Federal Court of Appeal | Cour d'appel fédérale

Date: 20210728

Docket: A-289-19

Citation: 2021 FCA 153

[ENGLISH TRANSLATION]

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

BETWEEN:

TVA GROUP INC. and
QUEBECOR MEDIA INC.

Appellants

and

BELL CANADA, BELL EXPRESSVU
LIMITED PARTNERSHIP and
BELL CANADA ENTREPRISES

Respondents

and

COGECO COMMUNICATIONS INC.
TELUS COMMUNICATIONS INC.
ATTORNEY GENERAL OF CANADA

Interveners

Heard by online videoconference hosted by the registry

on May 18, 2021.

Judgment delivered at Ottawa, Ontario, on July 28, 2021.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

I. Introduction

[1] TVA Group Inc. and Quebecor Media Inc. (TVA), the appellants, are appealing two decisions and one mandatory order issued by the Canadian Radio-television and Telecommunications Commission (the CRTC), specifically, a first decision dated April 10, 2019, communicated by letter, a second decision dated April 18, 2019 (CRTC 2019-109), and a mandatory order appended to decision CRTC 2019-109 (CRTC 2019-110). For the purposes of this appeal, the two decisions and the mandatory order in question will be referred to as the "impugned decisions".

[2] The impugned decisions were made following the first game of the National Hockey League playoffs on the evening of April 10, 2019, when TVA withdrew the signal of the TVA Sports channel from subscribers of Bell Canada, Bell ExpressVu Limited Partnership and Bell Canada Enterprises (Bell), the respondents. The following day, Bell applied for a temporary injunction, and the day after that, on April 12, 2019, from the bench, the Quebec Superior Court ordered TVA to restore the signal (*Bell Canada c. Québecor inc.*, 2019 QCCS 1366). TVA complied with the Superior Court's order.

[3] The CRTC concurrently intervened in the dispute between TVA and Bell, rendering the impugned decisions. The CRTC first determined that TVA and Bell were engaged in a dispute. The CRTC confirmed this finding in a letter dated April 10, 2019, and decided that the standstill

rule set out in subsection 15(1) of the *Discretionary Services Regulations*, S.O.R./2017-159, applied in the case.

[4] On April 18, 2019, the CRTC found that TVA had contravened section 15 of the *Discretionary Services Regulations* by withholding its signal of the TVA Sports channel from distribution by Bell. In the mandatory order appended to its decision, which was issued pursuant to subsection 12(2) of the *Broadcasting Act*, S.C. 1991, c. 11 (the Act), the CRTC ordered TVA to continue providing its programming service to Bell until the dispute was resolved. The CRTC also ordered the suspension of TVA's broadcasting licence if TVA again withheld its signal during the dispute.

[5] The impugned decisions were made while TVA and Bell were engaged in a negotiation process. The purpose of the negotiations was to renew an affiliation agreement dated November 21, 2011, that bound the parties in respect of specialty services. More specifically, the dispute between TVA and Bell concerned the terms of carriage and of distribution of the signal of the TVA Sports channel, including the tariff for the royalties payable by Bell for this channel.

[6] In this appeal, TVA is alleging that the impugned decisions are invalid on the ground that the regulatory provisions under which they were made are *ultra vires* the powers conferred on the CRTC under the Act.

[7] For the reasons that follow, I am of the view that the appeal should be dismissed with costs.

II. Background

[8] The context of this appeal goes back to February 27, 2019, when TVA and Bell were negotiating the renewal of an affiliation agreement. On that date, TVA filed an undue preference complaint against Bell with the CRTC. In that complaint, TVA criticized Bell for giving preferential treatment to its own sports channel, Réseau des sports (RDS), thereby disadvantaging TVA Sports. The next day, on February 28, 2019, TVA instituted an action in damages against Bell before the Quebec Superior Court on the same ground.

[9] Several weeks later, on April 5, 2019, when difficulties arose in the course of the negotiations, TVA and Bell participated in CRTC-assisted mediation, but they were unable to come to an agreement.

[10] The next day, on April 6, 2019, during the last game of the Montreal Canadiens regular hockey season, and four days before the playoffs were set to begin, crawls at the bottom of the screen informed Bell subscribers that the signal of the TVA Sports channel would be suspended in the following days.

[11] On April 7, 2019, Bell asked the CRTC to notify TVA that the standstill rule applied and that TVA therefore had to continue to provide the signal of the TVA Sports channel to Bell.

[12] On April 8, 2019, as stated in the introduction, the CRTC informed TVA and Bell that it was of the opinion that the two entities were engaged in a dispute and that the standstill rule

therefore applied. More specifically, TVA had to continue providing services to Bell under this rule and Bell had to continue distributing them according to the terms and conditions that were in place before the dispute arose in accordance with the affiliation agreement of the parties.

[13] On the same day, Bell asked the CRTC to issue a mandatory order under subsection 12(2) of the Act to prohibit TVA from withdrawing its signal. Bell also submitted its response to the undue preference complaint filed by TVA on February 27, 2019.

[14] Also on the same day, TVA sent Bell a notice of termination of the affiliation agreement, which Bell opposed.

[15] On April 9, 2019, TVA informed the public that it would withdraw the TVA Sports signal from Bell subscribers as of 7 p.m. the following day.

[16] On April 10, 2019, Bell filed an application for final offer arbitration with the CRTC regarding the carriage of TVA Sports, asking the CRTC to rule on the applicable rates for the signal of the channel.

[17] On the same day, the CRTC issued the first impugned decision in this appeal by letter. In the letter, the CRTC informed TVA and Bell that it had determined that they were engaged in a dispute. The CRTC confirmed that the standstill rule set out in subsection 15(1) of the *Discretionary Services Regulations* applied in the case and stated the following:

> [T]he *Discretionary Services Regulations* contemplate dispute resolution on *carriage* as well as disputes regarding *terms of carriage*. **The Commission has determined that Bell and Québecor are engaged in such a dispute and therefore the standstill rule applies**. Accordingly, Bell and Québecor are required to provide their respective programming services to one another, and are required to distribute those services, at the same rates and on the same terms and conditions as they did before the dispute, until the parties resolve their dispute or the Commission issues a decision concerning this unresolved matter.
>
> (Letter from the CRTC to Peggy Tabet (Quebecor Media Inc.) and Rob Malcolmson (Bell Canada Enterprises) dated April 10, 2019, Appeal Book, Vol. 1, pp. 16–17)
>
> [Bold in original] [Emphasis added].

[18] On April 10, 2019, at the start of the television broadcast of the first game of the National Hockey League playoffs, TVA withheld the signal of its TVA Sports channel from Bell subscribers, thereby depriving nearly one million subscribers of the French-language broadcast of part of the playoffs.

[19] On April 11, 2019, Bell applied for a temporary injunction, asking the Quebec Superior Court to order TVA to restore the signal of the TVA Sports channel. The Court allowed the application, and TVA restored the signal.

[20] On April 17, 2019, the CRTC held a hearing to determine whether on April 10, 2019, TVA had contravened subsection 15(1) of the *Discretionary Services Regulations* by withholding or interfering with the signal of its TVA Sports channel.

[21] The day after the hearing, on April 18, 2019, the CRTC rendered the second impugned decision in this appeal. The CRTC found that TVA had contravened the standstill rule under

section 15 of the *Discretionary Services Regulations* as it had acted in a way that "prevented Bell from providing TVA Sports to Canadians during a dispute". At the same time, the CRTC issued a mandatory order requiring TVA to continue to provide the signal of the TVA Sports channel to Bell at the same rates until the dispute was resolved or the CRTC had rendered a decision concerning any unresolved matter. Such a mandatory order, imposed under subsection 12(2) of the Act, is made an order of the Federal Court or of any superior court of a province when it is filed with one such court and is enforceable in the same manner as an order of the court (s. 13). Non-compliance with such an order constitutes an offence under section 32 of the Act and may lead to prosecution before the courts. The mandatory order is also being challenged in this appeal.

[22] The CRTC, concerned with TVA's disregard for its authority, also suspended TVA Sports' broadcasting licence. That suspension, however, would go into effect only if "TVA Sports' signal [was] withheld from Bell's distribution undertakings by TVA Group prior to the resolution of the dispute" (Broadcasting Decision CRTC 2019-109 and Broadcasting Order CRTC 2019-110, Appeal Book, Vol. 1, pp. 19–25).

[23] Dissatisfied with the CRTC's decisions, TVA filed an application for leave to appeal these decisions before this Court, with subsection 31(2) of the Act providing for an appeal on a question of law or a question of jurisdiction.

[24] It is in this context that on June 18, 2019, this Court allowed TVA's application for leave to appeal.

[25] In this appeal, TVA is challenging the decisions and mandatory order of the CRTC described above and is challenging not only section 15 of the *Discretionary Services Regulations* but also subsection 14(1) of those Regulations and subsection 12(1) of the *Broadcasting Distribution Regulations*, S.O.R./97-555 (the impugned regulatory provisions) on the ground that these provisions are *ultra vires* the powers of the CRTC.

[26] In short, the impugned regulatory provisions provide for a dispute resolution mechanism in the event of a dispute between a programming undertaking and a distribution undertaking concerning the carriage or the terms of carriage of programming.

[27] Remarkably, the respondent Bell, like the appellant TVA, is also asking the Court to conclude that the impugned regulatory provisions are *ultra vires* the powers conferred by the Act. The only difference in Bell's position is that Bell is asking the Court to nevertheless confirm the validity of the CRTC decisions at issue. Before this Court, TVA's submissions concerned the CRTC's jurisdiction to adopt the impugned regulatory provisions while Bell's were limited to the question of whether the impugned regulatory provisions conflict with paragraph 3(1)(*f*) and subsection 13(4) of the *Copyright Act*, R.S.C. 1985, c. C-42.

[28] Finally, it should be noted that the Court also heard the submissions and representations of three interveners in this appeal: the Attorney General of Canada (AGC), Cogeco Communications Inc. (Cogeco) and Telus Communications Inc. (Telus), all of which were granted intervener status on December 4, 2019, by order of this Court.

III. Relevant provisions

[29] The impugned regulatory provisions in this appeal are as follows:

***Discretionary Services Regulations*, S.O.R./2017-159**	***Règlement sur les services facultatifs*, D.O.R.S./2017-159**
Referral of dispute to Commission	**Règlement de différends – renvoi au Conseil**
14 (1) If there is a dispute between a licensee and the operator of a licensed distribution undertaking or an exempt distribution undertaking concerning the carriage or terms of carriage of programming that originates from the licensee, including the wholesale rate and the terms of any audit referred to in section 15.1 of the *Broadcasting Distribution Regulations*, one or both of the parties to the dispute may refer the matter to the Commission for dispute resolution.	**14 (1)** En cas de différend entre le titulaire et l'exploitant d'une entreprise de distribution autorisée ou exemptée concernant la fourniture ou des modalités de fourniture de la programmation transmise par le titulaire — y compris le tarif de gros et les modalités de la vérification visée à l'article 15.1 du *Règlement sur la distribution de radiodiffusion* —, l'une des parties ou les deux peuvent s'adresser au Conseil en vue d'un règlement.
. . .	. . .
Obligations During Dispute	**Obligation lors d'un différend**
Obligation — rates, terms and conditions	**Obligation — tarifs et modalités**
15 (1) During a dispute between a licensee and a person that is licensed to carry on a distribution undertaking or the operator of an exempt distribution undertaking concerning the carriage or terms of carriage of programming that originates from the licensee or concerning any right or obligation under the Act, the licensee must continue to provide its programming services to the distribution undertaking at the same rates and on the same terms and	**15 (1)** En cas de différend entre le titulaire et une personne autorisée à exploiter une entreprise de distribution ou l'exploitant d'une entreprise de distribution exemptée concernant la fourniture ou des modalités de fourniture de la programmation transmise par le titulaire ou concernant tout droit ou toute obligation prévus par la Loi, le titulaire continue à fournir ses services de programmation à l'entreprise de distribution aux

conditions as it did before the dispute.

Period of dispute

15 (2) For the purposes of subsection (1), a dispute begins when written notice of the dispute is provided to the Commission and is served on the other undertaking that is a party to the dispute and ends when an agreement settling the dispute is reached by the concerned undertakings or, if no such agreement is reached, when the Commission renders a decision concerning any unresolved matter.

mêmes tarifs et selon les modalités qui s'appliquaient aux parties avant le différend.

Durée du différend

15 (2) Pour l'application du paragraphe (1), le différend débute lorsqu'un avis écrit en faisant état est déposé auprès du Conseil et signifié à l'autre entreprise en cause. Le différend prend fin dès que les entreprises en cause parviennent à un accord ou, à défaut, dès que le Conseil rend une décision concernant toute question non résolue.

***Broadcasting Distribution Regulations*, S.O.R./97-555**

Dispute Resolution

12 (1) If there is a dispute between the licensee of a distribution undertaking and the operator of a licensed programming undertaking or an exempt programming undertaking concerning the carriage or terms of carriage of programming originated by the programming undertaking — including the wholesale rate and the terms of any audit referred to in section 15.1 — one or both of the parties to the dispute may refer the matter to the Commission.

***Règlement sur la distribution de radiodiffusion*, D.O.R.S./97-555**

Règlement de différends

12 (1) En cas de différend entre, d'une part, le titulaire d'une entreprise de distribution et, d'autre part, l'exploitant d'une entreprise de programmation autorisée ou exemptée au sujet de la fourniture ou des modalités de fourniture de la programmation transmise par l'entreprise de programmation — y compris le tarif de gros et les modalités de la vérification visée à l'article 15.1 —, l'une des parties ou les deux peuvent s'adresser au Conseil.

IV. Issues

[30] The appeal raises two issues:

A. Are the impugned regulatory provisions *ultra vires* the powers conferred on the CRTC by the *Broadcasting Act*?

B. Do the impugned regulatory provisions conflict with paragraph 3(1)(*f*) and subsection 13(4) of the *Copyright Act*?

V. Standard of review

[31] It is important to note that in allowing TVA's application for leave to appeal, this Court found that [TRANSLATION] "the applicants advanced solid arguments and an arguable case concerning the CRTC's jurisdiction to adopt section 14 and section 15 of the *Discretionary Services Regulations* and subsection 12(1) of *Broadcasting Distribution Regulations*" (Appellants' Compendium, p. 6). This appeal therefore raises questions of law that directly concern the limits of the CRTC's power. The appeal mechanism provided for in subsection 31(2) of the Act clearly covers such questions, and according to the Supreme Court of Canada, the standards of appellate review will apply in such circumstances (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, paras. 36–52 [*Vavilov*]; *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, 441 D.L.R. (4th) 155, paras. 34 and 35 [*Bell 2019*]). In this case, and in accordance with the standards of appellate review (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235), it is the standard of correctness that applies to the impugned decisions.

VI. Analysis

A. *Are the impugned regulatory provisions ultra vires the powers conferred on the CRTC by the Broadcasting Act?*

[32] It is important to note at the outset that Parliament conferred on the CRTC the mission of regulating and supervising the Canadian broadcasting system (section 3 and section 5 of the Act), and the Act gives it broad powers to do so. In *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 S.C.R. 489 [*Reference re Broadcasting Policy*], the Supreme Court noted the following at paragraph 15:

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

[33] Among the broad powers conferred on the CRTC is the authority to make regulations under section 10 of the Act, in this case the impugned regulatory provisions. The impugned regulatory provisions set out a dispute resolution mechanism and require programming and distribution undertakings to continue to provide their respective services until an agreement settling their dispute is reached or, where applicable, the CRTC renders a decision. Pending resolution of the conflict, this rule, which is at the heart of the dispute and is known as the standstill rule, therefore intends to ensure that undertakings maintain their existing services.

[34] However, TVA and Bell both submit that sections 3, 5 and 10 of the Act do not confer on the CRTC the power to adopt the impugned regulatory provisions, which required TVA to continue providing the TVA Sports channel to Bell against its will until the CRTC rendered a

decision on the dispute. In fact, according to TVA, the impugned regulatory provisions, and more specifically the standstill rule, force programming undertakings and distribution undertakings to remain in contractual relationships, and TVA submits that this constraint is *ultra vires* the regulatory powers the Act confers on the CRTC.

[35] As noted by TVA, it should be recognized that section 3 and section 5 of the Act are not attributive of jurisdiction and are not sufficient in and of themselves to justify the validity of the impugned regulatory provisions. Consequently, without disregarding the objectives listed in section 3 and section 5 of the Act, the Court must analyze the issue of whether the CRTC has the jurisdiction to adopt the impugned regulatory provisions, particularly in light of section 10 of the Act, which grants the CRTC its delegated authority to make regulations (*Bell Canada v. Canada (Attorney General)*, 2016 FCA 217, 402 DLR (4th) 551, paras. 47–49). At issue more specifically is the CRTC's regulatory authority under paragraph 10(1)(*h*) in the event of a dispute arising between a programming undertaking—in this case TVA—and a distribution undertaking—in this case Bell—concerning the carriage of programming.

[36] In order to analyze the interpretation to be given to paragraph 10(1)(*h*) of the Act, the Court must follow the modern approach to statutory interpretation, according to which "the words of a statute must be read 'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'" (*Vavilov*, para. 117; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, paras. 26 and 27; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 DLR (4th) 193, para. 21; E. Driedger, *Construction of Statutes* (2nd ed. 1983), p. 87). I will

therefore examine (i) the wording of paragraph 10(1)(*h*) of the Act, (ii) the purpose of the Act and finally (iii) its legislative history, all with a view to determining whether the impugned regulatory provisions are *ultra vires* the powers conferred on the CRTC under the Act.

(1) Statutory interpretation

(a) *The wording of paragraph 10(1)(h) of the Broadcasting Act*

[37] TVA submits that the CRTC cannot have an impact on the economic aspects that exist between a programming undertaking and a distribution undertaking on the ground that the CRTC's actions must remain essentially cultural in scope and not economic. At the same time, both TVA and Bell are attempting to limit the CRTC to a supporting role that consists of [TRANSLATION] "assisting" parties in their negotiations. This simplistic vision of the CRTC's powers is not consistent with the wording of paragraph 10(1)(*h*) of the Act.

[38] I note that paragraph 10(1)(*h*) of the Act reads as follows:

10 (1) The Commission may, in furtherance of its objects, make regulations	**10 (1)** Dans l'exécution de sa mission, le Conseil peut, par règlement :
…	[…]
(*h*) for resolving, by way of mediation or otherwise, any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertakings;	***h*)** pourvoir au règlement — notamment par la médiation — de différends concernant la fourniture de programmation et survenant entre les entreprises de programmation qui la transmettent et les entreprises de distribution;

[39] On its face, paragraph 10(1)(*h*) of the Act clearly indicates that Parliament granted the CRTC the authority to make regulations in order to be able to intervene in disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming. The English version of paragraph 10(1)(*h*) confirms the broad discretion granted to the CRTC in making regulations for resolving "any disputes". This interpretation is also supported by the French version: "pourvoir au règlement . . . de différends". Moreover, as rightly noted by Cogeco, [TRANSLATION] "an enabling provision [such as paragraph 10(1)(*h*)], which authorizes the making of regulations 'for' or 'for the purpose of' carrying out an objective, . . . must be given a broad and liberal interpretation" (Cogeco's Memorandum of Fact and Law, para. 27; Ruth Sullivan, *Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) p. 160). The AGC also aptly notes that it is difficult to envisage how the CRTC, in exercising the authority conferred on it under paragraph 10(1)(*h*), could resolve a dispute between a programming undertaking and a distribution undertaking without influencing an economic aspect of their relationship, an aspect that is necessarily prominent.

[40] At first sight therefore, the wording of paragraph 10(1)(*h*) of the Act grants the CRTC the jurisdiction to adopt the impugned regulatory provisions and, more importantly, the standstill rule.

(b) *The purpose of the Broadcasting Act*

[41] The Act has a broad purpose, and it is clear from some of the provisions of the Act that the objectives established by Parliament include not only the cultural aspects of broadcasting but also the economic aspects. For example, subparagraph 3(1)(*d*)(i) of the Act states that the

Canadian broadcasting system should "serve to . . . strengthen the cultural, political, social and economic fabric of Canada" (emphasis added). Similarly, paragraph 3(1)(*t*) of the Act sets out objectives for distribution undertakings with respect to the carriage of programming services, so it would be unreasonable to claim that there is no economic dimension to the CRTC's mission.

[42] TVA nevertheless submits that paragraph 10(1)(*h*) of the Act does not authorize the CRTC to adopt the impugned regulatory provisions, including the standstill rule, because, by doing so, the CRTC is interfering in the contractual and economic relationships between the programming undertakings and the distribution undertakings. In support of this claim, TVA adroitly points to the restrictive interpretation given by the courts to another provision, namely, paragraph 9(1)(*h*) of the Act, including by this Court in *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, 428 DLR (4th) 311 [*Bell 2018*]. TVA invites us to transfer this interpretation to paragraph 10(1)(*h*), thereby limiting its scope.

[43] TVA alleges that the reasons of my colleague Woods J.A. in *Bell 2018*, concurred in by my colleague Nadon J.A., confirm that the Act—and more specifically paragraph 9(1)(*h*)—does not allow the CRTC to regulate the terms and conditions of affiliation agreements, whether directly or through a dispute resolution process as set out in the impugned regulatory provisions. In support of this claim, TVA refers to paragraphs 167 and 169 of *Bell 2018*:

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

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

[44] In this case, TVA submits that, to the extent that sections 9 and 10 of the Act are to be interpreted with the same objectives in mind, this Court's reasoning in *Bell 2018* must apply to this case and that the CRTC lacks jurisdiction to adopt the impugned regulatory provisions.

[45] I disagree.

[46] The majority of this Court in *Bell 2018* (Woods J.A. and Nadon J.A.) addressed a specific issue without commenting directly on paragraph 10(1)(*h*) or the CRTC's power to resolve disputes. The standstill rule at the heart of this dispute, and paragraph 10(1)(*h*) in particular, were not analyzed in *Bell 2018*. The Court was careful to clarify at paragraph 173 that its decision was limited to the scope of paragraph 9(1)(*h*) of the Act:

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

[47] In support of its claim in this case, TVA also relies on the Supreme Court of Canada's decision in *Reference re Broadcasting Policy*. In that case, the Supreme Court examined the CRTC's jurisdiction to establish a market-based value for signal regime. The main feature of the regime was to give private local television stations (as broadcasters) the right to prohibit broadcasting distribution undertakings from retransmitting their signals in the event of a breakdown of negotiations if the parties failed to reach an agreement on compensation. The

program deletion right was intended to give broadcasters the necessary leverage to require compensation from the broadcasting distribution undertakings (*Reference re Broadcasting Policy*, para. 19).

[48] The Supreme Court, having read the Act in its entire context, found that the creation of the rights envisaged by the CRTC was "too great a stretch from the core purposes intended by Parliament and from the powers granted to the CRTC under the *Broadcasting Act*" (*Reference re Broadcasting Policy*, para. 33). Moreover, according to the Supreme Court, the regime proposed by the CRTC conflicted with certain provisions of the *Copyright Act* (sections 21 and 31).

[49] In this case, TVA claims that according to the Supreme Court's analysis in *Reference re Broadcasting Policy*, the CRTC may not control or interfere with the economic relationship between a programming undertaking and a distribution undertaking and that the impugned regulatory provisions and the standstill rule must therefore be declared invalid.

[50] Again, I disagree. The importance TVA gives to *Reference re Broadcasting Policy* in this case is exaggerated given the issue that was before the Supreme Court. One must read the Supreme Court's finding in *Reference re Broadcasting Policy* as being limited to the compensation regime proposed by the CRTC. Thus, it does not mean that every regulatory measure adopted by the CRTC that has economic consequences is de facto *ultra vires* the Act. *Reference re Broadcasting Policy* cannot, therefore, be seen as a prohibition against or elimination of any power of the CRTC to exert economic control over a programming undertaking and a distribution undertaking within the Canadian broadcasting system.

[51] Similarly, it should also be noted that recently, in *Bell 2019*, the Supreme Court of Canada clearly indicated that a narrow reading of paragraph 9(1)(*h*) "will not hamper [the CRTC's] efforts to regulate the broadcasting industry in accordance with the statutory objectives listed in s. 3(1)" (*Bell 2019*, para. 49). Ultimately, and as argued by the interveners, the scope of the provision at issue in this case, namely, paragraph 10(1)(*h*), is in no way altered by the courts' restrictive interpretation of paragraph 9(1)(*h*) of the Act.

(c) *Legislative history*

[52] While legislative history is not in itself determinative, it does provide additional information on how to interpret paragraph 10(1)(*h*) of the Act. In this case, an overview of the history reveals that Parliament's intent was to give very broad powers to the CRTC in support of its broadcasting mission, especially with respect to the settlement of disputes in light of the growing challenge posed by the advent of the distribution undertaking as the gatekeeper of programming.

[53] It should be noted that this challenge arose when the federal government authorized vertical integration without restriction. In so doing, it allowed a single entity to own or control both programming and distribution services. In approving vertical integration, the federal government immediately became aware of the increased potential for conflicts of interest. To address this challenge, it was decided that the CRTC would have the power to resolve disputes that might arise in the context of negotiations between a programming undertaking and a distribution undertaking. The adjudicative role conferred on the CRTC to mitigate the potential risk of conflicts of interest and to resolve, in the public interest, disputes between undertakings

has been reiterated on a number of occasions: see *Canadian Voices, Canadian Choices: A New Broadcasting Policy for Canada* (Communications Canada, 1988); *Government Response to the Fifteenth Report of the Standing Committee on Communications and Culture: A Broadcasting Policy for Canada* (June 1988); House of Commons, Legislative Committee on Bill C-136, *Minutes of Proceedings and Evidence*, 33-2, No. 1 and No. 4 (August 10 and 17, 1988), at 1:27 and 4:41 (Chairman: Robert E. J. Layton); *The Broadcasting Act 1988*: a clause-by-clause analysis of Bill C-136 (Canada, Department of Communications, August 1988); *House of Commons Debates*, 34-2 (November 3, 1989), at p. 5548 (Hon. Marcel Masse) (Joint Book of Statutes, Regulations and Authorities, Vol. 12, p. 4497, Vol. 13, pp. 4838, 4842, 4879, 4999, Vol. 14, pp. 5278, 5396). In this case, the decision-making role conferred on the CRTC is all the more crucial given that, as noted by the AGC, both TVA and Bell are vertically integrated companies that both distribute and offer programming, thereby multiplying the risk of disputes.

[54] Moreover, when the Act was enacted, the Canadian Cable Television Association had proposed that the power of the CRTC at issue be limited to a non-binding power of mediation (House of Commons, Legislative Committee on Bill C-136, *Minutes of Proceedings and Evidence*, 33-2, No. 4 (August 17, 1988) at 4A:7 (Chairman: Robert E. J. Layton) (Joint Book of Statutes, Regulations and Authorities, Vol. 14, p. 5308). However, that proposal by the industry, which was intended to limit the CRTC's role to that of "assist[ing]" undertakings in their disputes—and which TVA is now echoing some 30 years later—was not accepted by Parliament at the time. It opted instead to confer on the CRTC the power to "settle disputes" (Joint Book of Statutes, Regulations and Authorities, Vol. 13, p. 4999).

[55] In light of the foregoing, it appears that Parliament intended, through paragraph 10(1)(*h*) of the Act, to give the CRTC the power to intervene through regulations in a specific aspect of the economic relationships between programming undertakings and distribution undertakings, more specifically that of adjudicating their disputes regarding the carriage of programming. It follows that the regulatory provisions contested by TVA and Bell are *intra vires* the CRTC's powers and fall within the regulatory power given to the CRTC by Parliament in paragraph 10(1)(*h*) of the Act.

[56] What remains to be addressed is the claim by TVA and Bell that the standstill rule, by requiring TVA to provide the signal of its TVA Sports channel to Bell, enables the CRTC to force the maintenance of a permanent contractual relationship between TVA and Bell despite TVA's lack of consent.

(2) The impact of the standstill rule on the parties' contractual relationship

[57] It should be recalled that when the dispute regarding the signal of the TVA Sports channel arose between TVA and Bell, the two undertakings were bound by an affiliation agreement. Under the agreement, TVA was indeed required to transmit its signal for its TVA Sports channel to Bell.

[58] In this context, the CRTC, noting, among other things, the undue preference complaint filed by TVA on February 27, 2019, the CRTC-assisted mediation in which TVA and Bell had participated on April 5, 2019, and the letters from Bell (April 7, 8 and 10, 2019), correctly determined that the parties were engaged in a dispute.

[59] It was on the basis of this finding that the CRTC applied the standstill rule, requiring TVA and Bell to provide their respective services to one another in accordance with the terms set out in the affiliation agreement that was in place before the dispute arose.

[60] TVA argues that by rendering the impugned decisions and by applying the standstill rule, the CRTC forced it to continue in its contractual relationship with Bell despite the fact that its intent had been to terminate the affiliation agreement. However, as noted by the interveners, the evidence in the record demonstrates that TVA did not actually terminate the agreement in question with Bell. As of April 10, 2019, the date on which TVA interrupted its signal, TVA had not made it known that it wished to terminate the agreement. On the contrary, TVA remained open to seeking a solution, resolving the impasse it had reached with Bell and reaching a new, satisfactory affiliation agreement (Appeal Book, Vol. 4, p. 800, Vol. 5, pp. 842, 843). It follows that TVA's claims that it intended to terminate the affiliation agreement cannot be accepted.

[61] As for the notice of termination that TVA sent Bell on April 8, 2019, and on which TVA is relying to support its claim that the affiliation agreement between the two undertakings was no longer in effect, the fact is that it does not contain an effective date of termination. The notice of termination expressly states that the effective date and time of termination will be confirmed [TRANSLATION] "in a future communication" (Appeal Book, Vol. 2, p. 343). Furthermore, the evidence in the record does not include any subsequent letter confirming the terms of the termination. In that sense, the notice of termination invoked by TVA in support of its claims is more akin to an expression of its intent to withdraw from the affiliation agreement, an intent it did not follow through with. Moreover, in the event that TVA or Bell had wished to terminate

the agreement, the agreement in question has a fixed term, renewable until one party gives 180 days' notice to the other party, as Bell has correctly pointed out (Appeal Book, Vol. 5, p. 837). According to the very terms of the agreement at issue, TVA was required to give 180 days' notice if it wished to terminate the agreement, which it did not do.

[62] In the circumstances, it is difficult to accept TVA's argument that the standstill rule has required it to remain in a contractual relationship without its consent knowing that it is precisely under the affiliation agreement that TVA is required to transmit its signal to Bell. If TVA had no longer wished to be bound by the affiliation agreement, TVA was free to terminate it in accordance with the terms of the agreement. Because it did not do so, the affiliation agreement remained in effect, and TVA nevertheless withheld its signal on April 10, 2019, thereby depriving nearly one million Canadian consumers of the exclusive French-language broadcast of the first match of the National Hockey League playoffs.

[63] The very purpose of the standstill rule is to prevent a programming undertaking bound by an affiliation agreement from withholding its signal in the context of negotiations in which a dispute arises—or to prevent a programming undertaking from simply abandoning the service. This rule allows the CRTC, as part of the mission given to it by Parliament, (i) to maintain the affiliation agreement in question as it existed before the dispute arose, (ii) to maintain a level playing field throughout a negotiation process, and (iii) to ensure that Canadian consumers are not deprived of services during such disputes. In fact, it is only by preserving the status quo with respect to programming and by neutralizing the possibility of an arbitrary withdrawal of service that the CRTC can act to protect the public interest. In other words, to the extent that the

standstill rule requires the provision of service, its very purpose is to maintain the existing balance and thereby protect that interest. Finally, the standstill rule is not permanent in nature, as TVA submits, because a party may directly ask the CRTC to lift the standstill rule if the dispute at issue is resolved or, in the absence of an agreement, the CRTC may render a decision concerning any unresolved matter (*Discretionary Services Regulations*, subsection 15(2)).

B. *Do the impugned regulatory provisions conflict with paragraph 3(1)(f) and subsection 13(4) of the Copyright Act?*

[64] At the hearing before the CRTC, TVA challenged the CRTC's jurisdiction under the Act to adopt the impugned regulatory provisions. The CRTC analyzed and decided this issue in its decisions with this in mind. Before the CRTC, neither Bell nor TVA raised the argument that the impugned provisions conflict with the *Copyright Act*. However, before this Court, that argument has nevertheless been raised and fully developed despite the fact that the only reference to the copyright issue in connection with the standstill rule can be found in TVA's written submissions to the CRTC and is limited to the following:

> [TRANSLATION]
> Finally, the FOA process that imposes the status quo and that ultimately leads to a CRTC decision on the tariff for royalties is not only *ultra vires* the CRTC's authority, but violates sections 3(1)(*f*) and 13(4) of the *Copyright Act*.
>
> (Appeal Book, Vol. 4, p. 629)

[65] The CRTC did not actually have before it the arguments relating to the *Copyright Act*, which explains why it did not reach a decision on this issue. However, Bell and TVA are asking this Court to do so despite the CRTC's silence on this point in its decision. As Telus correctly points out, the mere passing reference to copyright contained in the above-cited excerpt of

TVA's submissions before the CRTC is not sufficient to warrant a review and analysis of the issue by this Court (*Taman v. Canada (Attorney General)*, 2017 FCA 1, [2017] 3 F.C.R. 520). I am of the view that it would be inappropriate to deal with this issue in the circumstances.

[66] That said, and without deciding the issue, it is worth noting that, at first glance, the conflict between the *Copyright Act* and the impugned regulatory provisions raised by Bell and TVA appears to be moot because the standstill rule necessarily implies that a contractual agreement already exists between a programming undertaking and a distribution undertaking. In accordance with the agreement in effect at the time of the dispute between TVA and Bell, TVA had consented to the transmission of its works by Bell. It follows that an assignment of copyright by TVA predated the application of the standstill rule, so the issue of whether the impugned regulatory provisions conflict with the provisions of the *Copyright Act* has, a priori, no material impact on this case.

VII. Conclusion

[67] For the above reasons, I am of the view that the impugned regulatory provisions are *intra vires* the CRTC's powers under the *Broadcasting Act*. I would dismiss the appeal with costs.

"Richard Boivin"

J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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