S.C.C. Court File No. 37896

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N :

BELL CANADA and BELL MEDIA INC.

Appellants (Appellants)

- and -

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

- and -

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Intervener (Pursuant to Rule 22(3)(c)(iv))

FACTUM OF THE APPELLANTS (BELL CANADA and BELL MEDIA INC.)

(Pursuant to Section 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and Rules 35 and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I—OVERVIEW AND FACTS

1. Overview

1. For over 45 years, one of the central pillars of the Canadian broadcasting system has been the regime known as "simultaneous substitution" ("**Sim Sub**"). Sim Sub allows a Canadian television station that licences exclusive Canadian rights to a U.S. program to require that cable and satellite companies substitute incoming U.S. network signals showing the same program with the Canadian station's own signal, so that local viewers receive only the Canadian station's signal and commercials regardless of which channel they watch. This enables the television station to offer Canadian advertisers exclusive access to the Canadian audience for that program – and thereby fully realize its advertising value – while protecting the intellectual property rights of the U.S. program owner in Canada. In addition, Sim Sub leads to increased spending on the production of Canadian programming to the benefit of Canadian businesses, advertisers, creators, artists and audiences, all in furtherance of the cultural objectives of the *Broadcasting Act*.

2. In 2015, while recognizing the importance of Sim Sub to the Canadian broadcasting system and maintaining it for all other programs, the Canadian Radio-television and Telecommunications Commission (the "**CRTC**") suddenly announced that it would exclude the Super Bowl program alone from this generally applicable regime, and require that any BDU who distributes the Canadian Super Bowl broadcast also carry the U.S. version on every applicable U.S. station it offers. This extraordinary and unprecedented action – targeting a single program, owned by a single copyright holder (the NFL, *infra*), broadcast in Canada on a single day by a single exclusive licensee (Bell, *infra*) – not only caused millions of dollars in advertising revenues to Bell and irreparable damage to the commercial goodwill of the NFL's flagship program, but also negatively impacted countless members of the Canadian broadcasting industry who depend on the significant economic activity and cultural interest generated by the Super Bowl, the single most watched television program in Canada.

3. The discriminatory nature of this plan, however, created a clear jurisdictional dilemma for the CRTC. Not only had the CRTC never taken such an action before, but Parliament did not give it the authority to target a single program for distribution by BDUs under the *Broadcasting Act*. Determined to carry it out, the CRTC initially proposed to target the Super Bowl under its regulation-making power in s. 10 of the *Broadcasting Act*. When Bell and the NFL objected, pointing out that s. 10(2) of the *Broadcasting Act* prohibits CRTC regulations which discriminate (requiring that they be

"applicable to ***all*** persons holding licences or to ***all*** persons holding licences of one or more classes"), the CRTC pivoted, purporting to ground the order in the licensing power of s. 9(1)(h) instead.

4. Yet s. 9(1)(h) of the *Broadcasting Act*, like s. 10, also does not enable the CRTC to make distribution orders that target an individual ***program*** like the Super Bowl. Section 9(1)(h) only permits the CRTC to make orders about the carriage of "***programming services***", which the CRTC defined in *Star Choice* to mean the ***entire output of a programming undertaking***, i.e., a channel.[1]

5. The *Broadcasting Act*, through s. 26(2), only gives the power to require the broadcast of "***any program***" to the Governor in Council – a democratically accountable body – in recognition of the infringement this creates upon "***the freedom of expression and… creative and programming independence enjoyed by broadcasting undertakings***" under s. 2(3). The CRTC's attempt to usurp this power here has profound, Orwellian implications for all citizens. The effect is that a subordinate agency has now conferred upon itself the ability to dictate the particular television programs that broadcasters distribute, not by setting general standards but literally on a program-by-program basis.

6. These appeals thus raise fundamental issues of jurisdictional overreach that go directly to the constitutional principles of the rule of law and legislative supremacy at the heart of judicial review. It is inconceivable that Parliament would have intended the CRTC to receive deference, or have the "last word", on whether its authority under s. 9(1)(h) extends this far, particularly when it infringes both the exclusive authority that Parliament granted to the Governor in Council and the freedom of expression guaranteed by the *Broadcasting Act*. It is precisely in this instance that Parliament would have intended the ***independent judiciary***, rather than the administrative body itself, to be the ultimate arbiter of this issue. Indeed, these appeals are brought under a statutory appeal right for "a question of law ***or a question of jurisdiction***" in s. 31(2) of the *Broadcasting Act*.

7. This case, more than any other since *Dunsmuir*, squarely raises a "true" question of jurisdiction. It concerns a naked attempt by the CRTC to enlarge its powers at the expense of a democratically accountable body and a fundamental freedom under a provision (s. 9(1)(h)) this Court called "jurisdiction-conferring" in *Cogeco*.[2] The only question is the legal meaning of the phrase "programming services" in s. 9(1)(h), which are objective rather than evaluative words; no question

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[1] *Distribution of omnibus high definition channels by Star Choice and Cancom* – Broadcasting Decision CRTC 2005-195, 12 May 2005, ¶26-28 ("***Star Choice (CRTC 2005)***").
[2] See paragraph 57 below.

of fact, policy or discretion is involved, and Parliament had no intention to leave their ultimate interpretation to the CRTC. Further, the CRTC itself recognized that Bell and the NFL had raised a question about its "jurisdiction", distinguishing whether it ***could*** issue a distribution order against a single program under s. 9(1)(h) from whether it ***should*** do so for the Super Bowl based on the policy objects in ss. 3(1) and 5(2) of the *Broadcasting Act*. In the words of *Dunsmuir*, the CRTC "explicitly determine[d] whether its statutory grant of power [gave] it the authority" to make this latter inquiry. As a result, the CRTC's decision in this case must be reviewed on a correctness standard.

8. If, despite this, the Court concludes that the standard of review is reasonableness, it can only be by eliminating correctness review for jurisdiction questions entirely, or narrowing it to the point of practical non-existence. Either outcome would fundamentally alter judicial review and necessitate that the reasonableness standard be applied with heightened scrutiny in statutory interpretation disputes that clearly engage the limits of a tribunal's authority. Otherwise, the constitutional principles of the rule of law and legislative supremacy will be reduced to an empty mantra.

9. To ensure these principles remain real, the Court must confirm that the notion a home statute may give rise to only a ***single*** reasonable interpretation is a meaningful guarantee. A statutory provision can only give rise to more than one "reasonable" interpretation where it contains a ***genuine ambiguity***, in the sense that "two people [would] spend good money in backing two opposing views as to [its] meaning" after the text, context and purpose have been reviewed.[3]

10. Further, the Court must clarify that the proper role of deference in this context is to ***resolve*** such ambiguities, not ***create*** them. The issue of whether a tribunal's interpretation is reasonable in the face of the competing interpretation advanced by the applicant must turn on the principles of statutory interpretation themselves, consistent with the intention of Parliament – which drafts legislation with these principles in mind – and the rule of law, which requires common, objective and predictable standards for ascertaining Parliament's intent. To defer to a tribunal's interpretation of its home statute and find it reasonable ***before*** the ordinary tools of statutory interpretation have been applied would distort the concept of deference, and transform it from an attitude of respect into an instrument of submission.

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[3] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, ¶30 ("***Bell ExpressVu (SCC 2002)***").

11. Finally, even where more than one reasonable interpretation exists, deference should not compel acceptance of the tribunal's interpretation if its reasons do not ***intelligibly justify*** that interpretation over the competing ones. Otherwise, the ambiguity has not been truly resolved, and the court must determine the matter for itself. To adopt the tribunal's interpretation in such cases would ignore the fact that "[t]he difference between mere legal subjects and citizens is the democratic right of the latter to require an accounting for acts of public power".[4]

12. For the reasons in the NFL Factum, s. 9(1)(h) of the *Broadcasting Act*, when read with the ordinary tools of statutory interpretation, does not give rise to a genuine ambiguity. No prudent, independent observer would spend good money backing the view that it permits the CRTC to dictate the individual programs broadcasters must distribute after the text, context and purpose of the statute have been reviewed. Further, the CRTC's rationale for adopting this position fails even the most basic requirements of justification, transparency and intelligibility. In the final analysis, the CRTC simply "articulated what it considered to be a beneficial policy outcome rather than engage in an interpretative process taking account of the text, context and purpose of the provisions in issue".[5] Bell therefore respectfully requests that the CRTC's order and decision be set aside.

2. The Facts

13. Bell Canada and Bell Media Inc. (collectively, **Bell**") have coordinated their submissions with the National Football League, NFL International LLC and NFL Productions LLC (collectively, the "**NFL**"), who appeal from the same judgment (the "**Appeal Decision**")[6] in which the Federal Court of Appeal upheld the CRTC decision and order (the "**CRTC Instruments**", *infra*). This Bell Factum addresses the standards of review applicable to the CRTC Instruments, while the NFL Factum addresses the errors that vitiate them. Each set of appellants relies upon the submissions of the other.

A. The Parties and their Licence Agreement

14. Bell Media Inc. is a Canadian broadcaster that owns and operates 30 local CTV television stations in large and small markets across the country, in addition to certain discretionary ("pay" or

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[4] D. Dyzenhaus "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997), 279 at 305, Joint Book of Authorities ("**JA**"), **Tab 6**.

[5] *Canada (Canadian Human Rights Commission) v. Canada (A.G.)*, 2011 SCC 53, ¶64 ("***Mowat (SCC 2011)***").

[6] *Bell Canada v. Canada (A.G.)*, 2017 FCA 249 ("**Appeal Decision**"), Joint Record ("**JR**"), Tab 8.

"specialty") programming services like TSN. Bell Canada is the parent company of Bell Media. The National Football League is an unincorporated association of 32 separately owned member clubs which each operate a professional football team. NFL International LLC and NFL Productions LLC are affiliates that produce, license and distribute programming relating to NFL football.[7]

15. Each year, the National Football League presents a season of games that culminate in a championship called the "Super Bowl". The Super Bowl broadcast is the most watched television program in Canada, and the NFL owns valuable copyrights in television productions of it. In 2013, NFL International LLC exercised those rights by entering into a contract to grant Bell Media Inc. an exclusive licence to broadcast the Super Bowl in Canada on CTV until the 2018-2019 season.[8]

B. The Simultaneous Substitution Regime

16. The Canadian broadcasting system is regulated by the CRTC, whose objects and powers in relation to broadcasting are set out in the *Broadcasting Act*. The *Broadcasting Act* differentiates between "programming undertakings" and "distribution undertakings":

(a) Programming undertakings, or "broadcasters", will "acquire, create and produce television programming" and – in the case of programming undertakings that are television stations like CTV (i.e., that broadcast free over-the-air signals rather than encrypted discretionary services available only via subscription) – "are licensed by the CRTC to serve a certain geographic area" under s. 9 of the *Broadcasting Act*.[9]

(b) Distribution undertakings, or "BDUs" (i.e., cable or satellite television service providers), will "pick up the over-the-air signals of broadcasters and distribute them to the BDUs' subscribers for a fee", along with discretionary services they contract to retransmit, and are also licensed under s. 9 of the *Broadcasting Act*.[10]

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[7] *Bell Canada v. Canada (A.G.)*, 2016 FCA 217 ("**Prematurity Decision**"), ¶12-13, JR Tab 5.
[8] *Ibid*, ¶12; Appeal Decision, ¶3, 33, JR Tab 8.
[9] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 ("***Cogeco (SCC 2012)***"), ¶4, 85. **See also** *Broadcasting Distribution Regulations*, s. 1, *s.v.* "licence", "station".
[10] *Cogeco (SCC 2012)*, *supra* note 9, ¶4-5, 87. **See also:** *Notice of Hearing: Let's Talk TV* – Broadcasting Notice of Consultation CRTC 2014-190, 24 April 2014 ("**BNC 2014-190**"), ¶14-15, 19-21, JR Tab 14; *Over-the-air transmission of television signals and local programming* – Broadcasting Regulatory Policy CRTC 2015-24, 29 January 2015 ("**BRP 2015-24**"), ¶3, JR Tab 17;

17. Importantly, television stations themselves receive no compensation from BDUs to carry their over-the-air signals, and U.S. copyright owners of the programs retransmitted in those signals receive only Copyright Board royalties from BDUs, not a licence fee. To capture the value of their intellectual property rights, U.S. copyright owners must license the Canadian broadcasting rights to Canadian television stations, who in turn recoup the cost of purchasing those rights by selling advertising time during popular U.S. programs.[11]

18. In recognition of this fact, for over 45 years, the CRTC has exercised its regulation-making authority in s. 10 of the *Broadcasting Act* to create a Sim Sub regime, now found in the *Simultaneous Programming Service Deletion and Substitution Regulations* (the "***Sim Sub Regulations***").

19. Sim Sub is a process by which the signal of a distant (usually American) station being broadcast in Canada is replaced by the signal of a local Canadian broadcaster that broadcasts comparable programming at the same time. It empowers Canadian television stations who have licensed Canadian rights to U.S. programming to require that BDUs carry their signals – with their Canadian advertisements – in place of incoming U.S. network signals showing the same program but with U.S. advertisements.[12] This permits the Canadian television stations to sell advertising space for these programs at higher amounts, given the larger audiences the advertisements will reach, and thereby "earn a reasonable return on their investment in acquiring non-Canadian programming so they have the financial resources to contribute to the Canadian broadcasting system in the form of the production of Canadian programming".[13] Without Sim Sub, the value of the exclusive rights licensed by Canadian television stations in U.S. programming is substantially diminished.

20. As the Court of Appeal observed, "[t]he Canadian broadcaster of the Super Bowl made such simultaneous substitution requests for many years and so, up until the Order that is the subject of this judicial review, the Super Bowl was broadcast in Canada with Canadian commercials on both

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Simultaneous substitution for the Super Bowl – Broadcasting Regulatory Policy CRTC 2016-334 and Broadcasting Order CRTC 2016-335, 19 August 2016 ("**Third CRTC Decision**"), ¶63, JR Tab 1.

[11] *Cogeco (SCC 2012)*, *supra* note 9, ¶5, 46-59, 87; *Copyright Act*, ss. 2, *s.v.* "broadcaster", 3(1)(f), 21(1), 31(2); BNC 2014-190, ¶14, 66, JR Tab 14.

[12] *Measures to address issues related to simultaneous substitution* – Broadcasting Regulatory Policy CRTC 2015-25, 29 January 2015, ("**First CRTC Decision**"), ¶2, JR Tab 16. **See also:** BNC 2014-190, ¶54-56, JR Tab 14; Prematurity Decision, ¶4-5, JR Tab 5; Appeal Decision, ¶4, JR Tab 8.

[13] BNC 2014-190, ¶54, JR Tab 14. **See also** First CRTC Decision, Preamble, JR Tab 16.

Canadian and American channels".[14] Given its endurance, Bell and the NFL relied heavily on the existence of the Sim Sub regime when entering into their licence agreement for the Super Bowl.[15]

21. The CRTC ban on Sim Sub for the Super Bowl results in Canadian audiences being split between CTV and the U.S. broadcast signals that are widely available throughout Canada (typically from CBS, NBC or Fox), so that fewer people watch Canadian advertisements on the Canadian station. This substantially decreases the value of Canadian advertising during the Super Bowl, causing the local television stations to suffer losses in the tens of millions of dollars.

C. The First CRTC Decision

22. In 2013, the CRTC initiated a broad public consultation in three phases entitled *Let's Talk TV*.[16] At the beginning of the third phase in 2014, the CRTC launched a public hearing seeking comments on Sim Sub, and set out two proposals for discussion based in part on a "limited number of complaints" (less than 100) it had received in phases 1-2 from viewers desiring to watch U.S. ads during the Super Bowl: (a) eliminating Sim Sub entirely; or (b) eliminating it "for live event programming (e.g., a sporting event or an awards show)".[17] While the CRTC referenced the Super Bowl, it never suggested it was contemplating eliminating Sim Sub for the Super Bowl alone.

23. On January 29, 2015, the CRTC released a decision arising out of this public hearing (the "**First CRTC Decision**") announcing, *inter alia*, its unprecedented intention to prohibit Sim Sub ***for only the Super Bowl*** starting in 2017, but to maintain it for all other programming (including all other "sports events, specific sports events or live events") broadcast through over-the-air signals rather than encrypted discretionary services.[18] The CRTC advised it would do so by exercising its power ***under s. 10 of the Broadcasting Act*** to amend the regulations for Sim Sub, which at the time existed in ss. 38 and 51 of the *Broadcasting Distribution Regulations* (the "***BD Regulations***").[19]

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[14] Appeal Decision, ¶4.
[15] See paragraph 115 below.
[16] *Let's Talk TV: A conversation with Canadians about the future of television* – Broadcasting Notice of Invitation CRTC 2013-563, 24 October 2013 ("**BNI 2013-563**"), JR Tab 13.
[17] BNC 2014-190, ¶57, 60-61, JR Tab 14; *Notice of Hearing: Let's Talk TV* – Broadcasting Notice of Consultation CRTC 2014-190-3, Appendix, ¶4, JR Tab 15; First CRTC Decision, ¶4, JR Tab 16; Third CRTC Decision, ¶5-6, 25, JR Tab 1.
[18] First CRTC Decision, ¶18-22, footnote 2, JR Tab 16; Prematurity Decision, ¶8-9, JR Tab 5.
[19] First CRTC Decision, ¶23, JR Tab 16; Prematurity Decision, ¶10, JR Tab 5.

D. The Second CRTC Decision

24. After the First CRTC Decision was released, Bell was granted leave to appeal to the Federal Court of Appeal and the NFL was given leave to intervene.[20] They argued that the proposed regulation amendment, targeting only the Super Bowl, was *ultra vires* the *Broadcasting Act*, since s. 10(2) requires that CRTC regulations be "applicable to ***all*** persons holding licences or to ***all*** persons holding licences of one or more classes".

25. The CRTC agreed. Shortly after the parties filed their leave submissions it "reversed its course",[21] saying it would instead prohibit Sim Sub for the Super Bowl via a distribution order under ***s. 9(1)(h) of the Broadcasting Act,*** not by a regulation amendment under s. 10.[22]

26. At the same time, the CRTC sought public comments on its then-proposed *Sim Sub Regulations*. The NFL filed submissions objecting to the CRTC's jurisdiction to discriminate against the Super Bowl under s. 9(1)(h), and arguing that the proposed order would also conflict with s. 31(2) of the *Copyright Act*.[23]

27. On November 19, 2015, while the appeal of the First Decision was ongoing, the CRTC released its decision from this consultation process (the "**Second CRTC Decision**") announcing it had made the *Sim Sub Regulations*, which replaced the existing Sim Sub regime in the *BD Regulations* effective December 1, 2015.[24] The CRTC also acknowledged that it lacked jurisdiction to prohibit Sim Sub under s. 10, but found it had the power to do so through an order under s. 9(1)(h), and gave reasons rejecting the NFL's arguments against this.[25] Nonetheless, it refrained from actually issuing a s. 9(1)(h) order at this time.

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[20] Prematurity Decision, ¶11, 14, JR Tab 5.
[21] *Ibid*, ¶15, 30.
[22] *Simultaneous substitution errors* – Broadcasting Information Bulletin CRTC 2015-329, 23 July 2015, ¶17, JR Tab 19; *Call for comments on the proposed Simultaneous Programming Service Deletion and Substitution Regulations* – Broadcasting Notice of Consultation CRTC 2015-330, 23 July 2015 ("**BNC 2015-330**"), ¶8, JR Tab 18.
[23] Letter from Neil Finkelstein to John Traversy, September 11, 2015, JR Tab 20; *Regulations to implement policy determinations regarding simultaneous substitution in the Let's Talk TV proceeding* – Broadcasting Regulatory Policy 2015-513, 19 November 2015 ("**Second CRTC Decision**"), ¶20, JR Tab 22.
[24] Second CRTC Decision, JR Tab 22; Third CRTC Decision, ¶2, footnote 1, JR Tab 1.
[25] Second CRTC Decision, ¶26-28, JR Tab 22.

E. The CRTC Instruments Under Appeal

28. Bell and the NFL each sought and were granted leave to appeal the Second CRTC Decision, and those appeals were consolidated with the appeal of the First CRTC Decision.[26] Soon after they filed their leave materials, the CRTC sought public comments on the proposed s. 9(1)(h) order.[27]

29. Bell and the NFL filed submissions in this CRTC proceeding that again made extensive jurisdictional objections,[28] including that s. 9(1)(h) only permits a distribution order relating to "***programming services***" ("services de programmation") – i.e., the entire output of a programming undertaking, in the nature of a television channel like TSN – not an individual "***program***" ("émission") such as the Super Bowl. In doing so, the NFL noted: that (1) the *Broadcasting Act* only gives the ***Governor in Council*** the latter power under s. 26(2); (2) the CRTC had ***itself*** reached a similar conclusion in its previous *Star Choice* decision;[29] and (3) the proposed order would conflict with s. 31(2) of the *Copyright Act* and the international treaty obligations that provision implements.

30. Regrettably, the CRTC delayed its release of the actual s. 9(1)(h) order (the "**CRTC Order**") until ***after*** the consolidated appeal from the First and Second CRTC Decisions was heard on June 20, 2016.[30] It then defended those appeals on the ground of prematurity,[31] even though the CRTC Order ended up being ***identical*** to the proposed one it released for public comments before that appeal.[32]

31. The CRTC Order, issued on August 16, 2016, excludes only ***one program***, broadcast by only ***one broadcaster***, on only ***one day a year*** – the Super Bowl – from the *Sim Sub Regulations* pursuant to s. 9(1)(h) of the *Broadcasting Act*.[33] It is appended to a decision (the "**Third CRTC Decision**",

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[26] Prematurity Decision, ¶18, JR Tab 5.
[27] *Call for comments on a proposed distribution order prohibiting simultaneous substitution for the Super Bowl* – Broadcasting Notice of Consultation CRTC 2016-37, 3 February 2016 ("**BNC 2016-37**"), JR Tab 23. **See also** Prematurity Decision, ¶19, JR Tab 5.
[28] Letter from Neil Finkelstein to Danielle May-Cuconato, March 3, 2016, JR Tab 24; Letter from Mirko Bibic to Danielle May-Cuconato, March 4, 2016, JR Tab 25; Appeal Decision, ¶41-43, JR Tab 8.
[29] *Star Choice (CRTC 2005)*, *supra* note 1.
[30] Third CRTC Decision, ¶12 and footnote 4, JR Tab 1.
[31] Prematurity Decision, ¶20-23, JR Tab5.
[32] BNC 2016-37, Appendix, JR Tab 23.
[33] Third CRTC Decision, Appendix ("**CRTC Order**"), JR Tab 1.

collectively with the CRTC Order, the "**CRTC Instruments**") in which the CRTC gave reasons for rejecting, *inter alia*, the jurisdictional objections by Bell and the NFL.[34]

F. The Federal Court of Appeal Decisions

32. On September 2, 2016, the Federal Court of Appeal dismissed the appeals from the First and Second Decisions as premature.[35] As a result, the CRTC's 18-month delay in issuing the CRTC Instruments from the date of the First Decision insulated them from review before the 2017 Super Bowl on February 5, 2017,[36] at significant and irrecoverable cost to Bell and the NFL.

33. Bell and the NFL were each granted leave to appeal the CRTC Instruments on October 31, 2016, but the appeals were dismissed on December 18, 2017. The Court of Appeal held the CRTC Instruments were only reviewable for unreasonableness – regardless of whether they raised a question of jurisdiction – since the CRTC was interpreting its home statute, and rejected arguments that the range of reasonable outcomes in this context was narrow. Applying this standard, Near J.A. found that "the CRTC's explanation of its jurisdiction to make the Final Order" was reasonable.[37]

PART II—ISSUES

34. The issues in the Bell and NFL appeals that will be addressed in this Factum are as follows:

(a) What is the standard of appellate review?

(b) What is the standard of judicial review in relation to the *Broadcasting Act* issue?

(c) What is the standard of judicial review in relation to the *Copyright Act* issue?

PART III—ARGUMENT

1. The Standard of Appellate Review

35. A lower court is not entitled to deference in either its selection or application of the standard of judicial review,[38] and in any event, the Court of Appeal misdirected itself as to both. The Court of Appeal's decision may therefore be put aside for the purpose of these appeals.

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[34] Third CRTC Decision, ¶44-60, JR Tab 1.
[35] Prematurity Decision,¶22-34, JR Tab 5.
[36] *Ibid*, ¶34.
[37] Appeal Decision, ¶1-2, 9, 28, 51, JR Tab 8.
[38] *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, ¶46-47; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, ¶42.

2. The *Broadcasting Act* Issue and the Standard of Judicial Review

A. The Standard of Review Is Correctness

i. The Issue Raises a True Jurisdictional Question

a. Correctness Review for True Jurisdiction Questions Is Necessary

36. Over a decade ago, in *Dunsmuir*, this Court held it "without question" that correctness review "***must***" be maintained for jurisdictional questions, since the constitutional principle of the rule of law requires that courts have the "last word" on the limits of a tribunal's statutory grant of power:

> … "***[T]he rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority***…" In essence, ***the rule of law is maintained because the courts have the last word on jurisdiction***, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.
>
> …
>
> ***CUPE did not do away with correctness review altogether*** and in *Bibeault*, the Court affirmed that ***there are still questions on which a tribunal must be correct.*** As Beetz J. explained, "***the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and ... such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator***"…
>
> …
>
> As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also ***without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law***. This promotes just decisions and avoids inconsistent and unauthorized application of law. …
>
> …
>
> Administrative bodies ***must*** also be ***correct*** in their determinations of ***true questions of jurisdiction*** or *vires*. …[39]

37. Despite some questioning,[40] these comments remain valid today. Correctness review on true jurisdiction questions continues to be required by the constitutional principles articulated in *Dunsmuir*, which the majority of this Court recently held "should provide the foundation for any future direction" in the law relating to the standard of review.[41] Further, unlike in prior cases where

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[39] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶30, 36, 50, 59 (and ¶27-29) ("***Dunsmuir (SCC 2008)***"), *emphasis added*.

[40] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, ¶33-43 ("***ATA (SCC 2011)***"); *Canada (Canadian Human Rights Commission) v. Canada (A.G.)*, 2018 SCC 31, ¶31-41 ("***CHRC (SCC 2018)***").

[41] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶20, ("***Edmonton (SCC 2016)***"). **See also:** Hon. T.A. Cromwell, "From the New Despotism to *Dunsmuir*: A Funny Thing Happened on the Way to the Apocalypse" (2011) 24 C.J.A.L.P. 285 at 288, JA Tab

the parties did not present full argument on true jurisdiction questions or acknowledged that the law supported reasonableness review,[42] Bell and the NFL will have made complete submissions on why correctness applies to the jurisdictional issue raised in these appeals. With the benefit of these submissions, the Court should reaffirm that true jurisdiction questions are reviewed for correctness.

38. The starting point is that correctness review cannot be eliminated without undermining the rule of law, "a principle of profound constitutional and political significance".[43] On fundamental questions of "executive accountability to legal authority",[44] the last word cannot be left to tribunals themselves, because as creatures of the legislature who are part of the executive,[45] they lack any constitutional guarantee of ***judicial independence***.[46] Rather, "the rule of law… requires that the ***courts*** have the ***last word*** on whether an administrative body has acted within the scope of its ***lawful authority***".[47] This has been emphasized by several judges of this Court,[48] along with those of other Commonwealth countries,[49] and is guaranteed by ss. 96-101 of the *Constitution Act, 1867*:[50]

28; Hon. D. Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42 Queen's L.J. 27 at 43-44 ("**Stratas (2016)**"), JA Tab 21.

[42] *ATA (SCC 2011)*, *supra* note 40, ¶34; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, ¶39 ("***SODRAC (SCC 2015)***"); *Quebec (A.G.) v. Guérin*, 2017 SCC 42, ¶30 ("***Guérin (SCC 2017)***"); *CHRC (SCC 2018)*, *supra* note 40, ¶32, 41.

[43] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶71 (and ¶70) ("***Secession (SCC 1998)***").

[44] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 805-806.

[45] *Ontario (A.G.) v. O.P.S.E.U.*, [1987] 2 S.C.R. 2 at 41-43.

[46] *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, ¶23-24, 30-33 ("***Ocean (SCC 2001***"); *Bell Canada v. Canadian Telephone Employees Assn.*, 2003 SCC 36, ¶29. **See also** *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, ¶83, 107-109, 115-117, 123-129, 138-139, 143 ("***Judges (SCC 1997)***"); *Shoan v. Canada (A.G.)*, 2018 FC 476, ¶142-143; *CRTC Act*, s. 3, 6-7, 10.1.

[47] *Edmonton (SCC 2016)*, *supra* note 41, ¶21, *emphasis added*. **See also** Hon. M. Bastarache, "Modernizing Judicial Review" (2009) 22 C.J.A.L.P. 227 at 233-234 ("**Bastarache (2009)**"), JA Tab 27.

[48] *ATA (SCC 2011)*, *supra* note 40, ¶92-94, 98, 102-103, per Cromwell J. (concurring); *Guérin (SCC 2017)*, *supra* note 42, ¶68, 76-77, 83, per Brown and Rowe JJ. (concurring) and Côté J. (dissenting); *CHRC (SCC 2018)*, *supra* note 40, ¶77, 110-111 per Côté and Rowe (concurring) and Brown JJ. (concurring).

[49] *Kirk v. Industrial Relations Commission (N.S.W.)*, [2010] HCA 1, ¶55, 64-67, 71-77, 91-100 ("***Kirk (HCA 2010)***"), JA Tab 9.

[50] *Crevier v. Québec (A.G.)*, [1981] 2 S.C.R. 220 at 234-239 ("***Crevier (SCC 1981)***"); *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, ¶10, 13, 35; *Dunsmuir (2008 SCC)*, *supra* note 39, ¶31, 52.

> It has been suggested that judges, being human, will tend to enlarge unduly the area of their own guaranteed jurisdiction under the *B.N.A. Act*. But any governmental official or tribunal will feel this inflationary or imperialistic tendency to expand the area of power, and nevertheless ***someone must have the last word***. …***[S]uperior-court judges, on the whole, are the group of official persons least likely to seek unduly to expand their own powers. That is one purpose and effect of their unique independence and security***. Hence it is no accident that historically the superior courts have been entrusted with determining finally, not only the limits of their own powers, but those of other governmental officials and bodies as well. …[51]

39. If questions that truly engage a tribunal's jurisdiction were only reviewable for reasonableness, it would mean courts no longer have the "last word" on the scope of the tribunal's authority. Instead, the last word would go to the ***tribunal itself***, because "under reasonableness review, we defer to ***any*** reasonable interpretation adopted by an administrative decision maker, ***even if*** other reasonable interpretations may exist".[52] Thus, if the tribunal's enabling legislation permits multiple reasonable interpretations, and the tribunal selects any of them, then – provided the tribunal justifies that selection – its decision would have to be upheld, even if the court ***disagrees*** with that interpretation and would have selected a competing one over it had the court been given the final say.

40. No solution to this dilemma has been found by the Court. Instead, the *CHRC* majority said only that reasonableness review will "***often***" be sufficient to ensure the rule of law if true jurisdiction questions are eliminated, because ***some*** statues allow a single reasonable interpretation:

> … ***In matters of statutory interpretation where there is only one reasonable answer***, this Court has shown that the ***reasonableness standard still allows the reviewing court to properly deal with the principles of the rule of law and legislative supremacy*** that remain at the core of the judicial review analysis… ***In this regard, reasonableness review is often more than sufficient to fulfil the courts' supervisory role with regard to the jurisdiction*** of the executive.[53]

41. Unless the Court goes further, and holds that ***all*** jurisdictional questions will ***always*** permit only a single reasonable interpretation ***ex ante*** – the approach that Abella J. advocated in her

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[51] W.R. Lederman, "The Independence of the Judiciary" (1956) 34 Can. Bar Rev. 1139 at 1174-1175, *emphasis added*, JA Tab 39. This includes the Federal Court: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, ¶36; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, ¶32-33, 134-136.

[52] *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, ¶40 ("***McLean (SCC 2013)***"), *emphasis in original*.

[53] *CHRC (SCC 2018)*, *supra* note 40, ¶38, 40, *emphasis added*.

concurring reasons in *Wilson*[54] – correctness review for such issues cannot be eliminated without undermining the rule of law. Some home statutes may remain subject to multiple reasonable interpretations – such as the two reasonable outcomes this Court identified in *McLean*,[55] or the four that existed in *CUPE*[56] – in which case the tribunal itself would have the "last word" on the limits of its authority under reasonableness review, even if the court disagrees with the reading it selects.

42. Further, the rejection of correctness review for jurisdictional errors is also inconsistent with legislative supremacy, the other constitutional principle that *Dunsmuir* places at the heart of judicial review. Where a true jurisdiction question exists, it would undermine Parliament's intent to allow the tribunal to exceed the authority delegated to it by statute. As Laskin C.J.C. affirmed in *Crevier*:

> …***Parliament could not have intended to clothe such tribunal with the power to expand its statutory jurisdiction*** by an erroneous decision as to the scope of its own powers.[57]

43. This is reflected in the presumption of home statute deference, which only advances legislative supremacy when the legislature has made the ***choice*** to delegate authority to the tribunal:

> This presumption of deference… ***respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal***, rather than the courts. …[58]

44. Where the issue is whether Parliament has ***made this choice at all***, the legislative supremacy rationale for home statute deference is absent. Like the rule of law, legislative supremacy therefore requires that jurisdictional questions be preserved, and defined according to Parliament's intent:

> …***[L]egislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be*** narrowly circumscribed and ***defined according to the intent of the legislature*** in a contextual and purposeful way…[59]

45. In addition to the rule of law and legislative supremacy, a third constitutional principle of relevance here is the separation of powers. As LeBel J. observed:

> … The need for both judicial review and restraint in its exercise ***requires that a balance be struck*** that safeguards the rule of law to exist while allowing the legislature and executive to do their jobs. Too much judicial review and the system risks collapsing into an autocracy of the courts. ***Too much restraint and the rule of law will disappear with nothing to check***

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[54] *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, ¶24, 36 ("***Wilson (SCC 2016)***").
[55] *McLean (SCC 2013)*, *supra* note 52, ¶39-41, 70.
[56] *C.U.P.E. v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 at 230, 237-242 ("***CUPE (SCC 1979)***").
[57] *Crevier (SCC 1981)*, *supra* note 50, at 236, *emphasis added*.
[58] *Edmonton (SCC 2016)*, *supra* note 41, ¶22 (and ¶33).
[59] *Dunsmuir (SCC 2008)*, *supra* note 39, ¶30, *emphasis added*.

> ***illegal or arbitrary state action.*** Thus, it can be seen that achieving a balance between review and restraint in turn ***preserves another fundamental principle of the Canadian constitutional structure: the separation of powers.*** Too much of one or the other ***risks blurring the dividing line between the roles of the executive and legislature of the reviewing court.*** …[60]

46. The separation of powers is "a fundamental principle of the Canadian Constitution"[61] which "defines the powers of the constituent elements of Canada's system of government":[62]

> … ***The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws*** and holds the purse strings of government, as only it can authorize the spending of public funds. ***The executive implements and administers those policy choices and laws*** with the assistance of a professional public service. ***The judiciary maintains the rule of law, by interpreting and applying these laws*** through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.
>
> …***[E]ach branch will be unable to fulfill its role if it is unduly interfered with by the others***. …"[I]t is fundamental to the working of government as a whole that all these parts play their proper role. It is equally ***fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other***"…[63]

47. Accordingly, "[t]he separation of powers requires, at the very least, that some functions must be ***exclusively*** reserved to particular bodies".[64] This "***mutual*** respect"[65] calls for deference not just to the legislature and tribunals, but also to ***courts themselves*** when determining jurisdictional matters with significant implications for the rule of law.[66] The "traditional division between the executive, the legislature and the judiciary… requires a constitutional guarantee of an ***independent judiciary***",[67] and if the executive could decide for ***itself*** what powers were delegated to it by the legislature, then "the web of institutional relationships between the legislature, the executive and the judiciary which

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[60] Hon. L. LeBel, "Some Property Deferential Thoughts on Deference" (2008) 21 C.J.A.L.P. at 4 (and 15-16), *emphasis added*, JA Tab 26. **See also:** *Dunsmuir (SCC 2008)*, *supra* note 39, ¶159, per Deschamps J. (concurring); Hon. D.W. Stratas, "Looking past *Dunsmuir*: Beginning Afresh" (March 8, 2018), online at: <https://doubleaspect.blog/2018/03/08/looking-past-dunsmuir-beginning-afresh/> ("**Stratas (2018)**").

[61] *Judges (SCC 1997)*, *supra* note 46, ¶138. **See also** *Babcock v. Canada (A.G.)*, 2002 SCC 57, ¶54.

[62] *Reference re Senate Reform*, 2014 SCC 32, ¶23.

[63] *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, ¶28-29, *emphasis added*.

[64] *Judges (SCC 1997)*, *supra* note 46, ¶139, *emphasis added*.

[65] *Bell ExpressVu (SCC 2002)*, *supra* note 3, ¶65, *emphasis added*.

[66] T. Lipton, "Justifying True Questions of Jurisdiction" (2015) 46 Ottawa L. Rev. 275 at 289-294.

[67] *Ocean (SCC 2001)*, *supra* note 46, ¶32, *emphasis added*.

continue to form the backbone of our constitutional system" will break down.[68] As Lord Bingham points out, "***[t]here are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live***".[69]

48. In summary, there is no principled basis for eliminating the correctness standard on true questions of jurisdiction. To the contrary, the constitutional foundations of judicial review – the rule of law, legislative supremacy and the separation of powers, which are "binding upon ***both courts and governments***"[70] – all require that this category be retained.

49. The case law bears this out. While the *ATA* majority suggested this Court had not identified a true jurisdiction question since *Dunsmuir*,[71] other post-*Dunsmuir* cases of this Court recognize that administrative bodies are not entitled to deference in establishing the limits of their own authority,[72] and true jurisdiction questions have been identified by lower appellate courts.[73] Further, this Court ***did*** recognize a true jurisdiction question in *Rio*, where the issue was whether the B.C. Utilities Commission could consider if the Crown met its duty to consult Aboriginal groups:

> The first question is whether consideration of the duty to consult was within the mandate of the Commission. ***This being an issue of jurisdiction, the standard of review at common law is correctness.*** The relevant statutes, discussed earlier, do not displace that standard. …[74]

50. Finally, the practical justification for eliminating true questions of jurisdiction – the difficulty of defining them – is unpersuasive. While such questions may resist identification outside a particular

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[68] *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, ¶31.
[69] T. Bingham, *The Rule of Law* (London: Penguin Books, 2010) at 65, *emphasis added*, JA Tab 36. **See also** *City of Arlington v. F.C.C.*, 569 U.S. 290, 312, 327 (2013) ("***Arlington (USSC 2013)***"), per Roberts C.J. (dissenting), JA Tab 4.
[70] *Secession (SCC 1998)*, *supra* note 43, ¶54 (and ¶49), *emphasis added*.
[71] *ATA (SCC 2011)*, *supra* note 40, ¶33.
[72] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, ¶48. **See also** *Coward v. Alberta (Chief Commissioner of Human Rights and Citizenship Commission)*, 2008 ABQB 455, ¶47, per S.L. Martin J (as she then was).
[73] *Lysohirka v. British Columbia (Workers' Compensation Board)*, 2012 BCCA 457, ¶38-43, leave to appeal refused, [2013] S.C.C.A. No. 23; *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, 2012 NLCA 38, ¶86-103.
[74] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, ¶67 (and ¶55, 68), *emphasis added*. **See also:** *Northrop Grumman Overseas Services Corp. v. Canada*, 2009 SCC 50, ¶10; *ATA (SCC 2011)*, *supra* note 40, ¶98, per Cromwell J. (dissenting); *Guérin (SCC 2017)*, *supra* note 42, ¶74, 83-84 per Brown and Rowe JJ. (concurring) (Côté J. (dissenting) agreeing on this point).

factual context, so too do many other legal concepts that have proven to be perfectly workable (e.g., "negligence", "good faith", "duress", etc.). As Laskin C.J.C. said in *Crevier*:

> ... ***There may be differences of opinion as to what are questions of jurisdiction but, in my lexicon, they rise above and are different from errors of law***, whether involving statutory construction or evidentiary matters or other matters. …[75]

51. As discussed below, the facts of this case illustrate how a true jurisdiction question may be identified in a sufficiently narrow and exceptional way that this practical concern recedes.

b. A True Jurisdictional Question Exists Here

52. In *Dunsmuir*, this Court adopted the same test for true jurisdiction questions that Dickson J. (as he then was) preferred to "the language of 'preliminary or collateral matter'" in *CUPE*, i.e., "jurisdiction in the narrow sense of authority to enter upon an inquiry":"[76]

> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE.* It is important here to take a robust view of jurisdiction. ***We neither wish nor intend to return to the jurisdiction/preliminary question doctrine*** that plagued the jurisprudence in this area for many years. ***"Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry.*** In other words, ***true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter***. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction… ***An example may be found in United Taxi Drivers***…[77]

53. This *Dunsmuir/CUPE* test for true jurisdiction questions is met here. The issue is whether s. 9(1)(h) of the *Broadcasting Act*, which only allows the CRTC to make distribution orders about "programming services", gave it "the authority to make the inquiry": i.e., whether to prohibit Sim Sub for the Super Bowl – a single program – based on its policy objects in ss. 3(1) and 5(2). Indeed, the CRTC found it "must explicitly determine whether its statutory grant of power [gave] it the authority to decide [this] particular matter" given the Bell/NFL jurisdictional objections:

> ***BCE contended that the Commission does not have the jurisdiction*** to prohibit simultaneous substitution for the Super Bowl by way of an order issued pursuant to section 9(1)(h) of the Act…

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[75] *Crevier (SCC 1981)*, *supra* note 50, at 236. **See also:** *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230 at 268; *Kirk (HCA 2010)*, *supra* note 49, ¶66.
[76] *CUPE (SCC 1979)*, *supra* note 56, at 233-234, 237 (and 235).
[77] *Dunsmuir (SCC 2008)*, *supra* note 39, ¶59, *emphasis added*.

> ***The NFL also questioned the Commission's jurisdiction*** to discriminate against the Super Bowl by exempting it alone from the *Simultaneous Deletion and Substitution Regulations* under section 9(1)(h) of the Act. …
> …
> ***In regard to other legal issues*** relating to no longer authorizing simultaneous substitution for the Super Bowl, ***the Commission determines that i[t] must address the following***:
>
> ○ ***its jurisdiction*** to issue the distribution order where regulations exist;
> …
> ○ ***the targeting of a specific program***;[78]

54. In doing so, the CRTC distinguished these jurisdictional questions – which it called "other legal issues" – from the "policy" considerations of whether it was "reasonable" to make the order and whether it would have a "potential negative impact" contrary to the objects of the *Broadcasting Act*:

> ***The Commission has considered the following issues*** in regard to the proposed distribution order:
>
> ○ ***policy*** and procedural considerations regarding the exclusion of the Super Bowl from the simultaneous substitution regime;
>
> ○ ***other legal issues*** regarding the exclusion of the Super Bowl from the simultaneous substitution regime
> …
> ***Policy*** and procedural considerations
>
> ***In regard to this issue, the Commission has considered whether it should*** change or maintain its policy decision to exclude the Super Bowl from the simultaneous substitution regime. Specifically, ***it has focused on the following:***
>
> ○ ***the reasonableness of the Commission's decision*** to no longer authorize simultaneous substitution for the Super Bowl; and
>
> ○ ***the potential negative impact*** of no longer authorizing simultaneous substitution for the Super Bowl.[79]

55. Accordingly, the CRTC recognized that the issue of whether it ***could*** issue a distribution order against a single program given the limitation of that power to "programming services" in s. 9(1)(h) was entirely separate from whether it ***should*** do so for the Super Bowl based on the policy objects it was required to balance under ss. 3(1) and 5(2) of the *Broadcasting Act*. This is therefore a classic case of a tribunal determining whether it had the authority to make the inquiry before it.

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[78] Third CRTC Decision, ¶41-42, 44 (and ¶46, 52, 54), JR Tab 1, *emphasis added*. **See also** Second CRTC Decision, ¶4, 20-21, 26-28, JR Tab 22.
[79] Third CRTC Decision, ¶14-15 (and ¶28, 39, 40), JR Tab 1, *emphasis added*. **See also** Appeal Decision, ¶27, JR Tab 8.

56. However, in addition to meeting the *Dunsmuir/CUPE* definition of a true jurisdiction question, the issue in these appeals is narrow and exceptional, and will not cause a return to the "highly formalistic, artificial 'jurisdiction' test that could easily be manipulated" prior to *CUPE*:[80]

(a) the issue alleges a fundamental flaw that goes to the root of the tribunal's authority;

(b) the issue raises serious concerns about the rule of law; and

(c) treating the issue as a jurisdictional one implements Parliament's intent.

57. As to the ***first*** point (the issue alleges a fundamental flaw that goes to the root of the tribunal's authority), the appeals concern the ***principal source*** of the CRTC's authority in the *Broadcasting Act*. In *Cogeco*, this Court held that s. 9 is one of the two main provisions (along with s. 10) by which Parliament granted the CRTC powers under the *Broadcasting Act*. Calling ss. 9-10 "***jurisdiction-conferring provisions***",[81] the Court distinguished them from the "policy statements" in s. 3(1), noting that s. 3(1) can only ***circumscribe*** the CRTC's jurisdiction, but cannot – unlike ss. 9-10 themselves – ***grant*** it the regulatory means to accomplish its objects:

> ***The powers granted to the CRTC are found in ss. 9 and 10 of the Broadcasting Act***. …
> …
> …The CRTC referred specifically only to ss. 3(1)(e) and (f) of the *Broadcasting Act*… ***The CRTC did not refer to the jurisdiction-conferring provisions in ss. 9 and 10.***
>
> ***Policy statements, such as the declaration of Canadian broadcasting policy found in s. 3(1) of the Broadcasting Act, are not jurisdiction-conferring provisions.*** They describe the objectives of Parliament in enacting the legislation and, thus, ***they circumscribe the discretion granted to a subordinate legislative body***… As such, declarations of policy ***cannot serve to extend the powers of the subordinate body to spheres not granted by Parliament in jurisdiction-conferring provisions.***
>
> … It is therefore ***necessary to consider the jurisdiction granted to the CRTC under ss. 9 and 10 of the Act*** to attach conditions to licences and to make regulations.
> ...
> …***[T]he regulatory means granted to the CRTC to achieve these [s. 3(1)] objectives fall short***…[82]

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[80] *Dunsmuir (SCC 2008)*, *supra* note 39, ¶43 (and ¶59).

[81] While Rothstein J. elsewhere distinguished certain subsections in ss. 9-10 from "true jurisdiction-conferring provisions", he continued to characterize s. 9(1)(h) as an "open-ended jurisdiction-conferring provisio[n]": *Cogeco (SCC 2012)*, *supra* note 9, ¶39, 78 (and ¶26-27, 29-31).

[82] *Cogeco (SCC 2012)*, *supra* note 9, ¶16, 21-23, 32 (and ¶93, 99), *emphasis added*.

58. Accordingly, s. 9(1)(h) is different from other provisions in the *Broadcasting Act*. It is included within one of the two primary "jurisdiction-conferring" provisions for the CRTC, and unlike s. 3(1) is capable of establishing the ***regulatory means*** the CRTC may use to achieve its objects. In contrast to the pre-*CUPE* jurisprudence,[83] treating the scope of the CRTC's s. 9(1)(h) authority as a true jurisdiction question will not transform disputes about every other provision in the *Broadcasting Act* into one as well, because those other provisions are not ***grants*** of authority to the CRTC but only ***circumscribe*** the powers actually granted to it in ss. 9-10.

59. Unlike prior cases, this raises a "broad question of the tribunal's authority", not an issue that is "incidental" to the main powers bestowed upon the CRTC:

> The inference to be drawn from… *Dunsmuir* is that courts should usually defer when the tribunal is interpreting its own statute and will ***only exceptionally apply a correctness of standard when interpretation of that statute raises a broad question of the tribunal's authority***.
>
> … ***The question of costs is one that is incidental to the broad power of the Tribunal*** to review decisions of the Superintendent in the context of the regulation of pensions. It is one over which ***the Court should adopt a deferential standard*** of review…[84]

60. Further, the issue relates not only to the "jurisdiction-conferring provision" of s. 9(1)(h), but to the ***direct object*** of that jurisdiction-conferring provision, i.e., "programming services":

> 9 (1) Subject to this Part, ***the Commission may***, in furtherance of its objects,
>
> …
>
> (h) ***require any licensee*** who is authorized to carry on a distribution undertaking ***to carry***, on such terms and conditions as the Commission deems appropriate, ***programming services*** specified by the Commission. [*emphasis added*]

61. In other words, the issue concerns the very "***end and aim***" of the CRTC's statutory grant of authority, or what its distribution orders must be ***about***. That is substantially different from the issues in the classic jurisdiction/preliminary question cases,[85] such as *Metropolitan Life* (where the tribunal "had jurisdiction to enter on the inquiry" whether to certify a union as bargaining agent, but in doing so "stepped outside its jurisdiction" by asking the "wrong question" of whether bargaining

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[83] *Canada (A.G.) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 953.
[84] *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, ¶34-35 (and ¶33) ("***Nolan (SCC 2009)***"), *emphasis added*.
[85] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶45 ("***Khosa (SCC 2009)***"); *ATA (SCC 2011)*, *supra* note 40, ¶80, 95, per Binnie (concurring) and Cromwell JJ. (concurring); *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, ¶28-34 ("***Halifax (SCC 2012)***").

unit employees were union members functionally rather than under its constitution),[86] or *Bell* (where a board investigating whether the applicant was denied "occupancy of… any self-contained dwelling unit… because of the race... colour… or place of origin of such person" found there was insufficient evidence to decide, at the inquiry stage, if the rental was a "self-contained dwelling unit").[87] Unlike these pre-*CUPE* cases, whether or not a single program is a "programming service" is the ***controlling feature*** of the scope of the power granted by s. 9(1)(h).

62. The issue also contrasts with other matters this Court has held are not true jurisdiction questions since *Dunsmuir*, such as standing,[88] a limitation period,[89] or the authority to grant a remedy (e.g., to award costs,[90] or increase an assessment[91]). All these matters were ***incidental*** to the tribunal's exercise of its substantive authority, like the types of jurisdictional error rejected in *CUPE*.[92] Here, the issue involves the centre of gravity of the tribunal's substantive authority itself. Only "law office metaphysics" could permit it to be viewed as a non-jurisdictional one.[93]

63. As to the ***second*** point at paragraph 56 above (the issue raises serious questions about the rule of law), the majority in *Guérin* suggested that an important factor in classifying an issue as a true jurisdiction one is whether "applying the reasonableness standard [to it] undermines… the rule of law [o]r the other constitutional bases of judicial review".[94] This case meets that threshold.

64. The ability to make distribution orders in relation to individual programs – i.e., to dictate the specific television shows broadcasters must distribute, like the U.S. Super Bowl – is an extraordinary infringement on "the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings" under s. 2(3) of the *Broadcasting Act*. This is

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[86] *Metropolitan Life Insurance Co. v. International Union of Operating Engineers*, [1970] S.C.R. 425 at 434-436.
[87] *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756 at 771-775.
[88] *Canadian National Railway Co. v. Canada (A.G.)*, 2014 SCC 40, ¶61 ("***CN Rail (SCC 2014)***"); *Guérin (SCC 2017)*, *supra* note 42, ¶35-36.
[89] *ATA (SCC 2011)*, *supra* note 40, ¶33, 48-49.
[90] *Nolan (SCC 2009)*, *supra* note 84, ¶33-35; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, ¶36; *CHRC (SCC 2018)*, *supra* note 40, ¶24-47.
[91] *Edmonton (SCC 2016)*, *supra* note 41, ¶25-26.
[92] *CUPE (SCC 1979)*, *supra* note 56, at 233. **See also** Hon. J. T. Robertson, "Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence" (2014) 66 S.C.L.R. (2d) 1 at 39-46, 70-73, 78 ("**Robertson (2014)**"), JA Tab 23.
[93] *Dunsmuir (SCC 2008)*, *supra* note 39, ¶122, per Binnie J. (concurring).
[94] *Guérin (SCC 2017)*, *supra* note 42, ¶34.

"a question of deep 'economic and political significance", and had Parliament "wished to assign that question to an agency, it surely would have done so expressly".[95] However, Parliament did not.

65. Instead, s. 26(2) of the *Broadcasting Act* expressly grants this power only to the Governor in Council – a ***democratically accountable body*** – not a subordinate agency like the CRTC. Further, the *Broadcasting Act* places strict limits on the Governor in Council's power, requiring that its use be of "urgent importance" (s. 26(2)) and that the order be published in the *Canada Gazette* and laid before each House of Parliament within 15 days (s. 26(3)). To date, this power has only ever been exercised ***once***, on the eve of the Quebec referendum in 1995, to require that national television networks carry the Prime Minister's plea for national unity.[96] That the CRTC has unilaterally claimed this power for itself is a clear indication the question is a true jurisdictional one, because it frustrates Parliament's intent and undermines the rule of law.

66. Parliament drew careful jurisdictional lines between the Governor in Council and the CRTC. Whereas ***s. 9(1)(h)*** is included in Part II of the *Broadcasting Act* after the "General Powers" subheading of "Objects and ***Powers of the Commission***", ***s. 26(2)*** is found after the further subheading "General ***Powers of the Governor in Council***".[97] The Act spells out the relative authority of each, including provisions that allow the Governor in Council to set aside CRTC orders and issue binding directions to it.[98] While some of these provisions require the Governor in Council to consult with the CRTC before making an order, s. 26(4) does ***not*** require it to do so when making a single-program order under s. 26(2).

67. This Court has repeatedly held that "issues of competing jurisdiction between tribunals" are reviewable on a standard of correctness.[99] As stated in *Dunsmuir*:

> Questions regarding the ***jurisdictional lines between two or more competing specialized tribunals*** have also been subject to review on a ***correctness*** basis…[100]

68. Accordingly, whether taken on its own or as part of the true jurisdiction inquiry, the fact that the issue in these appeals raises competing jurisdictional lines between the CRTC and Parliament's designate, the Governor in Council – a "specialized" tribunal when acting under the *Broadcasting*

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[95] *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015), JA Tab 8.
[96] NFL Factum, ¶56.
[97] Headings in statutes are relevant to their interpretation: *R. v. Davis*, [1999] 3 S.C.R. 759, ¶51-55.
[98] *Broadcasting Act*, ss. 5(1), 7-8, 15, 22(1)(a), 24(1)(b), 26-30.
[99] *CHRC (SCC 2018)*, *supra* note 40, ¶28.
[100] *Dunsmuir (SCC 2008)*, *supra* note 39, ¶61, *emphasis added*.

Act[101] – is a reason why correctness review is required.[102] Indeed, "issues respecting potentially competing and mutually exclusive jurisdiction" have been called the one area "where the concept of a true jurisdictional question has considerable life".[103]

69. Finally, these rule of law concerns are magnified by the fact that the CRTC found it ***had*** jurisdiction to make the order against a single program under s. 9(1)(h), to the detriment of a single Canadian rights holder and single U.S. copyright holder. This is not a case like *Guérin* or *CHRC*, where the alleged jurisdictional question arose because the tribunal found it ***lacked*** authority.[104] If the CRTC's decision is not reviewed for correctness here, its powers will be enlarged.

70. As to the ***third*** point at paragraph 56 above (treating the issue as a jurisdictional one implements Parliament's intent), *Dunsmuir* holds that "legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent".[105] In this case, the intent of Parliament is clear: questions relating to the scope of the CRTC's authority in s. 9(1)(h) of the *Broadcasting Act* are to be treated as jurisdictional ones.

71. Parliament manifestly intended that true jurisdiction questions regarding the CRTC exist. Indeed, the *Broadcasting Act*: (a) repeatedly refers to the CRTC's authority to decide matters that are "***within its jurisdiction***" (ss. 6, 14(1), 15(1), 18(3)); (b) only allows it to determine questions of fact or law if it does so "***within its jurisdiction***" (s. 17); and (c) provides a right of appeal "on a question of law ***or a question of jurisdiction***" (s. 31(2)).

72. Further, Part II of the *Broadcasting Act* is headed "Objects and ***Powers of the Commission in Relation to Broadcasting***", and s. 9(1)(h) is found in the very first provision after the subheading under it called "General ***Powers***". Given the centrality of this jurisdiction-conferring provision to the CRTC's authority under the *Broadcasting Act*, Parliament must be presumed to have been highly deliberate in formulating its precise scope. It would not have intended that the CRTC could enlarge this authority through an erroneous interpretation of it.

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[101] *CN Rail (SCC 2014)*, *supra* note 88, ¶56.
[102] *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, ¶24; *Shaw v. Alberta (Utilities Commission)*, 2012 ABCA 378, ¶25-29.
[103] D. Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action – The Top Fifteen!" (2013) 42 Adv. Q. 1 at 17-18 ("**Mullan (2013)**"), JA Tab 19. **See also** Robertson (2014), *supra* note 92, at 41-42, 74, 78, 135, 169, footnote 275, JA Tab 23.
[104] *Guérin (SCC 2017)*, *supra* note 42, ¶2-4, 15-16; *CHRC (SCC 2018)*, *supra* note 40, ¶3, 11-19.
[105] *Dunsmuir (SCC 2008)*, *supra* note 39, ¶30 (and ¶29).

73. Finally, the phrase Parliament used to define the scope of the CRTC's power in s. 9(1)(h) – "programming services" – consists of objective rather than "evaluative words",[106] demonstrating that Parliament did not enact an intentionally vague provision in order to leave its interpretation to the CRTC.[107] The meaning of these words does not raise a question of ***policy or discretion***, such as whether a rate is "just and reasonable" or in the "public interest". Nor does it raise a question of ***mixed fact and law***, like whether the particular rental in *Bell* was a "self-contained dwelling unit". Instead, the meaning of "programming services" in s. 9(1)(h) raises a pure question of law about whether ***any*** single program can be the target of a distribution order.[108]

74. In *United Taxi*, this Court held that because no "policy-making function [was] being exercised", the City did "not possess any greater institutional competence or expertise than the courts in delineating [its] jurisdiction".[109] The similarities to the case at bar are evident. Section 9(1)(h) allows the CRTC to weigh the policy objects in ss. 3(1) and 5(2) in deciding whether to issue distribution orders about programming services, and gives it discretion to attach the terms and conditions to such orders that it deems appropriate, but leaves ***no room*** for policy or discretion on whether the CRTC can issue distribution orders about something other than "programming services", i.e., a single "program" like the Super Bowl. [110] Instead, ss. 5(1) and 9(1) make clear that the CRTC's discretion to implement the policy objects and attach terms and conditions is "***[s]ubject to this Act***" and "***[s]ubject to this Part***", i.e., the limitation of s. 9(1)(h) to "programming services".

75. This Court has repeatedly held that a CRTC decision on "a question of jurisdiction… involv[ing] an inquiry into whether [it] had the power" to do something is "not a decision which falls within the [CRTC's] area of special expertise" so as to attract deference.[111] Instead, "as regards

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[106] W. Wade and C. Forsyth, *Administrative Law*, 10th ed. (Oxford: Oxford University Press, 2009) at 219, JA Tab 38.
[107] *Arlington (USSC 2013)*, *supra* note 69, 317, per Roberts C.J. (dissenting), JA Tab 4.
[108] Bastarache (2009), *supra* note 47, at 233, JA Tab 27.
[109] *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, ¶5.
[110] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, ¶2, 7, 35 ("***ATCO (SCC 2006)***").
[111] *Bell Canada v. Canada (C.R.T.C.)*, [1989] 1 S.C.R. 1722 at 1747 (and 1744-1746) ("***Bell (SCC 1989***").

jurisdictional questions and questions of law outside the CRTC's area of expertise, the CRTC is entitled to no deference and is to be reviewed on a standard of correctness".[112] As stated in *Barrie*:

> … ***The proper interpretation of the phrase "the supporting structure of a transmission line" in s. 43(5) [of the Telecommunications Act] is not a question that engages the CRTC's special expertise*** in the regulation and supervision of Canadian broadcasting and telecommunications. ***This is not a question of telecommunications policy,*** or one which requires an understanding of technical language. Rather, ***it is a purely legal question*** and is therefore… "***ultimately within the province of the judiciary***"…
>
> … The proper interpretation of s. 43(5) at issue in this case is ***not a "polycentric" question***. ***It is a question of whether s. 43(5), properly construed, gives the CRTC jurisdiction*** to hear the parties' dispute. Again, this factor points to a less deferential standard of review.[113]

76. This is why *Barrie* was treated as "entirely distinct" in *Bell Aliant*,[114] where the issue related to the CRTC's authority to set "just and reasonable rates" under s. 27 of the *Telecommunications Act*. Unlike *Barrie*, the CRTC in *Bell Aliant* exercised "a wide discretion" in setting rates, a "polycentric exercise" on which it had "considerable expertise", and under the Act "it was required to do [so] 'with a view to implementing the Canadian telecommunications policy objectives'".[115] Here, by contrast, the issue of whether the CRTC has jurisdiction under 9(1)(h) to target a single program does not engage the CRTC's policy function. It is therefore distinguishable from cases where no true jurisdiction issue arose because the tribunal was undertaking a discretionary balancing of objects.[116]

ii. The Presumption of Home Statute Deference Is Also Rebutted By Context

77. Alternatively, even if the Court finds the *Broadcasting Act* issue is not a true jurisdiction question, "***[t]he presumption endorsed in Alberta Teachers… is not carved in stone***".[117] Instead, "[e]ven where the question under review does not fit neatly into one of the four *Dunsmuir* correctness

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[112] *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739, ¶31 (and ¶1, 66, 67-68, 78, 82) ("***BC Tel (SCC 1995)***").
[113] *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, ¶16-17 (and ¶12-15) ("***Barrie (SCC 2003)***"), *emphasis added*. **See also** *ATCO (SCC 2006)*, *supra* note 110, ¶27, 30-32.
[114] *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, ¶50 (and ¶49).
[115] *Ibid*, ¶30, 37-38, 50.
[116] *Halifax (SCC 2012)*, *supra* note 85, ¶18, 25-26, 34; *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, ¶27; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, ¶23 ("***West Fraser (SCC 2018)***").
[117] *McLean (SCC 2013)*, *supra* note 52, ¶22, *emphasis added*. **See also:** *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, ¶11-17 ("***Rogers (SCC 2012)***"); *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, ¶35-39.

categories, 'a contextual analysis' that reveals a legislative intent not to defer to a tribunal's decision may nonetheless rebut the presumption of reasonableness" for home statute interpretations.[118]

78. It is true that the *CHRC* majority said a contextual approach should be "applied sparingly",[119] but *CHRC* did not eliminate context from the standard of review.[120] Indeed, *Dunsmuir* was clear that "***[t]he analysis must be contextual***".[121] While the presumption of reasonableness creates "simplicity" by "prevent[ing] litigants from undertaking a full standard of review analysis in every case",[122] the Court's goal must not just be simplicity for simplicity's sake.[123] The "complexity was created not by the courts but by the legislatures, who wisely decided that not all administrative agencies would operate in the same way", so "[i]t is a complexity that the courts must attempt to deal with and it would be irresponsible simply for judges to wish it away".[124]

79. In this case, at least three factors combine to establish a clear legislative intent that courts not to defer to the CRTC on the *Broadcasting Act* issue.[125] These factors correspond, respectively, to the rule of law, legislative supremacy and separation of powers discussed at paragraphs 42-53 above.

80. ***First***, the CRTC interpreted s. 9(1)(h) as authorizing it to make distribution orders about ***individual programs***, arrogating to itself the power to dictate the specific television shows that broadcasters distribute. It used s. 9(1)(h) to require that BDUs televising the Canadian Super Bowl program on one channel also televise the American Super Bowl program on another. If the CRTC can target the Super Bowl this way, there is nothing to stop it from ordering that any other program it

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[118] *Groia v. Law Society of Upper Canada*, 2018 SCC 27, ¶53 ("***Groia (SCC 2018)***"). **See also:** *Barreau du Québec v. Quebec (A.G.)*, 2017 SCC 56, ¶23 ("***Barreau (SCC 2017)***"); *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, ¶27 ("***Williams (SCC 2018)***").

[119] *CHRC (SCC 2018)*, *supra* note 40, ¶45-46.

[120] **See also:** *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, ¶45; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, ¶32-33; *Green v. Law Society of Manitoba*, 2017 SCC 20, ¶24-25 ("***Green (SCC 2017)***").

[121] *Dunsmuir (SCC 2008)*, *supra* note 39, ¶64, *emphasis added*.

[122] *CHRC (SCC 2018)*, *supra* note 40, ¶45.

[123] Hon. T.A. Cromwell, "What I Think I've Learned About Administrative Law" (2017) 30 C.J.A.L.P. 307 at 311-315, JA Tab 29; Stratas (2018), *supra* note 60.

[124] Hon. F. Iacobucci, "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2002) 27 Queen's L.J. 859 at 872, JA Tab 22.

[125] *Khosa (SCC 2009)*, *supra* note 85, ¶54.

chooses be shown. It could require, e.g., that "Good Morning America" be aired in place of "Heartland", or that some or all of "The Simpsons" be deleted. The Attorney General agreed below:

> Justice Near: So, in your view, ***they could also use 9(1)(h) to prohibit a particular channel from carrying a particular program altogether***; in a different ty– test to the programming service.
> …
> Mr. Morris: Um, I would say, ***the answer's yes. They can***. I'd reconsider and see why I'm wrong and let you know. But, at the moment, I'd say yes. ***There is no limitation to what they can do under that power in relation to a term and condition.***[126]

81. This is a significant infringement on freedom of expression that Parliament did not intend to leave in the final hands of the CRTC. The legislative reports that led to the *Broadcasting Act* called courts the "***ultimate arbiters***" of *Charter* issues,[127] and s. 2(3) of the *Broadcasting Act* states that broadcasting undertakings "***shall***" enjoy freedom of expression and programming independence, while s. 3(1)(h) provides that "broadcasting undertakings have a ***responsibility*** for the programs they broadcast". Therefore, as this Court said in the *ISP Reference*:

> … The Act makes it clear that ***"broadcasting undertakings" are assumed to have some measure of control over programming. Section 2(3) states that the Act "shall be construed and applied in a manner that is consistent with the freedom of expression*** and journalistic, creative ***and programming independence enjoyed by broadcasting undertakings".*** …[128]

82. The only exception is s. 26(2), which as outlined above allows the ***Governor in Council*** – a democratically accountable body – to require that a program of "urgent importance" be broadcast to Canadians. Parliament did not give the ***CRTC*** the Orwellian power to reach down into the specific shows that broadcasters create and decide which ones are worthy of retransmission to the public. It only allowed the CRTC to make distribution orders about ***entire channels*** in s. 9(1)(h), and set ***general*** standards for ***all*** programs through regulations in s. 10.[129]

83. In *Saguenay*, this Court recognized that the presumption of deference may be rebutted for statutory interpretation issues with a *Charter* dimension like this.[130] While *Doré* holds that a decision which limits *Charter* rights or values is reviewable for reasonableness, this only "applies to

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[126] FCA Transcript Excerpt, Exhibit "A", JR Tab 26, p. 143, *emphasis added*.
[127] Task Force on Broadcasting Policy, *Report of the Task Force on Broadcasting Policy* (Ottawa: Supply and Services Canada, 1986) at 138, *emphasis added*, JA Tab 37
[128] *Reference re Broadcasting Act*, 2012 SCC 4, ¶4 ("***ISP Reference (SCC 2012)***"), *emphasis added*.
[129] NFL Factum, ¶91.
[130] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, ¶49 ("***Saguenay (SCC 2015)***").
See also: *Dunsmuir (2008 SCC)*, *supra* note 39, ¶58; *CHRC (SCC 2018)*, *supra* note 40, ¶53.

discretionary administrative decisions".[131] The interpretive issue in this case is not discretionary – the CRTC was not determining a "just and reasonable" rate – but is a pure question of law about the meaning of the term "programming services" in s. 9(1)(h).[132] Parliament could not have intended that the CRTC receive deference on an issue whose infringement on freedom of expression is so extreme, particularly when s. 2(3) of the *Broadcasting Act* ***itself requires*** that the statute be construed consistently with the freedom before any presumption of compliance with the *Charter* is reached.[133]

84. ***Second***, s. 31(2) of the *Broadcasting Act* contains an appeal right – with leave – on statutory interpretation questions such as this, immediately after a "full" privative clause for all other issues:[134]

> 31 (1) ***Except as provided in this Part, every decision and order of the Commission is final and conclusive***.
>
> (2) ***An appeal lies from a decision or order of the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction if leave therefor is obtained from that Court*** on application made within one month after the making of the decision or order sought to be appealed from or within such further time as that Court under special circumstances allows. [*emphasis added*]

85. Notably, Parliament found it necessary to provide the CRTC appeal right in s. 31(2) despite the fact that s. 28(1) of the *Federal Courts Act* ***already*** permits judicial review from the CRTC:

> 28 (1) ***The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of*** any of the following…:
>
> …
>
> (c) ***the Canadian Radio-television and Telecommunications Commission***… [*emphasis added*]

86. The necessary inference is that Parliament viewed questions of law or jurisdiction which attract leave under s. 31(2) as being qualitatively different from other issues relating to the CRTC that are subject only to judicial review under the constraints of a full privative clause. This is

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[131] *Loyola High School v. Quebec (A.G.)*, 2015 SCC 12, ¶35 (and ¶3-4). **See also:** *Doré v. Barreau du Québec*, 2012 SCC 12, ¶3, 24-28, 33-38, 42-43, 45, 47, 52-55, 58, 60, 66; *Groia (SCC 2018)*, *supra* note 118, ¶111-114; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, ¶57, 79 ("***Trinity (SCC 2018)***").

[132] *ATA (SCC 2011)*, *supra* note 40, ¶47. **See also** Mullan (2013), *supra* note 103, at 55.

[133] *Bell ExpressVu (SCC 2002)*, *supra* note 3, ¶28, 61-66.

[134] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, ¶30.

confirmed by contrasting s. 31(2) to s. 28(1) of the *Broadcasting Act*, which creates an alternative appeal route to the Governor in Council intended for issues of ***policy***, not ***law and jurisdiction***.[135]

87. The creation of the statutory appeal right on questions of law and jurisdiction is thus a strong indication of Parliament's intent that this issue be reviewed for correctness.[136] As the Court's post-*Dunsmuir* jurisprudence confirms, "[w]hile privative clauses deter judicial intervention, a statutory right of appeal may be at ease with it, depending on its terms".[137] It is true the majority in *Edmonton* found the statutory appeal right there did not rebut the presumption of deference,[138] but unlike in this case it was not accompanied by a full privative clause on other issues, for which an appeal was granted to a different administrative body. Further, the *Edmonton* majority did not hold that statutory appeal rights are unable to operate ***in combination*** with other factors to rebut the presumption.

88. ***Third***, the standard of review is informed by "whether the question falls within the body's area of expertise",[139] and the *Broadcasting Act* shows that Parliament did not regard pure statutory interpretation issues as engaging the specialized expertise of the CRTC. Rather, Parliament only recognized that the CRTC's expertise lies in ***policy*** decisions:[140]

> [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***.
> …
> 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). [*emphasis added*]

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[135] House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-40*, 34th Parl., 2nd Sess., No. 9 (22 February 1990) at 22-23 (Keith Spicer), JA Tab 55C.
[136] Bastarache (2009), *supra* note 47, at 234, JA Tab 27; Hon. J.M. Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014) C.J.A.L.P. 101 at 106-107 ("**Evans (2014)**"), JA Tab 25; Robertson (2014), *supra* note 92, at 3, 81, 133, 169-172, JA Tab 23; Hon. M. Bastarache, "Dunsmuir 10 Years Later" (March 9, 2018), online at <https://doubleaspect.blog/2018/03/09/dunsmuir-10-years-later/>.
[137] *Khosa (SCC 2009)*, *supra* note 85, ¶55. **See also** *Saguenay (SCC 2015)*, *supra* note 130, ¶43.
[138] *Edmonton (SCC 2016)*, *supra* note 41, ¶27-31, 34.
[139] *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, ¶13 ("***Catalyst (2012 SCC)***"). **See also:** *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, ¶22; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, ¶82 ("***Teal (SCC 2017)***").
[140] *Bell (SCC 1989)*, *supra* note 111, at 1747; *Barrie (SCC 2003)*, *supra* note 113, ¶17.

89. The interpretation of "programming services" in s. 9(1)(h) is not an issue that "calls for a fact-dependent and policy-driven assessment".[141] Unlike the issue of whether prohibiting Sim Sub for the Super Bowl would advance the policy objects in ss. 3 and 5 of the *Broadcasting Act*, the interpretation of "programming services" in s. 9(1)(h) involves the purely legal meaning of a term in a jurisdiction-conferring provision, a matter on which the CRTC has no more "relative expertise" than the courts.[142] As in *Rogers*, the *Broadcasting Act* comes before the courts at first instance,[143] and this Court often interprets it without any underlying decision by the CRTC.[144] This judicial expertise is even recognized by the CRTC itself, which has referred other matters involving the interpretation of the Act to the courts.[145] As Gonthier J. held in *Barrie*:

> ***The proper concern of the reviewing court is not the expertise of the decision maker in general, but its expertise relative to that of the court itself vis-à-vis the particular issue***… The reviewing court must ***also*** bear in mind that… the focus of the inquiry is on the particular provision being invoked and interpreted by the tribunal; ***some provisions within the same Act may require greater curial deference than others***…
> …
> ***The CRTC's expertise lies in the regulation and supervision of Canadian broadcasting*** and telecommunications. …
>
> … ***This Court's expertise in matters of pure statutory interpretation is superior to that of the CRTC.*** This factor suggests a less deferential approach.[146]

B. Even If Correctness Review Does Not Apply, the Decision is Unreasonable

i. The *Broadcasting Act* Permits Only One Reasonable Interpretation

a. Statutes Can Have a Single or "Unambiguous" Interpretation

90. In the further alternative, if this Court finds that correctness review does not apply to the *Broadcasting Act* issue, it still makes no difference to the outcome of this case. That is because the question of whether "programming services" in s. 9(1)(h) include individual programs like the Super Bowl permits only ***one*** reasonable interpretation. As Moldaver J. explained in *McLean*:

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[141] *Khosa (SCC 2009)*, *supra* note 85, ¶57.
[142] *Dunsmuir (SCC 2008)*, *supra* note 39, ¶68 (and 54-55, 66, 70-71).
[143] *Rogers (SCC 2012)*, *supra* note 117, ¶10, 13-15.
[144] *R. v. Canadian Broadcasting Corp.*, [1983] 1 S.C.R. 339; *Irwin Toy Ltd. v. Québec (A.G.)*, [1989] 1 S.C.R. 927; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; *Bell ExpressVu (SCC 2002)*, *supra* note 3.
[145] *ISP Reference (SCC 2012)*, *supra* note 128, ¶1; *Cogeco (SCC 2012)*, *supra* note 9, ¶8.
[146] *Barrie (SCC 2003)*, *supra* note 113, ¶12, 15-16, *emphasis added.*

> It will not always be the case that a particular provision permits multiple reasonable interpretations. ***Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable -- no degree of deference can justify its acceptance***; see, e.g., ***Dunsmuir***, at para. 75; ***Mowat***, at para. 34. In those cases, ***the "range of reasonable outcomes"… will necessarily be limited to a single reasonable interpretation -- and the administrative decision maker must adopt it.***[147]

91. In effect, *McLean* recognizes that "[r]easonableness is a concept that must be applied in the particular context under review", such that "[t]he range of acceptable and rational solutions depends on the context of the particular type of decision making involved and all relevant factors".[148] Where the context is statutory interpretation, then the range of reasonable outcomes may be so narrow as to allow only a single answer. Indeed, *McLean* indicates this is the ***most likely*** scenario in such cases, saying it is only "***on occasion***" that "legislative provisions will… be susceptible to multiple reasonable interpretations".[149] This Court made the same point again in *CHRC*, holding that reasonableness review will "***often***" be sufficient to safeguard the rule of law and legislative supremacy for jurisdictional issues because a single reasonable statutory interpretation will exist.[150]

92. Accordingly, "[a] review of a question of statutory interpretation is different from a review of the exercise of discretion",[151] where multiple reasonable outcomes are the norm.[152] In some cases, of course, the legislature may intentionally use "evaluative" language so vague that statutory interpretation "shade[s] imperceptibly into questions of discretion",[153] such as a power to make orders in the "public interest" or decide if a rate is "just and reasonable".[154] But that is not the case here. The meaning of "programming services" does not involve a polycentric value judgment about deliberately ambiguous words, but is only a matter of ascertaining Parliament's objective intent.

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[147] *McLean (SCC 2013)*, *supra* note 52, ¶38, *emphasis added*. **See also:** *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, ¶6, 25, 42 ("***Wilson (SCC 2015)***"); *Teal (SCC 2017)*, *supra* note 139, ¶84-86; *CHRC (SCC 2018)*, *supra* note 40, ¶40.
[148] *Halifax (SCC 2012)*, *supra* note 85, ¶44 (and ¶49). **See also:** *Khosa (SCC 2009)*, *supra* note 85, ¶28, 59; *Catalyst (SCC 2012)*, *supra* note 139, ¶13, 17-25, 29.
[149] *McLean (SCC 2013)*, *supra* note 52, ¶32, *underlining in original, bolding and italics added.*
[150] *CHRC (SCC 2018)*, *supra* note 40, ¶40, *emphasis added.*
[151] *ATA (SCC 2011)*, *supra* note 40, ¶47.
[152] ***cf.*** *Groia (SCC 2018)*, *supra* note 118, ¶8, 125, 160.
[153] *Wilson (SCC 2016)*, *supra* note 54, ¶33, per Abella J. (concurring). **See also** Stratas (2016), *supra* note 41, at 50-51, JA Tab 21.
[154] *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, ¶73-74, 81-82; *Green (SCC 2017)*, *supra* note 120, ¶22, 24; *Teal (SCC 2017)*, *supra* note 139, ¶86.

b. Deference Should Resolve Ambiguities, Not Create Them

93. It is essential to be clear about the role that deference plays in home statute interpretation, particularly if the Court rejects the earlier argument made by Bell and the NFL and eliminates or narrows the category of true jurisdictional questions.[155] When assessing whether multiple reasonable interpretations of a statute exist, deference has no place in the analysis. Instead, the Court must determine – using the ordinary tools of statutory interpretation – whether the provision is ambiguous or not.[156] Only if a genuine ambiguity remains at the conclusion of this analysis, and the tribunal has selected and justified an interpretation which falls within it, will deference compel the court to accept that interpretation. Otherwise, the Court should resolve the ambiguity itself.[157]

94. Put differently, deference can only ***resolve*** ambiguities, it cannot ***create*** them. This understanding of deference is necessary to appropriately balance the constitutional principles of the rule of law, legislative supremacy and the separation of powers.[158] It recognizes that "[d]eference… does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations",[159] but that when a genuinely ambiguous statute requires resort to considerations beyond the ordinary tools of statutory interpretation, "courts 'may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad ***policy*** context within which that agency must work'".[160] Thus, while Dickson J. deferred in *CUPE* to the Board's interpretation of its home statute, he first noted that it "bristle[d] with ambiguities" which were "acknowledged and undoubted".[161]

95. This is reflected in *McLean*, where the Court treated ambiguity as the gateway to deference, calling deference in such cases "itself a principle of modern statutory interpretation" that is used to resolve an ambiguity only when the ordinary tools of statutory interpretation are unable to do so:

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[155] *CHRC (SCC 2018)*, *supra* note 40, ¶40, 110-112.
[156] *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984), JA Tab 3; *2274659 Ontario Inc. v. Canada Chrome Corp.*, 2016 ONCA 145, ¶47, 50, leave to appeal refused, [2016] S.C.C.A. No. 172.
[157] Evans (2014), *supra* note 136, 108-111, JA Tab 25; Robertson (2014), *supra* note 92, at 11-14, 157-164, JA Tab 23.
[158] *Secession (SCC 1998)*, *supra* note 43, ¶49, 67.
[159] *Dunsmuir (SCC 2008)*, *supra* note 39, ¶48.
[160] *Edmonton (SCC 2016)*, *supra* note 41, ¶33, *emphasis added*. **See also** *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1336-1337, per Wilson J. (concurring).
[161] *CUPE (SCC 1979)*, *supra* note 56, at 230, 237.

> …[B]ecause legislatures do not always speak clearly and ***because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple reasonable interpretations***… The question that arises, then, is ***who gets to decide among these competing reasonable interpretations***?
>
> The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because ***the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired the administrative decision maker -- not the courts -- to make. Indeed, the exercise of that interpretative discretion is part of an administrative decision maker's "expertise".***
> …
> … As between the two possible interpretations put forward with respect to the meaning of s. 159 as it applies to s. 161(6)(d), ***both find some support in the text, context, and purpose of the statute. In a word, both interpretations are reasonable***. …
>
> … Because the legislature charged the administrative decision maker rather than the courts with "administer[ing] and apply[ing]" its home statute… ***it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty*** by adopting any interpretation that the statutory language can reasonably bear. ***Judicial deference in such instances is itself a principle of modern statutory interpretation.***[162]

96. Therefore, as confirmed more recently in *CHRC*, "[w]hen applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to ***resolve any ambiguities*** in the statute".[163] Deference does not mean an interpretation ***is*** reasonable, only that where multiple reasonable interpretations ***do*** exist and the tribunal justifies one of them, the court cannot reject it for its own.

97. Were it otherwise, and a competing reasonable interpretation were found to exist ***because*** of deference to the tribunal before the ordinary principles of statutory interpretation are applied, then the tribunal's interpretation will prevail even when those principles – which Parliament has in mind when drafting legislation[164] – would have revealed the legislative intent to be unambiguous. That is contrary to the rule of law, legislative supremacy and the separation of powers, as "tribunals are equally bound with judges by the rules and principles governing statutory interpretation and the

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[162] *McLean (SCC 2013)*, *supra* note 52, ¶32-33, 39-40 (and ¶70), *underlining in original, bolding and italics added*.
[163] *CHRC (SCC 2018)*, *supra* note 40, ¶55, *emphasis added*. **See also** *Williams (SCC 2018)*, *supra* note 118, ¶108.
[164] R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada Inc., 2014), §8.7, JA Tab 35.

critical issue is whether the perceived ambiguity is real and not imagined".[165] It would amount to applying the ***patent unreasonableness*** standard of review rejected in *Dunsmuir*, where the tribunal's interpretation was accepted so long as "the 'immediacy' or 'obviousness' of the defect" did not "appear on [its] face" even when the unreasonableness of the interpretation could have been "discovered after [the] 'significant searching or testing'" required by the modern approach to statutory interpretation.[166] This deprives Parliament of the deference due to it by the executive, and is the central error committed by the Court of Appeal below, which took deference as its starting point rather than the tools of interpretation raised by Bell and the NFL.[167] As *Bell ExpressVu* holds:

> Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, ***when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator***. …[168]

c. Genuine Ambiguities Must Arise From the Entire Statutory Context

98. The ordinary principles of statutory interpretation dictate that a provision can only have multiple "reasonable" interpretations if it contains a "genuine ambiguity", in the sense of an ambiguity that would "induce two people to spend good money in backing two opposing views as to their meaning", after the "entire context" of the statute has been reviewed. As *Bell ExpressVu* holds:

> What, then, in law is an ambiguity? To answer, an ***ambiguity*** must be "real"… The words of ***the provision must be "reasonably capable of more than one meaning"***… By necessity, however, one must consider the "entire context" of a provision before one can determine if it is ***reasonably capable of multiple interpretations.*** … "It is only when ***genuine ambiguity arises between two or more plausible readings, <u>each equally in accordance with the intentions of the statute</u>***, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".
>
> …[A]mbiguity cannot reside in the mere fact that several courts… have come to differing conclusions on the interpretation of a given provision. ***[I]t is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity.*** It is

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[165] *Allen v. Newfoundland and Labrador (Workplace Health, Safety and Compensation Division)*, 2014 NLCA 42, ¶43 ("***Allen (NLCA 2014)***"), leave to appeal refused, [2015] S.C.C.A. No. 34. **See also:** *New Brunswick Liquor Corp. v. Small*, 2012 NBCA 53, ¶3-4, 31-33; *British Columbia Hydro and Power Authority v. Workers' Compensation Board of British Columbia*, 2014 BCCA 353, ¶45, leave to appeal refused, [2014] S.C.C.A. No. 499.

[166] *Dunsmuir (SCC 2008)*, *supra* note 39, ¶37, 40 (and ¶41). **See also** *West Fraser (SCC 2018)*, *supra* note 116, ¶32, 40, 42, 49.

[167] Appeal Decision, ¶28, JR Tab 8.

[168] *Bell ExpressVu (SCC 2002)*, *supra* note 3, ¶62, *emphasis added*.

> ***necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach*** set out by Driedger, ***and <u>thereafter</u> to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning***"…[169]

99. The Court recognized this in *McLean*, where it tied the *Bell ExpressVu* concept of a genuine ambiguity to a statutory interpretation issue that admits of more than one reasonable outcome:

> For the reasons that follow, I conclude that ***both interpretations are reasonable***. Here, the statutory language is less than crystal clear. Or, as Professor Willis once put it, "***the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning***" (…cited in ***Bell ExpressVu***…).[170]

100. The Court then reiterated this point in *Wilson*:

> … ***The provision is not ambiguous, and the adjudicator's interpretation was the only reasonable one***. …
>
> ***When assessing the reasonableness of an administrative decision maker's interpretation, Driedger's modern rule of statutory interpretation provides helpful guidance***…
> …
> …***[A] genuine ambiguity only exists when there are "two or more plausible readings, each equally in accordance with the intentions of the statute"*** … ***Bell ExpressVu,***…
> …
> … Section 215.41(3.1) does not meet that test. Indeed, in my view, ***it does not even given rise to two plausible readings, let alone two such readings that are equally in accordance with the intentions of the statute***. Rather, as I will explain, ***when read in light of its text, context, and legislative objective, it admits of only one reasonable interpretation -- the one arrived at by the adjudicator***. *Charter* values may not be used "to create ambiguity when none exists"… Consequently, they have no role to play as an interpretive tool in this case…
> …
> ***The adjudicator's interpretation is consistent with the text, context, and legislative objectives of the ARP scheme. Mr. Wilson's interpretation is not. The provision is unambiguous***. ***The adjudicator's interpretation is the only plausible one.***[171]

101. Therefore, the Court must review the ***entire context*** of s. 9(1)(h) to determine whether the CRTC's interpretation of "programming services" is reasonable. In *McLean*, even though "[t]he ordinary meaning… appear[ed] to support the Commission's interpretation", the Court still held it necessary to "di[g] deeper into the context and purpose of the provision" because "satisfying oneself

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[169] *Bell ExpressVu (SCC 2002)*, *supra* note 3, ¶29-30, *underlining in original, bolding and italics added*. **See also:** *Bristol-Myers Squibb Co. v. Canada (A.G.)*, 2005 SCC 26, ¶43-44, 65-68; *ATCO (SCC 2006)*, *supra* note 113, ¶48-49; *Re Canada 3000 Inc.*, 2006 SCC 24, ¶44-45, 60-61; *Pharmascience Inc. v. Binet*, 2006 SCC 48, ¶29, 32.

[170] *McLean (SCC 2013)*, *supra* note 52, ¶37, *emphasis added*.

[171] *Wilson (SCC 2015)*, *supra* note 147, ¶6, 18, 22, 25, 42, *emphasis added*.

as to the ordinary meaning of the phrase 'is not determinative and does not constitute the end of the inquiry'".[172] It is only if these "tools of statutory interpretation -- including the text, context and purpose of the provision -- can reasonably support the Tribunal's conclusion"[173] to the level that a prudent, independent observer would "spend good money in backing" it against the interpretation of Bell and the NFL that more than one reasonable outcome exists and deference becomes engaged.[174]

102. This explains the outcome in *Dunsmuir* itself – one of the two cases *McLean* referred to as examples of a single reasonable interpretation[175] – where the Court found "[t]he interpretation of the adjudicator… simply unreasonable in the ***context*** of the legislative wording and the larger labour context in which it is embedded", stating that "***no reasonable interpretation*** can lead to that result" and that "***on any reasonable interpretation***" the interpretation could not be sustained.[176] This may be contrasted with *CUPE*, where Dickson J. found the Board's interpretation "***at least as reasonable*** as the alternative interpretations suggested" after undertaking "***a careful reading*** of the Act".[177]

103. It is also instructive to consider *Mowat*, the other case that *McLean* referred to as allowing only one reasonable interpretation.[178] At issue in *Mowat* was whether the CHRC had reasonably interpreted ss. 53(2)(c) and (d) of the *Canadian Human Rights Act* as authorizing it to require that a person who engaged in a discriminatory practice pay the victim's legal costs in bringing the complaint. This Court unanimously held there was only ***one*** reasonable interpretation of the provisions, and that it was not the one selected by the CHRC:

> … When one conducts a full contextual and purposive analysis of the provisions it becomes clear that ***no reasonable interpretation supports that conclusion***.
> …
> In our view, the text, context and purpose of the legislation clearly show that there is no

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[172] *McLean (SCC 2013)*, *supra* note 52, ¶42-44. **See also** *ATA (SCC 2011)*, *supra* note 40, ¶72.
[173] *Williams (SCC 2018)*, *supra* note 118, ¶108 (and ¶122). **See also** *Barreau (SCC 2017)*, *supra* note 118, ¶25-26.
[174] *Canada (Minister of Public Safety and Emergency Preparedness) v. Huang*, 2014 FCA 228, ¶39, 57, 78; *Allen (NLCA 2014)*, *supra* note 174, ¶36-37, 41-48, 54, 59-61, 65, 68-69; *Copper Sands Land Corp. v. Edwards*, 2017 SKCA 7, ¶9, 35-36; *Richmond Hill (Town) v. Elginbay Corp.*, 2018 ONCA 72, ¶38, 46-49, 57, 87, leave to appeal filed, [2018] S.C.C.A. No 101, JA Tab 16; *University of British Columbia v. Lister*, 2018 BCCA 139, ¶28, 40; *EllisDon Corp. v. International Union of Operating Engineers, Local 721*, 2018 NSCA 36, ¶63, 79-81, 114, 119.
[175] See paragraph 90 above.
[176] *Dunsmuir (SCC 2008)*, *supra* note 39, ¶75-76 (and ¶74), *emphasis added*.
[177] *CUPE (SCC 1979)*, *supra* note 56, at 242, *emphasis added*.
[178] See paragraph 90 above.

> authority in the Tribunal to award legal costs and that ***there is no other reasonable interpretation*** of the relevant provisions. …[179]

104. The analytical path the Court took to arrive at this conclusion is telling. First, LeBel and Cromwell JJ. emphasized the importance of a proper statutory interpretation analysis:

> ***The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context*** and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament (E. A. Driedger...)…[180]

105. Next, the Court held that even though the ***text*** of the provisions were broad enough to include the CHRC's interpretation – and had been found to do so in three prior decisions of the Federal Court – the ***full context*** still had to be examined:

> Turning to the text of the provisions in issue, ***the words "any expenses incurred by the victim", taken on their own and divorced from their context, are wide enough to include legal costs.*** This was the view adopted by the Tribunal and the three Federal Court decisions on which it relied. ***However, when these words are read, as they must be, in their statutory context, it becomes clear that they cannot reasonably be interpreted as creating a stand-alone category of compensation*** capable of supporting any type of disbursement causally connected to the discrimination. …[181]

106. The Court then undertook a 30-paragraph analysis of numerous contextual factors relevant to the meaning of the provisions, including:

(a) the broader structure of the provisions in the Act;

(b) the legislative presumption against tautology;

(c) the meaning of "costs" in legal parlance;

(d) the legislative history and evolution of the provisions;

(e) the CHRC's own prior interpretations of its power to award costs;

(f) parallel provincial and territorial legislation; and

(g) law reform report recommendations.[182]

107. In concluding from this that the only reasonable interpretation was not the one reached by the CHRC, the Court held the tribunal failed to conduct its own review of the entire statutory context:

> As we noted earlier, the *CHRA* has been described as quasi-constitutional and deserves a broad, liberal, and purposive interpretation befitting of this special status. However, ***a liberal***

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[179] *Mowat (SCC 2011)*, *supra* note 5, ¶34, 64, *emphasis added*.
[180] *Ibid*, ¶33, *emphasis added*.
[181] *Ibid*, ¶35, *emphasis added*.
[182] *Ibid*, ¶35-64.

> ***and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament***…
> …
> … Faced with a difficult point of statutory interpretation and conflicting judicial authority, ***the Tribunal adopted a dictionary meaning of "expenses" and articulated what it considered to be a beneficial policy outcome rather than engage in an interpretative process taking account of the text, context and purpose of the provisions in issue***. In our respectful view, this ***led the Tribunal to adopt an unreasonable interpretation of the provisions***. …[183]

108. This Court has taken the same approach in many other post-*Dunsmuir* cases when finding the tribunal's interpretation of its home statute was unreasonable given the entire legislative context:

(a) In *John Doe*, a seven-member panel unanimously held that an Adjudicator unreasonably interpreted a disclosure exemption in her home statute, Ontario's 1988 *Freedom of Information and Protection of Privacy Act*. Citing the modern approach to statutory interpretation from *Rizzo Shoes*, Rothstein J. engaged in a lengthy analysis of the text, context, legislative history and statutory purpose of the Act.[184]

(b) In *B010*, a seven-member panel unanimously found that the Board unreasonably interpreted an inadmissibility exception in its home statute, the *Immigration and Refugee Protection Act*. Chief Justice McLachlin offered nearly 50 paragraphs analyzing the text of the provision, its statutory context, the presumption of compliance with Canada's international treaty obligations, and legislative history evidence before concluding that "[t]he tools of statutory interpretation… all point[ed] ***inexorably*** to the conclusion" opposite to the one reached by the Board.[185]

(c) In *Tran*, a nine-member panel unanimously found that a ministerial delegate unreasonably interpreted s. 36(1)(a) of the *Immigration and Refugee Protection Act*. Holding that "a contextual reading of s. 36(1)(a) supports ***only one conclusion***", Côté J. engaged in a detailed analysis that drew upon other statutes, predecessor legislation, parliamentary history, judicial case law and the presumptions against retrospectivity and absurd results.[186]

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[183] *Ibid*, ¶62, 64 (and ¶33-34, 61), *emphasis added*.
[184] *John Doe v. Ontario (Finance)*, 2014 SCC 36, ¶3, 17-51, 53-55.
[185] *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, ¶76 (and ¶25-72).
[186] *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, ¶23-53.

(d) In *Caron*, five of seven judges found the Commission unreasonably interpreted its home statute, the *Act respecting industrial accidents and occupational diseases*. Justice Abella for the majority undertook an extensive review of the text, context and purpose of the home statute, which included applying the presumption of compliance with the Quebec *Charter*.[187]

109. These cases are pertinent here. For the reasons given in the NFL Factum, the CRTC committed the same error as in *Mowat*. Rather than consider the entire text, context and purpose of s. 9(1)(h), the CRTC adopted a strained definition of "programming services" in order to impose what it viewed as a beneficial policy outcome after realizing it had no such authority under s. 10. This led to an unreasonable decision that cannot produce a genuine ambiguity when weighed against the interpretation of Bell and the NFL, which, as set forth in the NFL's factum, is consistent with the text, context and purpose of s. 9(1)(h), as well as the CRTC's own prior interpretations of that provision and the *Broadcasting Act* as a whole.

ii. The CRTC Did Not Justify the Interpretation It Selected

110. In the further alternative, the CRTC's interpretation would be unreasonable even if it did produce a genuine ambiguity after the entire statutory context is reviewed. This is because, as discussed in the NFL Factum, the reasons given by the CRTC still do not ***intelligibly justify*** its choice to select that interpretation over the one offered by Bell and the NFL. As held in *Trinity*:

> …***[R]easonableness review is concerned <u>both</u> with "the reasonableness of the substantive outcome*** of the decision, ***and with the process of articulating that outcome***"… ***To be reasonable, a decision must "fal[l] within a range of possible, acceptable outcomes"… <u>and</u> exhibit "justification, transparency and intelligibility*** within the decision-making process"…[188]

111. This reflects the fact that "deference under the reasonableness standard is ***best given effect*** when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided".[189] If the CRTC cannot "supply a convincing explanation why its choice of meanings was reasonable",[190] then

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[187] *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3, ¶4, 15-58.
[188] *Trinity (SCC 2018)*, *supra* note 131, ¶52, *emphasis in original*. **See also** *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, ¶12 ("***Delta (SCC 2018)***").
[189] *ATA (SCC 2011)*, *supra* note 40, ¶54, *emphasis added*.
[190] *Allen (NLCA 2014)*, *supra* note 174, ¶42.

the statutory ambiguity has not truly been resolved, and the Court must determine the matter itself. To defer to the CRTC's expertise in such circumstances ignores the fact that "[e]xpertise commands deference only when the expert is coherent", and that "[e]xpertise loses a right to deference when it is not defensible".[191] Further, it would undermine the rule of law. As McLachlin C.J.C. observed:

> …[S]ocieties governed by the Rule of Law are marked by a certain ***ethos of justification***. In a democratic society, this may well be the general characteristic of the Rule of Law within which the more specific ideals ... are subsumed. Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of ***rationality and fairness***. …[192]

112. Accordingly, "[t]he reviewing court must start from the Tribunal's decision and ask whether it is justified based on the authorities", and in doing so the Court does have not "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result".[193] As *Delta* confirms:

> ***… Dunsmuir still stands for the proposition that reviewing courts must look at both the reasons and the outcome.*** While this does not require "two discrete analyses"… it means that ***reasons still matter. If we allow reviewing courts to replace the reasons of administrative bodies with their own, the outcome of administrative decisions becomes the sole consideration.*** With that approach, as long as the reviewing court could come up with some possible justification -- even if it contradicted the reasons given by the administrative body -- the decision would be reasonable. ***This goes too far. It is important to maintain the requirement that where administrative bodies provide reasons for their decisions, they do so in an intelligible, justified, and transparent way.***[194]

113. In this case, the CRTC supplied "detailed" but deficient reasons, and they should not be supplemented by Court.[195] Indeed, the CRTC took ***two*** opportunities to explain its jurisdiction to make the Sim Sub order under s. 9(1)(h) – once in the Second CRTC Decision, and again in the Third CRTC Decision – after having ***changed*** its jurisdictional basis in the First CRTC Decision and

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[191] *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, ¶62.
[192] Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-99) 12 C.J.A.L.P. 171 at 174, *emphasis in original*, JA Tab 20. **See also:** *Judges (SCC 1997)*, *supra* note 46, ¶181; Bastarache (2009), *supra* note 47, at 236, JA Tab 27; Stratas (2018), *supra* note 60; Hon. J.M. Evans, "*Dunsmuir* – Reflections of a Recovering Judge" (March 1, 2018), online: <http://www.administrativelawmatters.com/blog/2018/03/01/dunsmuir-reflections-of-a-recovering-judge-hon-john-m-evans/>.
[193] *Williams (SCC 2018)*, *supra* note 118, ¶36, 116. **See also** *Groia (SCC 2018)*, *supra* note 118, ¶58.
[194] *Delta (SCC 2018)*, *supra* note 188, ¶27 (and ¶23-26, 29), *underlining in original*, *bolding and italics added*.
[195] *Ibid*, ¶23.

receiving arguments from the parties. Further, the appeal from the First and Second CRTC Decisions was dismissed as premature partly ***so that*** the CRTC could "refine its analysis and offer its rationale to support whatever order it may come up with after considering the appellants' arguments" in the Third CRTC Decision.[196] In this context, the need for justification, transparency and intelligibility is high, particularly when Parliament created an appeal right in s. 31(2) to which reasons are central:

> …[N]ot all administrative decision making requires the same procedure. ***Reasonableness "takes its colour from the context"… and the requirements of process will "vary with the context*** and nature of the decision-making process at issue"…[197]

114. In addition to the contextual points made at paragraphs 80-89 above, two other factors further increase the level of justification, transparency and intelligibility required of the CRTC here.

115. ***First***, the decision is of significant importance to the parties, the public and the legal system.[198] The CRTC itself recognized that "BCE may have negotiated its agreement with the NFL based on assumptions about the amount of revenue it can expect to receive from the subject broadcast rights", and that the CRTC Order "may affect the ability of Canadian broadcasters to obtain revenues from broadcasting this program".[199] It also observed that live-event programming like the Super Bowl "accounted for a very significant part of CTV's overall simultaneous substitution revenues ($40 million or up to roughly as much as 33% of CTV's simultaneous substitution revenues)", and "is more likely to be watched in real time with commercial interruptions than other types of programming… remain[ing] a valuable type of programming for local television broadcasters".[200]

116. Further, the importance of the CRTC Order extends well beyond the parties to the dispute, a point illustrated by the ***28 interventions*** filed in response to it from individuals, corporations, unions and trade associations,[201] as well as the interventions in the Court of Appeal below. There are "more

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[196] Prematurity Decision, ¶29, JR Tab 5.
[197] *Trinity (SCC 2018)*, *supra* note 131, ¶53, *emphasis added*.
[198] *Dunsmuir (SCC 2008)*, *supra* note 39, ¶60; *West Fraser (SCC 2018)*, *supra* note 116, ¶124, per Brown J. (dissenting on other grounds); L. Sossin and C.M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007) 57 U.T.L.J. 581 at 596, 601, JA Tab 30; Hon. J.M. Evans, "Standards of Review in Administrative Law" (2013) 26 C.J.A.L.P. 67 at 73, 77, JA Tab 24; L. Sossin, "The Complexity of Coherence: Justice LeBel's Administrative Law" (2015) 70 S.C.L.R. (2d) 145 at 160-162, JA Tab 31; Stratas (2018), *supra* note 60.
[199] Third CRTC Decision, ¶36, 56, 58, JR Tab 1.
[200] First CRTC Decision, ¶9, 15, JR Tab 16.
[201] Third CRTC Decision, ¶13, JR Tab 1.

than a ***half-billion hours*** of simulcast viewing annually",[202] so Sim Sub is essential to "[t]he Canadian television system… a thriving industry that directly ***employs almost 60,000 people***" and "is ***economically diverse***".[203] As the CRTC itself acknowledged, Sim Sub "fulfills an important role in achieving the policy objectives of the Act":[204]

> ● ***to allow Canadian broadcasters to maximize audiences and advertising revenues for the non-Canadian programs for which they have acquired the Canadian market rights.*** … In the 2012-2013 broadcast year, the estimated revenue impact of substitution was ***approximately $250 million.***
>
> ● ***to promote local broadcasting and local creation***. By helping local stations keep their local audiences and the advertising dollars that go with those audiences, simultaneous substitution ***enables them to continue to operate and to offer their viewers local as well as international programming.***
>
> ● ***to keep advertising dollars in the Canadian market***. A lot of the time, an American signal is replaced with a Canadian one. Since the Canadian signal features Canadian ads, advertising money is generated in the Canadian market, ***creating jobs and economic activity***.[205]

117. Finally, the legal implications of the CRTC Order are profound. Section 9(1)(h) is used to justify the CRTC's most controversial regulatory measures,[206] and has been invoked here to usurp a power that the *Broadcasting Act* grants only to the Governor in Council due to its significant infringement on freedom of expression. This Court has emphasized that it is "***difficult to imagine a guaranteed right more important*** to a democratic society than freedom of expression",[207] calling it "***the matrix, the indispensable condition of nearly every other form of freedom***".[208] The CRTC should not be permitted to derogate from this essential right without clear and compelling reasons.

118. The freedom of expression's role in this context is particularly acute because "the Canadian broadcasting system… provides, through its programming, a public service ***essential to the maintenance and enhancement of national identity and cultural sovereignty***"[209] and draws ***millions of Canadian viewers*** on a variety of platforms".[210] Further, as the Court of Appeal observed:

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[202] BNC 2015-330, ¶2, JR Tab 18.
[203] BNC 2014-190, ¶12, 14, JR Tab 14.
[204] Second CRTC Decision, ¶23, JR Tab 22, *emphasis added*.
[205] First CRTC Decision, Preamble, JR Tab 16, *emphasis added*.
[206] *Cogeco (SCC 2012)*, *supra* note 9, ¶20, 29-31.
[207] *Prud'homme v. Prud'homme*, 2002 SCC 85, ¶39.
[208] *R. v Sharpe*, 2001 SCC 2, ¶23.
[209] *Broadcasting Act*, s. 3(1)(b); *Bell ExpressVu (SCC 2002)*, *supra* note 3, ¶47.
[210] BNC 2014-190, ¶13, JR Tab 14. **See also** BNI 2013-563, 1, JR Tab.

> … ***[T]here is a certain irony that legislation that has the protection of the Canadian broadcasting industry and its employees as one of its important objectives is being used to allow for the broadcasting of American ads*** during the Super Bowl to the apparent detriment of the Canadian industry and its employees. …[211]

119. ***Second***, the CRTC previously rendered a decision in *Star Choice* that reached the ***opposite*** conclusion about the meaning of "programming services", and several judicial decisions have done the same.[212] While "[t]he potential for conflicting lines of authority does not warrant ***correctness*** review",[213] it is still an important contextual factor in assessing the level of justification, transparency and intelligibility required for ***reasonableness***. Indeed, *Dunsmuir* emphasizes the importance of "avoid[ing] ***inconsistent*** and unauthorized application of law",[214] a point that follows directly from "the rule of law and the values that underpin it: ***certainty,*** accessibility, ***intelligibility***, clarity and ***predictability***".[215] Accordingly, "[r]easonableness review includes the ability of courts to question for consistency where, in cases like this one, there is no apparent basis for implying a rationale for an inconsistency",[216] a principle this Court applied in *Mowat*.[217] However, the CRTC did not even ***refer*** to these conflicting authorities when raised by Bell and the NFL, let alone ***explain*** the inconsistency.

3. The *Copyright Act* Issue and the Standard of Judicial Review

120. This Court has repeatedly recognized that "the applicable standards on judicial review of the conclusions of a specialized administrative tribunal can sometimes vary" depending on the questions at issue.[218] Therefore, even if the Court finds the CRTC's interpretation of s. 9(1)(h) of the *Broadcasting Act* to be reviewable for reasonableness, the question of whether the CRTC Order

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[211] Appeal Decision, ¶24, JR Tab 8, *emphasis added*.
[212] NFL Factum, ¶32-33.
[213] *CHRC (SCC 2018)*, *supra* note 40, ¶52, *emphasis added*. ***cf.*** *BC Tel (SCC 1995)*, *supra* note 112, ¶1, 45-54, 66-67, 78-79, 82; *Ivanhoe Inc. v. UFCW, Local 500*, 2001 SCC 47, ¶27, 34-39; *Housen v. Nikolaisen*, 2002 SCC 33, ¶9.
[214] *Dunsmuir (SCC 2008)*, *supra* note 39, ¶50, *emphasis added*.
[215] *R. v. Ferguson*, 2008 SCC 6, ¶69 (and ¶68), *emphasis added*.
[216] *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, ¶79, per Rothstein and Moldaver JJ. (dissenting on other grounds). **See also** *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, ¶58.
[217] *Mowat (SCC (2011)*, *supra* note 179, ¶53-56.
[218] *Saguenay (SCC 2015)*, *supra* note 130, ¶51 (and ¶49-50). **See also** *SODRAC (SCC 2015)*, *supra* note 42, ¶41-42.

conflicts with s. 31(2) of the *Copyright Act* – making it *ipso facto* invalid on this alternative basis[219] – is still reviewable for correctness, as the Court of Appeal held below.[220]

121. This is because the presumption of home statute deference has no application to the *Copyright Act*. The presumption only applies "when a tribunal is interpreting ***its home statute or a statute closely connected to its function and with which it will have particular familiarity***".[221]

122. The *Copyright Act* is clearly not the CRTC's "home statute" – the *Canadian Radio-television and Telecommunications Commission Act* ("***CRTC Act***") is – nor is it "connected to its function", let alone "***closely***" so. In fact, s. 12 of the *CRTC Act* ***expressly defines*** what the CRTC's functions are, under the heading "Objects, Powers, Duties ***and Functions***", and provides that they are set out in the *Broadcasting Act*, the *Telecommunications Act* and related legislation. None of these statutes refer to the *Copyright Act* at all. As for the *Copyright Act*, it simply contains a handful of definitional provisions that cross-reference CRTC decisions under the *Broadcasting Act*,[222] without giving the CRTC any direct ***function*** in the *Copyright Act* itself.

123. This case is distinguishable from other post-*Dunsmuir* cases in which a tribunal's decisions under a non-home statute were found to be "closely connected to its function". In such situations, either the tribunal's home statute itself ***required*** that the non-home statute be applied,[223] or the non-home statute expressly referred to the tribunal and established a rule that the tribunal ***had*** to apply in proceedings before it and which it ***frequently*** interpreted in many other cases.[224] While the *Copyright Act* and *Broadcasting Act* are part of an interrelated scheme, Parliament has not made the "choice to give [the CRTC] ***responsibility for administering*** the statutory provisions" of the *Copyright Act*,[225] unlike in, e.g., the *Canada Elections Act*.[226] Instead, Parliament has chosen to

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[219] *Cogeco (SCC 2012)*, *supra* note 9, ¶2, 13, 34, 39, 45.
[220] Appeal Decision, ¶9, 37-38, JAR, Tab 8.
[221] *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, ¶13 ("***CAR (SCC 2014)***"), *emphasis added*.
[222] *Copyright Act*, ss. 30.8(11), 30.9(7), 31(1).
[223] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, ¶10, 26-27; *CAR (SCC 2014)*, *supra* note 221, ¶13.
[224] *Barreau (SCC 2017)*, *supra* note 118, ¶16.
[225] *Edmonton (SCC 2016)*, *supra* note 41, ¶33 (and ¶22), *emphasis added*.
[226] *Canada Elections Act*, s. 348.1(1).

delegate the administration of this general public statute to the concurrent expertise of the Copyright Board and the courts.[227] In these circumstances, the rationale for home statute deference is absent.

124. Finally, the contextual factors from *Dunsmuir* all mitigate towards correctness review: the issue is purely one of law and jurisdiction – including the interpretation of international treaties[228] – there is a statutory appeal right, the CRTC's legislative purposes have nothing to do with the *Copyright Act* itself, and the CRTC has no expertise here.[229] The CRTC acknowledged this in *KSTP*:

> The issues raised by Hubbard Broadcasting relating to the retransmission regime, agreed upon by Canada and the U.S. in the Agreement and implemented through ***section 31 of the Copyright Act, including retransmission, broadcast rights and compensation, and equal treatment, lie outside the Commission's mandate under the Broadcasting Act.*** …[T]he ***copyright issues*** raised by the applicant ***are more properly addressed in another forum.***[230]

PART IV—COSTS

125. Bell requests costs in this Court pursuant to s. 47 of the *Supreme Court Act*.

PART V—ORDERS SOUGHT

126. Bell requests that the appeal be allowed, the CRTC Instruments be set aside, and a declaration issue that the CRTC has no jurisdiction to prohibit Sim Sub for the Super Bowl under the *Sim Sub Regulations* pursuant to s. 9 of the *Broadcasting Act*, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of August, 2018.

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Steven G. Mason
Brandon Kain
Joanna Nairn
Richard Lizius

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[227] *Rogers (SCC 2012)*, *supra* note 117, ¶10, 13 and 15; *SODRAC (SCC 2015)*, *supra* note 42, ¶35.
[228] *Febles v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324, ¶24, aff'd, 2014 SCC 68.
[229] *Dunsmuir (SCC 2008)*, *supra* note 39, ¶62-64. **See also** *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, ¶21, 23.
[230] Removal of KSTP-TV Minneapolis from the *List of non-Canadian programming services authorized for distribution* – Broadcasting Decision CRTC 2015-187, 13 May 2015, ¶22, *emphasis added*.

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