusion qui

English or French language programming operate;	diffusent la programmation dans l'une ou l'autre langue;
(b) takes into account regional needs and concerns;	b) tenir compte des préoccupations et des besoins régionaux;
(c) is readily adaptable to scientific and technological change;	c) pouvoir aisément s'adapter aux progrès scientifiques et techniques;
(d) facilitates the provision of broadcasting to Canadians;	d) favoriser la radiodiffusion à l'intention des Canadiens;
(e) facilitates the provision of Canadian programs to Canadians;	e) favoriser la présentation d'émissions canadiennes aux Canadiens;
(f) does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians; and	f) permettre la mise au point de techniques d'information et leur application ainsi que la fourniture aux Canadiens des services qui en découlent;
(g) is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings.	g) tenir compte du fardeau administratif qu'elles sont susceptibles d'imposer aux exploitants d'entreprises de radiodiffusion.

[24] In the event of a conflict between the broadcasting policy in subsection 3(1) of the *Broadcasting Act* and the regulatory policy in subsection 5(2), the broadcasting policy prevails. That is the result of subsection 5(3) which reads as follows:

5. (3) The Commission shall give primary consideration to the objectives of the broadcasting policy set out in subsection 3(1) if, in any particular matter before the Commission, a conflict arises between those objectives and the objectives of the regulatory policy set out in subsection (2).	5. (3) Le Conseil privilégie, dans les affaires dont il connaît, les objectifs de la politique canadienne de radiodiffusion en cas de conflit avec ceux prévus au paragraphe (2).
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[25] Generally, the Commission exercises its statutory authority by enacting regulations pursuant to section 10 of the *Broadcasting Act*, and by imposing conditions on broadcasting licences it issues

pursuant to section 9 of the *Broadcasting Act*. According to paragraph 9(1)(b) of the *Broadcasting Act*, a condition imposed on a licence must be one that is deemed by the Commission to be appropriate for the implementation of the broadcasting policy stated in subsection 3(1) of the *Broadcasting Act*.

[26] As stated above, the Commission determined in the 2010 Policy that a value for signal regime is necessary to fulfil the objectives of the broadcasting policy stated in subsection 3(1) of the *Broadcasting Act*. According to paragraph 152 of the 2010 Policy, that determination relies specifically on paragraphs 3(1)(e) and 3(1)(f) of the *Broadcasting Act*. Those paragraphs are reproduced here for ease of reference, with the specific portions quoted by the Commission italicized:

3. (1) It is hereby declared as the broadcasting policy for Canada that

...

(e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;

(f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the

3. (1) Il est déclaré que, dans le cadre de la politique canadienne de radiodiffusion :

[...]

e) tous les éléments du système doivent contribuer, de la manière qui convient, à la création et la présentation d'une programmation canadienne;

f) toutes les entreprises de radiodiffusion sont tenues de faire appel au maximum, et dans tous les cas au moins de manière prédominante, aux ressources — créatrices et autres — canadiennes pour la création et la présentation de leur programmation à moins qu'une telle pratique ne s'avère difficilement réalisable en raison de la nature du service — notamment, son contenu ou format spécialisé ou l'utilisation qui y est

undertaking shall make the greatest practicable use of those resources

faite de langues autres que le français ou l'anglais — qu'elles fournissent, auquel cas elles devront faire appel aux ressources en question dans toute la mesure du possible [...].

[27] The BDUs have not challenged the soundness of the Commission's policy analysis, its understanding of the relevant facts, its conclusion that a value for signal regime is justified on the basis of the policy objectives set out in subsection 3(1) of the *Broadcasting Act*, or the reasonableness of the proposed value for signal regime (assuming the Commission has the statutory authority to implement it).

[28] Based on the Commission's analysis in the 2010 Policy and the statutory provisions referred to above, I conclude that the implementation of the proposed value for signal regime is within the statutory authority of the Commission, subject only to the legal objections raised by the BDUs in this reference based on the *Copyright Act* and its legislative history. I turn now to those arguments.

The copyright objection

[29] Both the *Copyright Act* and the *Broadcasting Act* are components of Canadian cultural policy. They may be viewed as sharing some territory, in the sense that both deal to some extent with the interest of the originators of television signals in benefiting economically from their work, and the interest of the public in having television signals made available to them. Both statutes are intended to ensure these competing interests are properly balanced. The two statutes now operate

together harmoniously, but I am prepared to assume without deciding that there may be a theoretical possibility of a conflict in their operation.

[30] The question raised in this reference is whether, as the BDUs argue, the proposed value for signal regime necessarily conflicts with the *Copyright Act* in such a way that this Court should conclude that even if the *Broadcasting Act* on its face authorizes the Commission to adopt the proposed value for signal regime, it should be interpreted in a way that precludes that possibility.

[31] Part of the BDUs' legal argument is not controversial. I agree with them that the principles of statutory interpretation require a harmonious, coherent and consistent interpretation of all statutes dealing with the legal rights and obligations relating to the retransmission of television signals.

[32] The question, however, is whether there is merit to the argument of the BDUs that the implementation of the proposed value for signal regime necessarily conflicts with the rights of the BDUs under the *Copyright Act*, in so far as it would give each private local television station the right to block a BDU from retransmitting that station's signals in the absence of a concluded contract for compensation flowing from the BDU to the station.

[33] The BDUs rely principally on subsection 21(1) and section 31 of the *Copyright Act*. It is common ground that subsection 21(1), and in particular paragraph 21(1)(c), gives a private local television station a copyright in the signals it broadcasts, and that this copyright includes the sole

right to authorize a BDU to retransmit those signals to the public simultaneously with its broadcast.

Subsection 21 reads as follows:

21. (1) Subject to subsection (2), a broadcaster has a copyright in the communication signals that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:

- (a) to fix it,
- (b) to reproduce any fixation of it that was made without the broadcaster's consent,
- (c) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast, and
- (d) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee,

and to authorize any act described in paragraph (a), (b) or (d).

21. (1) Sous réserve du paragraphe (2), le radiodiffuseur a un droit d'auteur qui comporte le droit exclusif, à l'égard du signal de communication qu'il émet ou de toute partie importante de celui-ci :

- a) de le fixer;
- b) d'en reproduire toute fixation faite sans son autorisation;
- c) d'autoriser un autre radiodiffuseur à le retransmettre au public simultanément à son émission;
- d) d'exécuter en public un signal de communication télévisuel en un lieu accessible au public moyennant droit d'entrée.

Il a aussi le droit d'autoriser les actes visés aux alinéas a), b) et d).

[34] The section 21 rights of broadcasters are significantly affected by section 31 of the

Copyright Act, which reads in relevant part as follows:

31. (2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

- (a) the communication is a retransmission of a local or distant signal;

31. (2) Ne constitue pas une violation du droit d'auteur le fait, pour le retransmetteur, de communiquer une oeuvre au public par télécommunication si, à la fois :

- a) la communication consiste en la retransmission d'un signal local ou éloigné, selon le cas;

- | | |
|--|---|
| <p>(b) the retransmission is lawful under the <i>Broadcasting Act</i>;</p> <p>(c) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;</p> <p>(d) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act; and</p> <p>(e) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(b).</p> <p>(3) The Governor in Council may make regulations</p> <p>(a) defining “local signal” and “distant signal” for the purposes of subsection (2); and</p> <p>(b) prescribing conditions for the purposes of paragraph (2)(e), and specifying whether any such condition applies to all retransmitters or only to a class of retransmitter.</p> | <p>b) la retransmission est licite en vertu de la <i>Loi sur la radiodiffusion</i>;</p> <p>c) le signal est retransmis, sauf obligation ou permission légale ou réglementaire, simultanément et sans modification;</p> <p>d) dans le cas de la retransmission d’un signal éloigné, le retransmetteur a acquitté les redevances et respecté les modalités fixées sous le régime de la présente loi;</p> <p>e) le retransmetteur respecte les conditions applicables, le cas échéant, visées à l’alinéa (3) b).</p> <p>(3) Le gouverneur en conseil peut, par règlement :</p> <p>a) définir « signal local » et « signal éloigné » pour l’application du paragraphe (2);</p> <p>b) fixer des conditions pour l’application de l’alinéa (2) e) et, le cas échéant, prévoir si elles s’appliquent à l’ensemble des retransmetteurs ou à une catégorie de ceux-ci.</p> |
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[35] Regulations have been made under paragraph 31(3)(a) of the *Copyright Act* to define “local signal” and “distant signal” (see *Local Signal and Distant Signal Regulations*, SOR/89-254), but no conditions have been prescribed under paragraph 31(3)(b). Generally, the signals of a private local television station are “local signals” and not “distant signals” under the *Local Signal and Distant Signal Regulations*.

[36] The BDUs that would be affected by the proposed value for signal regime are “retransmitters” and thus entitled to the benefit of subsection 31(2) of the *Copyright Act*. The effect of subsection 31(2) is that a BDU does not infringe the section 21 copyright of a private local television station when it retransmits the station’s local signals, if the retransmission is lawful under the *Broadcasting Act* and complies with any regulations made pursuant to paragraph 31(3)(b) of the *Copyright Act*, and the signal is retransmitted simultaneously and without alteration except as required or permitted by law.

[37] Because subsection 31(2) contemplates a royalty only for the retransmission of distant signals (which by definition would not include the signal of a private local television station), a private local television station has no right under the *Copyright Act* to demand a royalty from a BDU for retransmitting its signals. On that basis, the BDUs argue that subsection 31(2) gives them a statutory right, akin to the user right under the fair dealing provision of the *Copyright Act* (see *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, at paragraph 48), to retransmit the local signal of a private local television station without paying a royalty. I agree, provided the retransmission meets the conditions stated in subsection 31(2).

[38] However, the subsection 31(2) conditions are significant. In particular, paragraph 31(2)(b) requires any retransmission of a local signal to be lawful under the *Broadcasting Act*. That necessarily means that a BDU wishing to take advantage of the user right in subsection 31(2) of the *Copyright Act* must do so in compliance with the *Broadcasting Act*, any regulations made under the

Broadcasting Act, and any conditions the Commission has attached to the retransmitter's broadcasting licence.

[39] Paragraph 31(2)(b) of the *Copyright Act* marks an intersection of the two statutory schemes – one implementing Canada's broadcasting policy and the other implementing Canada's copyright policy. In paragraph 31(2)(b) of the *Copyright Act*, Parliament has permitted the Commission to limit the transmission rights under subsection 31(2) by imposing any regulatory or licensing condition consistent with the Commission's statutory mandate as stated in the *Broadcasting Act*.

[40] Put another way, by making the BDUs' statutory retransmission rights in subsection 31(2) of the *Copyright Act* subject to paragraph 31(2)(b), Parliament has ranked the objectives of Canada's broadcasting policy ahead of those statutory retransmission rights. I see nothing in the *Copyright Act* that would justify a reversal of that ranking if the Commission determines that the objectives of Canada's broadcasting policy require the imposition of a regulation or licensing condition that would permit a private local television station to demand cash or other consideration from a BDU for the right to retransmit its signals.

[41] For substantially the same reasons, I conclude that it is open to the Commission to adopt a regulation or a licensing condition that would oblige a BDU to pay money to a private local television station for the right to retransmit its signals, provided the Commission determines that the imposition of such an obligation is required to meet the objectives of Canada's broadcasting policy as stated in subsection 3(1) of the *Broadcasting Act*.

[42] In my view, it is irrelevant that such an obligation might be characterized as an obligation to pay a royalty. Even now, the Commission requires BDUs to compensate private local television stations in respect of the retransmission of their signals, and it is not suggested that those requirements are not properly imposed. Some of the required compensation is not monetary (mandatory carriage, preferential channel placement, and simultaneous distribution), but it nevertheless represents something of value passing from a BDU to a television station. Some of the required compensation is monetary (the contribution of 1.5% of gross revenues to the local programming improvement fund and potentially (starting in August of 2011), contractual consideration for any retransmission of a local television signal outside of that station's local market). It seems to me that the proposed value for signal regime is different only in degree, not in kind, substance or function.

[43] The BDUs present a further argument based on the lengthy and complex history of various proposals made and rejected to amend the *Copyright Act* to grant television stations a statutory right to a royalty or similar retransmission fee. The argument is that this history should be understood to have resulted in a deliberate legislative policy adopted by Parliament that would be defeated by the proposed value for signal regime. I do not accept this argument.

[44] It may well be that Parliament has determined for any number of reasons relating to Canada's copyright policy that the *Copyright Act* should not be amended to provide private local televisions stations with a right to a royalty for the retransmission of local signals. However, it does not follow that the same determination necessarily indicates any intention on the part of Parliament

to preclude the Commission from adopting the proposed value for signal regime in the interests of Canada's broadcasting policy. Indeed, the possibility that the Commission might adopt a value for signal regime has been under consideration for some time, but the record discloses no hint that Parliament or the Government of Canada would consider such a regime to be an improper or undesirable intrusion into copyright policy.

[45] Nor am I persuaded that there is merit to the suggestion of the BDUs that the proposed value for signal regime would undermine Canada's stated position in relation to recent proceedings of the 2001 World Intellectual Property Organization ("WIPO") Standing Committee on Copyright and Related Rights. Certainly Canada has taken no such position before the Commission or in this reference. Indeed, Canada has chosen not to participate in this reference at all.

[46] Finally, I note that the BDUs rely on past statements of the Commission (in 1993, 1999, 2001 and 2003) to the effect that the matter of compensation for local retransmission rights should be a matter of copyright policy, not broadcasting policy. I place no weight on those statements, particularly since the Commission has brought this reference to have the scope of its statutory authority determined as a matter of law.

[47] I conclude that nothing in the *Copyright Act* or its legislative history precludes the Commission from adopting the proposed value for signal regime.

Conclusion

[48] I would answer the reference question as follows:

The *Broadcasting Act* empowers the Canadian Radio-television and Telecommunications Commission to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations.

La *Loi sur la radiodiffusion* confie au Conseil de la radiodiffusion et des télécommunications canadiennes le pouvoir d'établir un régime permettant aux stations privées de télévision locale de choisir de négocier avec les entreprises de distribution de radiodiffusion une juste valeur en échange de la distribution des services de programmation diffusée par ces stations de télévision locales.

“K. Sharlow”

J.A.

“I agree

Carolyn Layden-Stevenson J.A.”

NADON J.A. DISSENTING

[49] I have had the benefit of reading the Reasons of my colleague Sharlow J.A., but I must respectfully disagree with her disposition of this matter. In my opinion, the value for signal regime (the “VFS regime”) proposed in Broadcasting Order CRTC 2010-168 (the “Order”) is *ultra vires* the powers of the Canadian Radio-television and Telecommunications Commission (the “CRTC”). I do so conclude because the VFS regime conflicts with Parliament’s clear statement in paragraph 31(2)(d) of the *Copyright Act* that royalties must be paid only for the retransmission of distant signals and not for the retransmission of local signals.

[50] I need not repeat the facts or submissions of the parties which Sharlow J.A. has thoroughly reviewed in her Reasons.

[51] It is first necessary to note, as Sharlow J.A. does at paragraph 35 of her Reasons, that the signals at issue in this reference are “local signals” as defined in paragraph 2(1)(a) of the *Local and Distant Signal Regulations*, SOR/89-254 (the “Regulations”). Local broadcasters, such as CTVglobemedia Inc. and Canwest Television Limited Partnership, want broadcasting distribution undertakings (“BDUs”), such as Bell Canada and Rogers Communications Inc., to pay them a fee for the right to collect and retransmit their local broadcast signals to BDU subscribers.

[52] The BDUs’ main claim is that subsection 31(2) of the Act prevents the CRTC from enacting the VFS regime. Under subsection 31(2), a retransmitter does not infringe copyright if it meets five conditions. The BDUs need this protection because the local signals they retransmit contain

copyrighted material. It is likely that the local broadcasters have copyright in or a license to use the works they broadcast, due to agreements they have with the original creators of the works. Such agreements are typical in the industry (*Bell ExpressVu v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para.51 [*Bell ExpressVu*]).

[53] The conditions set out at subsection 31(2) of the *Copyright Act* are as follows:

- | | |
|---|---|
| <p>(a) the communication is a retransmission of a local or distant signal;</p> | <p>a) la communication consiste en la retransmission d'un signal local ou éloigné, selon le cas;</p> |
| <p>(b) the retransmission is lawful under the <i>Broadcasting Act</i>;</p> | <p>b) la retransmission est licite en vertu de la <i>Loi sur la radiodiffusion</i>;</p> |
| <p>(c) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;</p> | <p>c) le signal est retransmis, sauf obligation ou permission légale ou réglementaire, simultanément et sans modification;</p> |
| <p>(d) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act; and</p> | <p>d) dans le cas de la retransmission d'un signal éloigné, le retransmetteur a acquitté les redevances et respecté les modalités fixées sous le régime de la présente loi;</p> |
| <p>(e) the retransmitter complies with the applicable conditions, if any, [imposed by the Governor in Council]</p> | <p>e) le retransmetteur respecte les conditions applicables, le cas échéant, fixer par le gouverneur en conseil</p> |

[54] The BDUs do not, in their Memorandum of Fact and Law, directly address the meaning of the word “lawful” found in paragraph 31(2)(b) of the *Copyright Act*. However, the local broadcasters provide a cogent analysis of the BDUs’ regulatory situation at paragraph 69 of their Joint Memorandum. Therein, the local broadcasters describe how BDUs operate subject to two different statutory schemes that apply to two different aspects of the same activity.

[55] First, there is the copyright regime wherein compulsory licenses are granted under subsection 31(2) of the *Copyright Act*, allowing the BDUs to use the copyrighted works carried in the local broadcasters' signals without the permission of the copyright holders.

[56] Second, there is the broadcasting licensing and regulation regime wherein the CRTC determines the conditions the BDUs must satisfy before they have lawful access to the local broadcasters' signals which contain the copyrighted works.

[57] In short, to have lawful access to retransmit the local broadcasters' programming, the BDUs must have both a license to access the airwaves that carry that programming and a license to access the copyrighted works contained in that programming.

[58] What does it mean to have "lawful" access to local signals under the *Broadcasting Act*? The term "lawful" is not defined in either the *Copyright Act* or the *Broadcasting Act*. The Supreme Court of Canada's decision in *Bell ExpressVu* helps to define this term. There, the Court considered the term "lawful right" in the context of section 2 of the *Radiocommunication Act* which reads as follows:

"lawful distributor" , in relation to an encrypted subscription programming signal or encrypted network feed, means a person who has the lawful right in Canada to transmit it and authorize its decoding;

«distributeur légitime », la personne légitimement autorisée, au Canada, à transmettre un signal d'abonnement ou une alimentation réseau, en situation d'encodage, et à en permettre le décodage

[59] The Court was asked to determine whether a company which sold decoding systems that read encrypted satellite signals was a “lawful distributor”. To make this determination, the Court had to interpret the words “lawful right”. At paragraph 42, the Court affirmed the interpretation of Létourneau J.A. of this Court, who wrote as follows:

[t]he concept of "lawful right" refers to the person who possesses the regulatory rights through proper licensing under the Act, the authorization of the Canadian Radio-television and Telecommunications Commission as well as the contractual and copyrights necessarily pertaining to the content involved in the transmission of the encrypted subscription programming signal or encrypted network feed.

[60] That is, to have a “lawful right” in a particular piece of broadcast property, a person must have four things: proper licensing under the relevant Act, proper authorization by the relevant agency, a contractual right of some kind to use the property and sufficient copyright to use the property.

[61] In my view, the language and the context in the two cases are sufficiently analogous to allow an application of the Supreme Court’s interpretation of the word “lawful” in *Bell ExpressVu* to paragraph 31(2)(b) of the *Copyright Act*.

[62] Applying *Bell ExpressVu*’s interpretation of the word “lawful” to paragraph 31(2)(b) of the *Copyright Act* suggests that the BDUs must comply with CRTC regulations or conditions imposed under the *Broadcasting Act* to be able to assert a subsection 31(2) exception to copyright infringement.

[63] At this point, I believe it helpful to note several features of the *Copyright Act*. Parliament expressly says in paragraph 31(2)(a) that an exception to copyright infringement can apply to a “local or distant signal”. Paragraph 31(3)(a) gives Cabinet the power of “defining ‘local signal’ and ‘distant signal’ for the purposes of subsection (2)”. The two types of signals are, as noted above, given different definitions in the *Regulations*.

[64] Moreover, in paragraph 31(2)(d), Parliament has specified that “in the case of the retransmission of a distant signal”, the retransmitter must pay the royalties fixed under the *Copyright Act* and must comply with any terms and conditions fixed under the *Copyright Act*. The Act does not impose any such obligations on persons retransmitting local signals.

[65] From these features I infer two things. First, Parliament intended that local signals and distant signals be treated differently. Second, one aspect of this different treatment is that royalties can be imposed on persons retransmitting distant signals but cannot be imposed on persons retransmitting local signals.

[66] In my view, this is a correct interpretation of the Act for four reasons. First, the Supreme Court said in *Bell ExpressVu* at paragraph 52 that subsection 31(2) comprises two different regimes. There, the Court said that section 21 of the *Copyright Act* gives local broadcasters copyright in their signals “subject to the exceptions in s.31(2)” [emphasis added]. The French version of the judgment also uses the plural: “*des exceptions*”.

[67] All elements in subsection 31(2) of the *Copyright Act* must be met before an exception to copyright infringement is available because a conjunctive “and” is used to link the paragraphs. Thus, the only way the Supreme Court could have concluded that there was more than one exception in subsection 31(2) was if it thought local and distant signals were to be treated differently.

[68] Second, failing to interpret paragraph (d) as applying to distant signals only would render the disjunctive “or” used in paragraph (a) redundant. Paragraphs (a), (b), (c), and (e) do not distinguish between local and distant signals. The only difference between the two types of signals in subsection 31(2) is expressed in paragraph (d). Thus, it must be that Parliament distinguished between the types of signals in paragraph (a) because the signals receive different treatment in paragraph (d).

[69] Third, the statutory interpretation maxim *expressio unius est exclusio alterius* suggests that since Parliament expressly said that royalties had to be paid for distant signals, it also meant that royalties did not have to be paid for local signals.

[70] Fourth, the *Copyright Act* uses the term “royalty” (or “royalties”) liberally – more than 60 times. If Parliament had intended that royalties be paid for the retransmission of local signals, it could easily have said so. It did not.

[71] I conclude, then, that Parliament intended paragraph 31(2)(d) of the *Copyright Act* to mean that royalties be paid only for distant signals and not for local signals.

[72] Given this conclusion, it follows, in my view, that the CRTC's Order is *ultra vires*. Parliament delegated power to the CRTC when it passed the *Broadcasting Act*. However, this delegation of power is not absolute: “[t]he delegate is, of course, always subordinate in that the delegation can be circumscribed and withdrawn” (*R. v. Furtney* [1991] 3 S.C.R. 89, p.104; see also *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92 at para.17).

[73] Parliament's intention, as expressly stated in paragraph 31(2)(d) of the *Copyright Act*, that royalties be paid for the retransmission of distant signals and implicitly that no royalties be paid for the retransmission of local signals is a clear limit on the CRTC's power to impose conditions under the *Broadcasting Act*. Thus, since the Order conflicts with Parliament's intention, it is *ultra vires* the CRTC.

[74] I will now address two of my colleague's statements. First, she finds that in paragraph 31(2)(b) of the *Copyright Act*, Parliament gave the CRTC the power to limit transmission rights under subsection 31(2) by stating that such transmissions must be “lawful under the *Broadcasting Act*”. If the BDUs fail to comply with any conditions imposed by the CRTC, including the VFS regime, then they cease to have lawful access to the airwaves. The section also suggests, in her view, that Parliament has ranked the objectives of Canada's broadcasting policy ahead of the retransmission rights created under the *Copyright Act*.

[75] I respectfully disagree. Paragraphs (b) and (d) of subsection 31(2) are linked by the conjunctive “and”. This language and structure suggests, in my view, they are co-equal conditions that must both be met before an exception to copyright infringement is recognized. It does not suggest, however, that paragraph (b) can be read to rank ahead of and to overwhelm paragraph (d). Both provisions apply with equal force.

[76] To put it another way, the CRTC could not assert its power to regulate the lawfulness of a retransmission under the *Broadcasting Act* to grant an exception to copyright infringement for non-simultaneous retransmissions, contrary to paragraph (c). Similarly, the CRTC could not assert its power over broadcasting to say that no royalty need be paid for the retransmission of distant signals, contrary to paragraph (d). In my view, this approach is sound because it would be contrary to the principle of parliamentary supremacy if a regulatory body with delegated power could use its power to override Parliament’s clear legislative statement.

[77] The effect of Sharlow J.A.’s interpretation of paragraph 31(2)(b) is that paragraph 31(2)(d) comes to mean that royalties may only be charged for the retransmission of distant signals and may not be charged for the retransmission of local signals, unless the CRTC decides otherwise. Such an interpretation is, in my respectful view, erroneous.

[78] Further, the VFS regime is similar to the distant signal royalty payment regime in several ways. In both regimes, a royalty is paid – that is, value is exchanged for the use of property: see *Mobil Oil Canada v. Canada*, 2001 FCA 333 at paras.17-18. Under the VFS regime, this value is

determined by negotiations between each individual local broadcaster and each individual BDU: Order at para.7. Under the distant signal regime, the royalties are determined either by tariffs filed by the collective society representing broadcasters or by negotiations between the collective society and individual retransmitters: *Copyright Act* ss.70.1(c), 70.13, 70.191.

[79] In both regimes, the payee and the payor are the same. Under the VFS regime, the local broadcasters are paid for their signals by the BDUs, or receive other forms of value from the BDUs: Order at para.7. Under the distant signal regime, a “broadcaster” is paid the tariff fixed pursuant to paragraph 31(2)(d), or the other compensation separately agreed to, because the broadcaster has the sole right to authorize another person to reproduce his signal: *Copyright Act* ss.21(1), 31(2)(d). The payor is the retransmitter.

[80] In both regimes, the obligation to pay attaches to the same activity. Under the VFS regime, the BDU is obliged to pay because it retransmits the local broadcasters’ signal: Order at para.7. Under the distant signal regime, the retransmitter is obliged to pay because it retransmits the broadcaster’s signal: *Copyright Act*, ss.21(1), 31(2).

[81] In both regimes, the protected property is the same. Under the VFS regime, the local broadcasters’ signals are what is being paid for: Order at para.7. Under the distant signal regime, the broadcaster’s signal is what the retransmitter is paying for: *Copyright Act* ss.21(1), 31(2).

[82] There are also some differences between the two regimes. Under the VFS regime, the royalty is established as a result of direct negotiation between each local broadcaster and each BDU: Order at para.7. Thus, the type of compensation can, theoretically, be different in each individual agreement. Under the distant signal regime, the collective society may either file a tariff that is applicable to all users or it may enter into agreements with individual users: *Copyright Act* ss.70.12, 70.191. As a result, the type of compensation may be the same, if a tariff is applicable, or it may differ, if individual agreements are reached. This difference is primarily a difference in form and thus is unimportant, considering the numerous substantive similarities between the two regimes.

[83] A second (potential) difference is the distinction Sharlow J.A. draws between Canada's broadcasting policy and its copyright policy. In her view, paragraph 31(2)(b) is an articulation of broadcasting policy while paragraph 31(2)(d) is an articulation of copyright policy: Reasons at paras.38-40, 43-44. Thus, in her view, even if the VFS regime essentially establishes royalties for local signals, these royalties constitute an expression of broadcasting policy and so cannot be said to conflict with Parliament's expression of copyright policy.

[84] With the greatest of respect, I cannot agree. The analysis above shows, in my view, that the VFS regime is far more similar to, than different from, the distant signal regime in the *Copyright Act*. Both regimes involve a royalty passing between the same parties for the same activity relating to the same protected property. They are functionally equivalent, despite slight differences in form.

[85] This functional equivalence results in the VFS regime being *ultra vires* the CRTC's powers. In *Galerie d'art du Petit Champlain inc. c. Théberge*, 2002 SCC 34, the Supreme Court said at paragraph 5 that “[c]opyright in this country is a creature of statute and the rights and remedies it provides are exhaustive”: see also *Copyright Act* s.89. Contrary to the exhaustiveness of statutory copyright law, the CRTC, through the Order, is attempting to create a royalty that is essentially the same as the royalty Parliament has, in effect, forbidden in paragraph 31(2)(d) of the *Copyright Act*. Given this conflict between the *Copyright Act* and the CRTC's Order, the CRTC's enactment must give way.

[86] I would also like to address my colleague's remarks found at paragraph 42 of her Reasons where she says that “it is irrelevant that the VFS regime might be characterized as an obligation to pay a royalty”. In support of that proposition, Sharlow J.A. says that the BDUs have not contested the CRTC's power to impose the current bundle of regulatory burdens on them, which includes both non-monetary and monetary compensation. In her view, since these regulations are presumably valid, and since the burdens imposed by the VFS regime differ from these regulations only in kind, not substance, the VFS regime must be valid.

[87] I cannot agree. The validity of the current CRTC regulations is not before us. This reference was submitted by the CRTC directly to this Court and asks solely whether the VFS regime is a valid enactment by the CRTC. Thus, the current regulations are beyond the scope of the reference. In other words, whether the current Regulations are valid is an irrelevant consideration in answering the question posed by the CRTC.

[88] I would therefore answer the question posed by the CRTC as follows:

The *Broadcasting Act* does not empower the Canadian Radio-television and Telecommunications Commission to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local stations.

La *Loi sur la radiodiffusion* ne confie pas au Conseil de la radiodiffusion et des télécommunications canadiennes le pouvoir d'établir un régime permettant aux stations privées de télévision locale de choisir de négocier avec les entreprises de distribution de radiodiffusion une juste valeur en échange de la distribution des services de programmation diffusée par ces stations de télévision locales.

“M. Nadon”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-113-10

(AN APPLICATION FOR A REFERENCE BY THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION TO THE FEDERAL COURT OF APPEAL PURSUANT TO SECTIONS 18.3(1) AND 28(2) OF THE *FEDERAL COURTS ACT*, R.S.C. 1985, C. F-7)

STYLE OF CAUSE: IN THE MATTER OF *THE BROADCASTING ACT*, S.C. 1991, C.11;

AND IN THE MATTER OF THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION'S BROADCASTING REGULATORY POLICY CRTC 2010-167 AND BROADCASTING ORDER CRTC 2010-168;

AND IN THE MATTER OF AN APPLICATION BY WAY OF A REFERENCE TO THE FEDERAL COURT OF APPEAL PURSUANT TO SECTIONS 18.3(1) AND 28(2) OF THE *FEDERAL COURTS ACT*, R.S.C. 1985, C. F-7.

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CONCURRED IN BY: LAYDEN-STEVENSON J.A.

DISSENTING REASONS BY: NADON J.A.

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