MEMORANDUM OF ARGUMENT OF THE RESPONDENT, ATTORNEY GENERAL OF CANADA

SCC 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))

and

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL FOR SASKATCHEWAN, ADVOCACY CENTRE FOR TENANTS ONTARIO, ONTARIO SECURITIES COMMISSION, BRITISH COLUMBIA SECURITIES COMMISSION AND ALBERTA SECURITIES COMMISSION, ECOJUSTICE CANADA SOCIETY, WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL (ONTARIO), WORKERS' COMPENSATION APPEALS TRIBUNAL (NORTHWEST TERRITORIES AND NUNAVUT), WORKERS' COMPENSATION APPEALS TRIBUNAL (NOVA SCOTIA), APPEALS COMMISSION FOR ALBERTA WORKERS' COMPENSATION AND WORKERS' COMPENSATION APPEALS TRIBUNAL (NEW BRUNSWICK), BRITISH COLUMBIA INTERNATIONAL COMMERCIAL ARBITRATION CENTRE FOUNDATION, COUNCIL OF CANADIAN ADMINISTRATIVE TRIBUNALS, CAMBRIDGE COMPARATIVE ADMINISTRATIVE LAW FORUM, NATIONAL ACADEMY OF ARBITRATORS, ONTARIO LABOUR-MANAGEMENT ARBITRATORS' ASSOCIATION AND CONFÉRENCE DES ARBITRES DU QUÉBEC, CANADIAN LABOUR CONGRESS, NATIONAL ASSOCIATION OF PHARMACY REGULATORY AUTHORITIES, QUEEN'S PRISON LAW CLINIC, ADVOCATES FOR THE RULE OF LAW, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, CANADIAN BAR ASSOCIATION, FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, BLUE ANT MEDIA INC., CANADIAN BROADCASTING CORPORATION, DHX MEDIA LTD., GROUPE V MEDIA INC., INDEPENDENT BROADCAST GROUP, ABORIGINAL PEOPLES TELEVISION NETWORK, ALLARCO ENTERTAINMENT INC., BBC KIDS, CHANNEL ZERO, ETHNIC CHANNELS GROUP LTD., HOLLYWOOD SUITE, OUTTV NETWORK INC., STINGRAY DIGITAL GROUP INC., TV5 QUÉBEC CANADA, ZOOMERMEDIA LTD. AND PELMOREX WEATHER NETWORKS (TELEVISION) INC. AND TELUS COMMUNICATIONS INC., ASSOCIATION OF

CANADIAN ADVERTISERS AND ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS

Interveners

and

AUDREY BOCTOR AND DANIEL JUTRAS

Amici Curiae

SCC Court File No.:37897

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

B E T W E E N :

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC AND NFL PRODUCTIONS LLC

Appellants (Appellants)

and

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

and

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

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

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TABLE OF CONTENTS

PART I – OVERVIEW & STATEMENT OF FACTS

A. OVERVIEW

1. After a lengthy consultation process, the Canadian Radio-television and Telecommunications Commission (the "CRTC") determined that Canadians should be free to watch the American broadcast of the Super Bowl, complete with American commercials, which the CRTC deemed to be an integral part of the programming event. The CRTC therefore issued an order under s. 9(1)(*h*) of the *Broadcasting Act*[1] prohibiting simultaneous substitution – the practice by which an American signal with American commercials is deleted and replaced by a Canadian signal with Canadian commercials – during broadcasts of the Super Bowl.

2. The CRTC determined that simultaneous substitution for the Super Bowl was not in the public interest. In making that finding, the CRTC balanced and weighed the many, sometimes competing, policy objectives set out in s. 3(1) of the *Broadcasting Act*, including ensuring Canadians have access to a range of broadcasting options from local, regional and international services. The CRTC is empowered to make precisely that kind of polycentric decision.

3. There is no merit to the Appellants' characterization of the CRTC's decision as "Orwellian" or outside its jurisdiction. These arguments simply constitute disagreements with the CRTC's interpretation of its statutory scheme, an interpretation that is entitled to deference. Nothing in this appeal justifies a departure from a deferential standard of review, the standard this Court and lower courts have consistently applied to the CRTC's decisions. Nor does this appeal raise "a true question of jurisdiction," a category of correctness review which has proven to be little more than a source of confusion. It is now time to abandon it. Even if the category is retained, there is no basis to conclude that the CRTC lacked jurisdiction for a decision that is clearly squarely within its mandate. The CRTC's decision is reasonable and should be upheld.

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[1] SC 1991, c 11 [*Broadcasting Act*]

B. SUMMARY OF THE FACTS AND HISTORY OF THE PROCEEDINGS

1) Background Facts

a) Let's Talk TV Consultations

4. In October 2013, the CRTC announced the start of a public consultation initiative entitled "Let's Talk TV: A conversation with Canadians about the future of television."[2] Let's Talk TV involved an extensive review of the entire framework for television regulation in Canada. From the outset of the proceedings, the CRTC contemplated significant and fundamental changes to television regulation in light of the rapidly changing broadcast environment.[3]

5. For the third and final phase of consultation, the CRTC organized the issues around various public interest outcomes, including "a Canadian television system that fosters choice and flexibility in selecting programming services."[4] Under this outcome, the CRTC addressed the practice of simultaneous substitution. Simultaneous substitution occurs when an American signal with American commercials is deleted and replaced by a Canadian signal with Canadian commercials. The CRTC requested comments on whether the practice should be maintained, modified, or eliminated in its entirety.[5] In so doing, the CRTC specifically referenced Canadians' complaints about the effect of simultaneous substitution on the broadcast of the Super Bowl, which prevented viewers from seeing American commercials.[6]

6. Issues associated with simultaneous substitution, including errors in performing substitutions generally and in respect of special events, particularly the Super Bowl, were an irritant to viewers and a frequent source of complaints to the CRTC. In fact, in 2013, one fifth of all English language market complaints to the CRTC pertained to Super Bowl commercials. Viewers wanted to see the American commercials.[7]

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[2] Broadcasting Notice of Invitation (BNI) CRTC 2013-563, **Joint Appellants' Record (JAR), Vol II, Tab 13, p 1**.
[3] BNI 2013-563, **JAR, Vol II, Tab 13, p 1**.
[4] Broadcasting Notice of Consultation (BNC) CRTC 2014-190, p 1, **JAR, Vol II, Tab 14, p 12**.
[5] BNC 2014-190, paras 54-61, **JAR, Vol II, Tab 14, pp 27-9**.
[6] BNC 2014-190, para 57, **JAR, Vol II, Tab 14, pp 27-8**.
[7] BNC 2014-190, para 57, **JAR, Vol II, Tab 14, pp 27-8**.

7. The CRTC subsequently sought comments on two potential policy reforms to the simultaneous substitution regime: the elimination of the practice in its entirety or for live event programming.[8] During the consultation process, the CRTC made clear that it was open to considering new issues, concerns and policy proposals, as well as adjustments or adaptations.[9]

b) Policy Statement on Simultaneous Substitution

8. In its January 29, 2015 policy statement entitled "Measures to address issues related to simultaneous substitution,"[10] the CRTC announced that it would continue to allow simultaneous substitution for local over-the-air stations, recognizing its overall contribution to the Canadian broadcasting environment.[11] Among other considerations, the CRTC acknowledged that simultaneous substitution allowed Canadian broadcasters to maximize audiences and advertising revenue, thereby facilitating the future production and acquisition of Canadian programming.[12]

9. However, the CRTC identified certain discrete areas for reform, including the creation of a remedial regime aimed at providing redress to viewers for recurring, substantial errors made during the simultaneous substitution process.[13] The CRTC also stated that, given the comments received from Canadians and in light of its finding that American advertising produced for the Super Bowl was an "integral part of this special event programming,"[14] it would prohibit simultaneous substitution during the Super Bowl beginning with the 2017 broadcast of the event.[15]

10. The CRTC indicated that it would issue a notice of consultation seeking comment on the text of proposed regulatory amendments required to implement the policy changes.[16]

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[8] BNC CRTC 2014-190-3, p 4, **JAR, Vol II, Tab 15, p 57**.
[9] BNC 2014-190, para 137, **JAR, Vol II, Tab 14, p 48**; BNC 2014-190-3, p 1, **JAR, Vol II, Tab 15, p 54**.
[10] Broadcasting Regulatory Policy (BRP) 2015-25, **JAR, Vol II, Tab 16, p 72**.
[11] BRP 2015-25, pp 1-2, **JAR, Vol II, Tab 16, pp 72-3**.
[12] BRP 2015-25, paras 13 & 18, **JAR, Vol II, Tab 16, p 76-7 & 78**.
[13] BRP 2015-25, paras 19-20, **JAR, Vol II, Tab 16, p 78**.
[14] BRP 2015-25, para 22, **JAR, Vol II, Tab 16, p 79**.
[15] BRP 2015-25, para 22, **JAR, Vol II, Tab 16, p 79**.
[16] BRP 2015-25, para 23, **JAR, Vol II, Tab 16, p 79**.

c) Simultaneous Programming Service Deletion and Substitution Regulations

11. On November 19, 2015, following a public consultation process,[17] the CRTC promulgated the *Simultaneous Programming Service Deletion and Substitution Regulations* ("*Sim Sub Regulations*").[18] The *Sim Sub Regulations* repealed and replaced ss. 38 and 51 of the *Broadcasting Distribution Regulations,*[19] which formerly governed the practice of simultaneous substitution. The *Sim Sub Regulations* also established a remedial regime for simultaneous substitution errors.

12. Under the regulatory framework for simultaneous substitution, the general rule remains that the signal of a programming service cannot be altered or deleted.[20] As an exception to this rule, the *Sim Sub Regulations* permit or require simultaneous substitution in certain circumstances. A broadcaster may request that a broadcast distribution undertaking ("BDU"), such as a cable or satellite company, perform the deletion and substitution of a programming service.[21] Subsection 4(1) requires that the BDU carry out the requested deletion and substitution if, among other conditions, the programming service to be deleted and the programming service to be substituted are "comparable and to be broadcast simultaneously."[22] A BDU may not substitute a programming service if the CRTC explicitly determines that simultaneous substitution would not be in the public interest.[23]

d) CRTC's Proposal for a s. 9(1)(*h*) *Order; Appellants' Premature Appeal of Policy &* Sim Sub Regulations

13. In a policy statement accompanying the release of the *Sim Sub Regulations*, the CRTC indicated that it would implement the prohibition on simultaneous substitution for the Super Bowl by way of an order issued under s. 9(1)(*h*) of the *Broadcasting Act.*[24] Section 9(1)(*h*) provides:

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[17] Broadcasting Notice of Consultation CRTC 2015-330, **JAR, Vol II, Tab 18, pp 88-98**; Broadcasting Information Bulletin CRTC 2015-329, **JAR, Vol II, Tab 19, pp 99-103**.
[18] SOR/2015-240 [*Sim Sub Regulations*]; Broadcasting Regulatory Policy CRTC 2015-513, **JAR, Vol II, Tab 22, pp 126-135**.
[19] SOR/97-555 [*Broadcasting Distribution Regulations*].
[20] *Broadcasting Distribution Regulations*, s 7.
[21] *Sim Sub Regulations*, s 3(1).
[22] *Sim Sub Regulations*, s 4(1)(*c*).
[23] *Sim Sub Regulations*, s 4(3).
[24] BRP 2015-513, paras 20 & 26, **JAR, Vol II, Tab 22, pp 129 & 130**.

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

14. On February 3, 2016, the CRTC invited comments on its proposed order. In response, 28 interveners, including the appellants ("Bell" and the "NFL" respectively), provided submissions.[25]

15. The Appellants also proceeded to appeal both the CRTC's policy statement on simultaneous substitution and the newly enacted *Sim Sub Regulations*. The Federal Court of Appeal dismissed that appeal on September 2, 2016. Writing for the Court, Justice de Montigny held that it was premature to assess the validity of the then-proposed distribution order concerning the Super Bowl.[26] He also found that the CRTC had the jurisdiction to establish a remedial regime for simultaneous substitution errors.[27]

2) Final Decision and s. 9(1)(*h*) Order of the CRTC

16. On August 16, 2016, the CRTC issued Broadcasting Regulatory Policy CRTC 2016-334, containing its final decision and rationale. It also issued Broadcasting Order CRTC 2016-335 entitled "Distribution of Canadian television stations that broadcast the Super Bowl" (the "9(1)(*h*) order"). The 9(1)(*h*) order removed authorization for simultaneous substitution during the Super Bowl, effective January 1, 2017. Specifically, the 9(1)(*h*) order provided that BDUs which distribute "the programming services of a Canadian television station that broadcasts the Super Bowl" may only do so on the condition that those BDUs not carry out a request for simultaneous substitution when the Super Bowl is being broadcast on the requesting television station.[28] In short,

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[25] Broadcasting Regulatory Policy CRTC 2016-334, para 13, **JAR, Vol I, Tab 1, p 4**.
[26] *Bell Canada v Canada (Attorney General)*, 2016 FCA 217 [*Bell (2016)*] at paras 22 & 34, **JAR, Vol I, Tab 5, pp 34 & 40-1**.
[27] *Bell (2016)* at para 50, **JAR, Vol I, Tab 5, pp 49-50**.
[28] Broadcasting Order 2016-335, **JAR, Vol I, Tab 1, p 17**; BRP 2016-334, para 54, **JAR, Vol II, Tab 1, p 13**.

both the American and Canadian television signals carrying the Super Bowl would be broadcast unaltered, thereby giving Canadians the option of watching the American broadcast with American commercials if they wished to do so.

17. In its reasons for decision, the CRTC responded to a number of concerns raised by participants in the consultation process. The CRTC noted that its policy determinations on simultaneous substitution were aimed at recalibrating the regime in order to address the concerns expressed by Canadian television viewers.[29] Although the CRTC had decided that the benefits of the simultaneous substitution regime as a whole remained important enough to continue the practice, certain modifications were necessary "to ensure that the broadcasting system is balanced as a whole in a way that fulfils the policy objectives of the Act."[30]

18. The CRTC therefore carved out discrete areas for reform, including the prohibition on simultaneous substitution during the Super Bowl. In response to Bell's submission that this change would interfere with the production and promotion of Canadian content, the CRTC observed that, while many of the policy objectives of the *Broadcasting Act* focused on Canadian cultural enrichment, they also included other objectives, such as ensuring Canadians have access to local, national and international programming.[31] During the various phases of Let's Talk TV, the Commission had heard that American commercials aired during the Super Bowl were "integral to the event itself."[32] The CRTC found that, by not being able to view the American commercials, Canadians were deprived of an integral cultural element of the event.[33]

19. As a result, the CRTC confirmed its view that simultaneous substitution for the Super Bowl was not in the public interest.[34] In arriving at this determination, the CRTC considered the argument that its decision could have a negative impact on advertising revenues in the Canadian broadcasting system. The CRTC noted that, while its overall decision to maintain the simultaneous substitution regime recognized its importance to the achievement of certain statutory objectives,

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[29] BRP 2016-334, para 9, **JAR, Vol I, Tab 1, p 3**.
[30] BRP 2016-334, para 24, **JAR, Vol I, Tab 1, p 6**.
[31] BRP 2016-334, para 21, **JAR, Vol I, Tab 1, p 6**.
[32] BRP 2016-334, para 26, **JAR, Vol I, Tab 1, p 7**.
[33] BRP 2016-334, paras 26-27, **JAR, Vol I, Tab 1, p 7**.
[34] BRP 2016-334, para 40, **JAR, Vol I, Tab 1, p 10**.

the potential negative effects of disallowing simultaneous substitution for the Super Bowl were outweighed by other policy objectives and concerns.[35]

20. The CRTC also addressed several legal issues raised by Bell and the NFL. Of particular relevance to this appeal, Bell and the NFL had submitted that the term "programming service" in s. 9(1)(*h*) of the *Broadcasting Act* should be interpreted to mean a television station or channel, not an individual program. Citing the terms of the 9(1)(*h*) order, the CRTC noted that it related to the distribution of "a Canadian television station that broadcasts the Super Bowl" and "imposes a condition on that distribution, specifically, that simultaneous substitution shall not be performed during the Super Bowl."[36] The operative condition was attached to the carriage of a "programming service," in the sense of a television station, and not a particular program.[37] In short, the CRTC's interpretation of "programming service" aligned with that proposed by Bell and NFL.

21. In addition, the CRTC rejected the NFL's argument that the 9(1)(*h*) order conflicted with the *Copyright Act*[38] and Canada's obligations under the *Canada-United States Free Trade Agreement* ("CUSFTA").[39] The CRTC concluded that the prohibition on simultaneous substitution during the Super Bowl would not affect the NFL's copyright in its programs and that, at most, its determinations would have a secondary impact on the value of NFL programming. With respect to Canada's treaty obligations, the CRTC found that it was not bound by trade agreements without specific legislation to that effect. In any event, the treaty provisions at issue simply provided Canada with the ability to create a simultaneous substitution regime; they did not limit the CRTC's ability to modify or remove the regime.[40]

3) Decision of the Federal Court of Appeal

22. The Federal Court of Appeal unanimously dismissed Bell and the NFL's appeals of the 9(1)(*h*) order. Writing for the court, Justice Near applied the reasonableness standard of review to

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[35] BRP 2016-334, paras 39-40, **JAR, Vol I, Tab 1, p 10**.
[36] BRP 2016-334, para 54, **JAR, Vol I, Tab 1, p 13**.
[37] BRP 2016-334, para 54, **JAR, Vol I, Tab 1, p 13**.
[38] RSC, 1985, c C-42 [*Copyright Act*].
[39] *Canada-United States Free Trade Agreement* ["CUSFTA"].
[40] BRP 2016-334, paras 58-59, **JAR, Vol I, Tab 1, p 14**.

the question of whether the CRTC acted within the scope of its authority under s. 9(1)(*h*) of the *Broadcasting Act*. Near JA noted that an administrative decision-maker's interpretation of its home statute was entitled to deference.[41] He dismissed as being of "limited assistance" the argument that the Court should apply a narrow margin of appreciation.[42]

23. Justice Near found that it was reasonable to conclude the CRTC was authorized to impose terms and conditions on the carriage of "programming services" which targeted individual programs.[43] He declined to re-weigh the CRTC's finding that the order would advance the objectives of the *Broadcasting Act.*[44] Near JA also rejected Bell's claim that the 9(1)(*h*) order conflicted with the *Sim Sub Regulations*. Subsection 4(3) of the *Sim Sub Regulations* provided an exception to the simultaneous substitution regime when the CRTC determined under s. 18(3) of the *Broadcasting Act* that the deletion and substitution of a programming service were not in the public interest, as the CRTC did in this case.

24. Finally, Justice Near rejected the NFL's argument that the 9(1)(*h*) order was in conflict with either the purpose or operation of the *Copyright Act.* Although this point was reviewed on a correctness standard of review, he found the *Copyright Act* did not incorporate a principle of non-discrimination as one of its general purposes and, consistent with the reasons of the CRTC, the 9(1)(*h*) order did not violate any provision of the CUSFTA. Near JA refused to find any operational conflict, noting that retransmissions of the Super Bowl in accordance with the 9(1)(*h*) order would satisfy every condition of s. 31(2) of the *Copyright Act*.[45] In particular, the broadcast of the Super Bowl would be retransmitted "simultaneously and without alteration," as required by s. 31(2)(*c*) to avoid an infringement of copyright.[46]

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[41] Judgment and Reasons for Judgment of the Federal Court of Appeal, dated December 18, 2018 [FCA Decision], para 9, **JAR, Vol I, Tab 5, p 29**.
[42] FCA Decision, para 9, **JAR, Vol I, Tab 5, p 29**.
[43] FCA Decision, para 19, **JAR, Vol I, Tab 5, p 33**.
[44] FCA Decision, paras 19-24, **JAR, Vol I, Tab 5, pp 33-5**.
[45] FCA Decision, paras 44-46, **JAR, Vol I, Tab 5, pp 46-7**.
[46] FCA Decision, para 48, **JAR, Vol I, Tab 5, p 48**.

PART II – QUESTION IN ISSUE

25. What principles should govern standard of review, and what is the applicable standard of review in these appeals?

26. Is the decision of the CRTC unreasonable?

PART III – ARGUMENT

A. STANDARD OF REVIEW

27. The Attorney General of Canada ("Canada") adopts and relies upon the factum filed by the Minister of Citizenship and Immigration in the companion appeal of *Minister of Citizenship and Immigration v. Alexander Vavilov* ("*Vavilov*"), and in particular the submissions on a proposed framework for judicial review.[47] It is Canada's position that the standard of review should be deferential, subject only to legislative provisions that explicitly define the standard of review to be applied by a court on judicial review, and in exceptional cases in which the foundational democratic principle and the rule of law make it clear that correctness applies. The primary example of this is where an administrative body is considering the constitutionality of a statute.

28. Nothing about this case justifies the imposition of a correctness standard of review. Hence, a deferential standard of review ought to apply in these appeals as the Court of Appeal correctly found in reviewing the CRTC's order under s. 9(1)(*h*) of the *Broadcasting Act*. That is so, regardless of whether this Court chooses to adopt Canada's proposed framework, or applies the existing law on standard of review.

1) Constitutional principles underpinning the determination of the standard of review

29. Contrary to the Appellants' submissions, the adoption of a sweeping interpretation of "jurisdictional questions" subject to a correctness standard is not required to ensure the rule of law or to maintain respect for legislative supremacy. In the vast majority of cases, the reasonableness standard of review reflects the complementary relationship between the inherent supervisory power of Courts to review administrative action, based on the rule of law, and the foundational

[47] Factum of the Appellant, Minister of Citizenship and Immigration, in Court file no. 37748, paras 42 – 66.

democratic principle allowing legislatures to create and empower administrative bodies to make decisions.[48] Adopting the Appellants' approach would overturn the careful balance in this complementary relationship and effectively "risk disinterring the jurisdiction/preliminary question doctrine that was clearly put to rest in *Dunsmuir*."[49] It would also return Canadian law to the distant past when all legal issues were matters for final judicial determination.

30. With or without a privative clause, a stance of deference is appropriate in order to respect the legislature's allocation of authority to an administrative body to exercise particular powers within its mandate. This includes the determination of facts, the exercise of non-adjudicative powers, the interpretation of statutes and any other steps required or permitted by that mandate.[50] An approach of deference as respect does not undermine the independence of the judiciary, as the Appellants argue. To the contrary, it ensures an appropriate balance is maintained between the three branches of government.[51]

31. The rule of law embraces the principle that the law is supreme over all officials of the government, as well as private individuals, and is intended to preclude the exercise of arbitrary power.[52] Deferring to reasonable interpretations of statutes by administrative decision-makers neither results in, nor encourages arbitrary decision-making in a manner that contradicts the principles underlying the rule of law. The rule of law does not require specific interpretations of legislation or specific outcomes of administrative decision-making. Nor does it require that courts, as distinct from administrative decision-makers, have the last word on legal issues arising in

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[48] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at para 27. See also: David Dyzenhaus, "*Dignity in Administrative Law*" (2012) 17:1 Rev Const Stud at 106, **Book of Authorities of the Respondents, Attorney General of Canada (AGC Auth), Tab 2**; Mark Walters, "Theorizing Administrative Law" (13 February 2018), *Double Aspect* (blog), online: https://doubleaspect.blog/2018/02/13/theorizing-administrative-law/; Jonathan M Coady, "*Time Has Come: Standard of Review in Canadian Administrative Law*" (2017) 68 UNBLJ at 94, **AGC Auth, Tab 1**.

[49] *CHRC v. Canada*, 2018 SCC 31 [*CHRC*] at para 33.

[50] *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*] at para 25; *Dunsmuir*, at paras 41 & 54.

[51] *Dunsmuir*, at paras 27 & 48-49; David Dyzenhaus, "*Dignity in Administrative Law*" (2012) 17:1 Rev Const Stud at 109 & 113, **AGC Auth, Tab 2**.

[52] *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 SCR 473 at paras 57-58; *Reference re: Manitoba Language Rights*, [1985] 1 SCR 721 at 750 (para 63).

administrative proceedings. That notion has long been discarded in Canadian law which now acknowledges and respects the fact that it is administrative decision-makers engaged in the daily work of implementing their administrative schemes who are typically in the best position to interpret their governing legislation. [53]

32. Judicial review must respect the legislature's choice to assign decision-making tasks to administrative decision-makers rather than the courts. Given that this assignment necessarily includes interpreting the provisions of statutes, respect for the legislature's choice entails respect for the body's reasonable interpretation of those statutes. Absent an explicit statutory standard of review or exceptional circumstance, neither of which is applicable here, an administrative body's decisions are entitled to deference. Ultimately, review for unreasonableness allows a reviewing court to address the concerns underlying the rule of law and legislative supremacy at the core of judicial review analysis. [54]

2) <u>The category of "true questions of jurisdiction" should be eliminated</u>

33. A majority of this Court has already made it clear that the elimination of the category of "true questions of jurisdiction" does not raise the spectre of reducing the constitutional guarantee of judicial review to an empty shell. [55] Nor does it risk undermining the rule of law. Review for unreasonableness does not mean automatic submission by a reviewing court to a determination made by an administrative decision-maker. It is substantive and meaningful review. If an administrative body unreasonably interprets a statute, or takes an action that is demonstrably outside the scope of reasonable responses open to it, it can be, and generally is, overturned.

34. As suggested by a majority of this Court in the recent *CHRC v. Canada (A.G.)* decision, the category of "true questions of jurisdiction" has been "on life support" since *Alberta Teachers.* [56] It is now time to recognize that the category should be eliminated. This recognition would also be

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[53] *Mclean v British Columbia*, 2013 SCC 67, [2013] 3 SCR 895 [*Mclean*] at paras 31-33; *Edmonton (City) v Edmonton East*, 2016 SCC 47, [2016] 2 SCR 293 [*Edmonton East*] at para 33.
[54] *CHRC*, at para 40; *Dunsmuir*, at paras 29-32; *Groia v Law Society*, 2018 SCC 27 at para 178.
[55] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers*] at para 43.
[56] *CHRC*, at paras 34-41.

consistent with the trend in the law since *CUPE v. New Brunswick Liquor,*[57] in which this Court first warned against branding "as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so."[58] As the majority observed in *CHRC*, in the ten years since *Dunsmuir* was decided, not a single decision of this Court has identified an instance where this category applied.[59]

35. Apart from the hopeless search for a "true question of jurisdiction", however, this slippery category arguably interferes with the administration of justice by introducing imprecision and uncertainty in the law, while inviting litigants and Courts to spend precious time and resources chasing a "mirage."[60] More significantly, its very imprecision "tempts litigants and judges alike to return to a broad understanding of jurisdiction as justification for correctness review contrary to this Court's jurisprudence."[61] The expansive interpretation given to this category by the Appellants in these appeals starkly illustrates the very problem identified by this Court in *CHRC*.

36. This Court has repeatedly declined to include statutory interpretation issues that generate conclusions about the scope of a tribunal's mandate in the exceptional category of true questions of jurisdiction. The most compelling examples are also the most recent decisions on point. In *Québec (Procureure générale) c. Guérin,*[62] the question at issue was whether, under a statute, a matter was or was not arbitrable. The Court declined to identify this as a true question of jurisdiction even though the decision on the matter made the difference between the tribunal proceeding with the case or not.[63] More recently in *CHRC*, this Court refused to characterize a decision by the Canadian Human Rights Tribunal regarding its power to consider a complaint

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[57] *CUPE v New Brunswick Liquor Board,* [1979] 2 SCR 227 [*CUPE*].
[58] *CUPE*, at 233.
[59] *CHRC*, at para 37.
[60] *McLean*, at para 25 (fn 2) citing *City of Arlington, Texas v Federal Communications Commission*, 133 S. Ct. 1863 (2013) ["the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage" because "a separate category of 'jurisdictional' interpretations does not exist" (pp 1868 and 1874)].
[61] *CHRC*, at para 38.
[62] 2017 SCC 42, [2017] 2 SCR 3 [*Guérin*].
[63] *Guérin*, at paras 32-37.

about legislative entitlement to registration under the *Indian Act* as a "true question of jurisdiction."[64] Similarly here, there is no question that the CRTC had the authority to issue an order under s. 9(1)(*h*) of the *Broadcasting Act* imposing terms and conditions on the carriage of programming services. As in *CHRC*, the CRTC was simply interpreting its own statute, and in doing so, it is owed deference.

3) If the category of "true questions of jurisdiction" exists, it does not apply here

37. The Appellants challenge the CRTC's decision on the basis that it is *ultra vires* s. 9(1)(*h*) of the *Broadcasting Act*, and claim this raises a "true question of jurisdiction." As noted above, neither the rule of law, nor the separation of powers requires the preservation of the category of "true questions of jurisdiction" as an exception to a presumption of deference in judicial review. In fact, an appropriate balance between these principles is undermined by its preservation and enhanced by its elimination. However, even if this Court ultimately decides that the category of "true questions of jurisdiction" must be preserved, it cannot justify the application of a correctness standard of review in this appeal.

38. Preservation of this category requires a recognition that the difficulty in defining what is a "true question of jurisdiction" raises the risk of "disguised" correctness review based on a broad interpretation of the term "jurisdiction." That is precisely what this Court in *CHRC* pointed to when it noted the difficulty in distinguishing between questions that determine the scope of one's authority (i.e. simple jurisdiction) and questions that determine whether one has authority to enter into the inquiry (i.e. true questions of jurisdiction).[65] Properly understood, therefore, "a true question of jurisdiction" or the more precise French term "compétence"[66] does not concern itself with jurisdiction in the broad sense, but only the question of whether or not the administrative tribunal is the proper forum to decide a question without an examination of the merits of the

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[64] *CHRC*, at paras 27-31 & 33.
[65] *CHRC*, at para 38.
[66] *Dictionnaire de droit privé et lexiques bilingues*, 2nd ed., Cowansville: Éditions Yvon Blais, 1991, at 108-109 (v° "compétence"), 326 (v° "juridiction"); *Dictionnaire de droit québécois et canadien*, v° "compétence" and "juridiction", https://dictionnairereid.caij.qc.ca/recherche#t=edictionnaire&sort=relevancy.

proceedings. From the moment a tribunal examines any substantive issues, it delves into questions other than "true" questions of jurisdiction.

39. In *Dunsmuir*, the only example provided of a true question of jurisdiction was *United Taxi*, which involved a question of the *vires* of a municipal bylaw.[67] That this Court has not identified a true question of jurisdiction since *Alberta Teachers*, including in *McLean*, *Guérin* and *CHRC*, where the issue was ostensibly the authority of the tribunal to make the inquiry, reflects the fact that, understood in this narrow sense, it could rarely, if ever, arise.

40. What the Appellants are really challenging here are the CRTC's determinations in respect of its authority to impose terms and conditions on the distribution of programming services. The fact that the CRTC has the power to set terms and conditions on licences and to make decisions under the *Sim-Sub Regulations* is simply not in question. The CRTC was interpreting its own statute, and in doing so, it is owed deference.

4) Deferential review does not require a preliminary determination of statutory ambiguity

41. Deferential analysis should begin, first, with a recognition that the onus lies squarely on an applicant to demonstrate that a decision is unreasonable and that the court should exercise its remedial discretion to intervene.[68] It requires respectful attention to the reasons offered or which could be offered for a decision, with a view to determining whether the decision discloses a rational basis for the conclusions drawn by the administrative body in light of its statutory mandate ("justified"); whether the decision is logical and internally consistent ("intelligible"); and whether it is possible to appreciate what the administrative body has decided and why ("transparent").[69] In judicially reviewing statutory interpretations by administrative decision-makers, a reviewing court

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[67] *Dunsmuir*, at para 59, citing *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*,2004 SCC 19, [2004] 1 SCR 485.
[68] Factum of the Appellant, Minister of Citizenship and Immigration, in Court file no. 37748 at paras 56-62.
[69] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at paras 13, 16; *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158 at para 16(d).

must refrain from measuring an interpretive outcome by reference to whether it aligns with its own exercise of statutory interpretation, "finding any inconsistency to be unreasonable."[70]

42. This Court has never found that judicial review analysis should include a preliminary consideration – through a formal application of the principles of statutory interpretation – of whether a provision is ambiguous as a condition precedent to assessing what standard of review applies. This confusing bifurcation of the judicial review analysis suggested by the Appellants risks turning the presumption of review for unreasonableness on its head, while greatly expanding the scope of correctness review. It is also inconsistent with this Court's affirmation that an applicant bears the burden of showing not only that a competing interpretation is reasonable, but that the administrative body's decision is unreasonable.[71]

43. In conducting judicial review, courts are often asked to consider competing interpretations of legislation. But that analysis does not include any requirement that some preliminary threshold of "statutory ambiguity" be established before deference is afforded.

44. There is no onus on a respondent on judicial review to demonstrate that the interpretation adopted by the administrative body is either the only reasonable interpretation, or that it is better than other reasonable interpretations. It remains open to an administrative body to choose *any* reasonable interpretation.[72] The focus on review for unreasonableness must remain squarely on the administrative body's decision. A decision should not be overturned, regardless of the existence of a preferred interpretation proffered by a litigant or the reviewing court itself, unless a court finds that the administrative body's interpretation was unreasonable.

5) A deferential standard of review applies to the CRTC's consideration of the *Copyright Act* and the CUSFTA

45. The Appellants argue that the standard of review for the CRTC's interpretation of the *Copyright Act* should be correctness on the grounds that it is not the CRTC's "home statute," nor is it connected "to its function." Although Justice Near applied the correctness standard in

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[70] *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 28; *Law Society of New Brunswick v Ryan*, 2003 SCC 20, [2003] 1 SCR 247 [*Ryan*] at paras 50-51.
[71] *McLean*, at paras 32-33 & 40; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at paras 35 & 108.
[72] *McLean*, at para 40.

summarily rejecting the alleged conflict between the 9(1)(*h*) order and the *Copyright Act*, the same deferential standard of review is warranted for this issue as for the remainder of the CRTC's decision.

46. When an administrative body is required to interpret a statute in order to carry out its mandate, it is entitled to deference regardless of whether it is interpreting a "home" statute or another one related to its function. The rationale for deference flows from the legislature having delegated decision-making authority under a statutory scheme to an administrative body. In discharging its delegated function, an administrative body may be required to address the interaction between the statute creating the body and other provisions that may be relevant to its mandate, including an international treaty. In carrying out this assigned task, as with every other aspect of its powers, the rationale for deference remains intact.

47. In this case, the CRTC was asked to consider the intersection between the *Copyright Act*, the CUSFTA and the prohibition on simultaneous substitution during broadcasts of the Super Bowl. The CRTC's decision required consideration of policy matters fundamental to its mandate. Its decision on these issues is owed deference.

6) Section 31 of the *Broadcasting Act* and related provisions do not alter the deferential standard of review that applies here

a) Existence of an appeal right on question of law or jurisdiction

48. The legislature's intention that deference be shown on judicial review should be inferred from its decision to delegate powers to an administrative body. Searching for other implicit signals of legislative intent to the contrary regarding the choice of standard of review has proven to be an artificial exercise yielding unpredictable results. The elaborate and complicated argument offered by the Appellants on legislative intent demonstrates precisely why the search for such elusive indicators should now be abandoned.

49. The *Broadcasting Act* contains a privative clause in s. 31(1), namely "every decision and order of the Commission is final and conclusive" and, in s. 31(2), a statutory right of appeal to the Federal Court of Appeal, with leave, on questions of law and jurisdiction. The existence of a statutory right of appeal on questions of law or jurisdiction does not alter the conclusion that – in the absence of exceptional circumstances not applicable here – a deferential standard of review

should apply to all of the decisions of the CRTC, including those subject to a potential right of appeal under s. 31(2).

50. This Court has recently made it clear that the existence of a statutory right of appeal does not displace the presumption of deference.[73] There is no ground upon which that decision can be, or should be, distinguished here. There is also no principled reason to abandon it. Instead, the consistent trend of this Court's jurisprudence recognizes that statutory appeals to superior courts are, in substance, indistinguishable from judicial review.[74]

51. On its face, s. 31(1) of the *Broadcasting Act* strongly supports an intention of deferential review. The privative clause is not restricted in any way: it clearly states "every decision and order of the CRTC is final and conclusive"; it applies to all decisions of the CRTC under Part II of the *Broadcasting Act*; and it is not restricted to "other issues" not in appeal.

52. Furthermore, the legislative history of the *Broadcasting Act* does not support an inference that Parliament intended for a non-deferential standard of review to apply. To the contrary, the Hansard evidence suggests the right of appeal, originally enacted as a right of appeal with leave to the Supreme Court of Canada, was added in order to provide an expeditious procedure for placing questions of law or jurisdiction before the courts.[75]

53. Following an extensive review process, the *Broadcasting Act* was re-enacted with amendments in 1991. During the legislative committee proceedings leading up to its re-enactment, s. 17 of the current *Broadcasting Act* was added to confirm the CRTC has the power to determine questions of law.[76] The rationale for this amendment was that it "makes explicit the jurisdiction of the commission to inquire into activities that fall within the commission's supervisory

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[73] *Edmonton East*, at paras 27-31; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3 [*Movement laïque*] at para 43. See also *British Columbia Telephone Co v Shaw Cable Systems (BC) Ltd*, [1995] 2 SCR 739 at para 32.
[74] *Edmonton East*, at para 30, citing *Movement laïque*, at para 38; *Dr. Q v College of Physicians and Surgeons (British Columbia)*, 2003 SCC 19, [2003] 1 SCR 226 at paras 17, 21, 27 & 36; *Ryan*, at paras 2 & 21.
[75] *House of Commons*, Standing Committee on Broadcasting, Films and Assistance to the Arts (24 Nov 1967) at 141 (Fred Gibson, Senior Counsel, Department of Justice), **AGC Auth, Tab 7A**.
[76] *Broadcasting Act*, s 17.

responsibilities under the act, and to make binding orders or decisions with respect to those activities."[77] Subsequent references disclose a legislative intent to restrict court challenges to CRTC decisions as much as possible, to ensure the CRTC "may regulate all types of broadcasting activities in the public's best interest without fear of its authority being challenged in the courts."[78] In short, these factors demonstrate that it was the CRTC being entrusted with the determination of these matters.

54. While the legislature clearly intended to restrict the grounds of appeal available under the *Broadcasting Act*, there is no suggestion in the Hansard evidence that it was Parliament's intention to eliminate deference to the CRTC's determinations of law.[79]

55. The reference to "jurisdiction" as a ground for leave to appeal under s. 31(2) of the *Broadcasting Act* does not signal an intention by Parliament to transform every jurisdictional challenge to the decisions of the CRTC into a "true question of jurisdiction" subject to a correctness standard of review. The term "jurisdiction" is extensively referred to in many different legislative contexts to describe the mandate or powers assigned to an administrative decision-maker. As this Court made clear in *Canada (Minister of Citizenship and Immigration) v. Khosa*,[80] a ground of review (in this case a ground for obtaining leave to appeal) does not dictate the standard of review.[81]

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[77] House of Commons, Legislative Committee on Bill C-40 (16 March 1990) at 14:74-14:75 (Jim Edwards, Parliamentary Secretary to the Minister of Communications), **AGC Auth, Tab 8B**.

[78] *House of Commons Debates*, 34th Parl, 2nd Sess, Vol 12 (4 Dec 1990) at 16224 (Hon Marcel Masse, Minister of Communications), **App Auth, Vol III, Tab 52B**; Standing Senate Committee on Transport and Communications, No 10, (14 January 1991) at 10:6, (Jim Edwards, Parliamentary Secretary to the Minister of Communications), **AGC Auth, Tab 8D**.

[79] Senator Atkins, who introduced the legislation in the Senate, noted that the CRTC is empowered to interpret and implement the *Broadcasting Act*, and that courts have generally adopted a deferential stance toward the CRTC: *Debates of the Senate*, 34th Parl, 2nd Sess (31 January 1991) at 5285 (Hon Norman K Atkins), **AGC Auth, Tab 8E**.

[80] *Khosa*, *supra*.

[81] *Khosa*, at paras 42-51.

b) Distinction between policy/discretionary and legal/jurisdictional decisions

56. The Appellants argue that the CRTC's decision is not owed deference, in part, because the 9(1)(*h*) order did not constitute an exercise of its "policy-making function," but was instead a legal determination on the meaning of the term "programming services." This argument has no merit. First, these appeals do not, in fact, turn on the definition of the term "programming services," but on the scope of the CRTC's power to attach terms and conditions to a distribution order issued under s. 9(1)(*h*) of the *Broadcasting Act*. Second, in the wake of *Dunsmuir* and the decisions following it, there is no longer any basis to distinguish, for the purpose of determining the standard of review, between decisions based on legal questions rather than those related to policy or discretion. The law is clear: administrative decision-makers are presumed to be owed deference when interpreting their home statutes or statutes related to their function regardless of whether the decision concerns a legal question or one engaging policy.

7) Conclusion on standard of review

57. The tension between the constitutional principles of the rule of law and legislative supremacy is best balanced by review for unreasonableness. Non-deferential review should be reserved for truly exceptional cases, where the foundational democratic principle and the rule of law both point to correctness review. As outlined in the Minister's factum in *Vavilov*, the primary example of such an exceptional case is where an administrative body is considering the constitutional invalidity of a legislative provision. This case involves no exceptional features. Reasonableness review ensures respect for the rule of law and for Parliament's choice to confer decision-making powers on the CRTC.

B. THE CRTC'S 9(1)(*h*) ORDER IS NOT UNREASONABLE AND SHOULD BE UPHELD

58. The CRTC decision being challenged in this case is an order made under s. 9(1)(*h*) of the *Broadcasting Act*. Section 9(1)(*h*) provides that the CRTC may, in furtherance of its objects, require BDUs "to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission." Based on its view that simultaneous substitution for the Super Bowl compromised Canadians' access to international programming,

and was not in the public interest,[82] the CRTC imposed a condition on the carriage of Canadian television stations prohibiting BDUs from performing simultaneous substitution during the Super Bowl.[83]

59. The Appellants have failed to demonstrate how the CRTC's interpretation of its power to impose terms and conditions on the distribution of programming services was unreasonable. The CRTC's decision meets the standard of justification, transparency and intelligibility, and should be upheld.

1) Reasonable interpretation of "programming service"

60. In the context of this case, the CRTC interpreted the term "programming services" to mean a television station or channel. The Appellants' submissions are predicated on the erroneous assumption that the CRTC interpreted the term to mean an individual program. This submission ignores the cogent rationale provided by the CRTC and denies the CRTC the "respectful attention" its reasons are entitled to under a deferential standard of review.

61. As noted by the CRTC, the 9(1)(*h*) order attached a condition to the carriage of Canadian *television stations:*[84] it directed BDUs to distribute "the programming services of a Canadian television station that broadcasts the Super Bowl" on the condition that those BDUs not carry out a request for simultaneous substitution when the Super Bowl was being broadcast on the requesting television station.[85]

62. The CRTC explained that, structured in this way, the 9(1)(*h*) order reflected the practical mechanics of how the simultaneous substitution process was actually performed, specifically that the "the entire output of a programming service is, for a particular program, deleted and the entire output of another programming service is substituted, until that program ends."[86] Far from being a "formalistic" interpretation, as the Appellants claim, this aspect of the CRTC's reasoning

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[82] BRP 2016-334, paras 9-10, 21, 24, 26-28, 39-40, **JAR, Vol I, Tab 1, p 10**.
[83] Broadcasting Order 2016-335; BRP 2016-334, paras 53-54, **JAR, Vol I, Tab 1, p 52**.
[84] BRP 2016-334, paras 53-54, **JAR, Vol I, Tab 1, p 13**.
[85] Broadcasting Order 2016-335, **JAR, Vol I, Tab 1, p 17**; BRP 2016-334, paras 53-54, **JAR, Vol I, Tab 1, p 13**.
[86] BRP 2016-334, para 55, **JAR, Vol I, Tab 1, p 13**.

engaged its specialized, technical knowledge of the operational context: when performing the substitution, BDUs delete and replace the signal of a television station, not a particular program.

63. The CRTC's decision was not, therefore, inconsistent with its previous decisions – particularly *Star Choice*.[87] In *Star Choice*, the CRTC determined that the term "programming service" may include the entire output of a programming undertaking for the purposes of interpreting s. 7 of the *Broadcasting Distribution Regulations*, despite s. 1 defining the term as "a program that is provided by a programming undertaking."[88] As a result, the meaning of the term "programming service" was found to depend "upon the context."[89] In rejecting the Appellants' argument on this point below, the Court of Appeal affirmed the contextual nature of the phrase.[90] Thus, even if the CRTC could be deemed to have used the term "programming service" as referring to a particular "program," *Star Choice* would not preclude this interpretation in the present context.

2) <u>The CRTC reasonably interpreted s. 9(1)(*h*) in imposing terms and conditions</u>

64. The CRTC's interpretation of its powers under s. 9(1)(*h*) of the *Broadcasting Act* was rationally supported and responsive to the Appellants' arguments, which were specifically taken into account by the CRTC (and ultimately rejected). Under a deferential standard of review, it is the CRTC which gets to choose among competing reasonable statutory interpretations. Although the Appellants repeat the same arguments before this Court that they raised with the CRTC, nothing in those submissions establishes that the CRTC's interpretation of s. 9(1)(*h*) was unreasonable.

65. Consistent with the plain language of the statute, the CRTC interpreted s. 9(1)(*h*) of the *Broadcasting Act* as conferring "broad powers to impose any terms and conditions on the distribution of programming services it deems necessary in furtherance of its objects."[91] The CRTC therefore found that s. 9(1)(*h*) permitted the imposition of a condition on the carriage of a programming service (in the sense of a television station) that prohibited simultaneous substitution

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[87] Broadcasting Decision CRTC 2005-195 [*Star Choice*], paras 25-27.
[88] *Broadcasting Distribution Regulations*, s 1.
[89] Broadcasting Decision CRTC 2005-195 [*Star Choice*], paras 27-28; see also FCA Reasons, para 18, **JAR, Vol II, Tab 2, pp 32-3**.
[90] FCA Reasons, para 18, **JAR, Vol I, Tab 2, pp 32-3**.
[91] BRP 2015-513, para 26, **JAR, Vol II, Tab 22, p 130**.

during a particular program (the Super Bowl). The Appellants' arguments are premised on an overly narrow interpretation of s. 9(1)(*h*) which fails to account for the broad, discretionary and subjective nature of the authority Parliament has conferred on the CRTC.

66. The subjective wording of s. 9(1)(*h*) – the power to impose such terms and conditions as the CRTC deems appropriate – clothes the CRTC with very broad discretion. Such language clearly signals Parliament's intent to make the regulator the final arbiter of what is appropriate.[92]

67. This Court has consistently declined to infer limits on a broadly framed statutory power if the proposed limits are not expressly supported by the text or purpose of the legislation. In *CTV Television Network Ltd v. Canadian Radio-Television and Telecommunications Commission,*[93] the Court held that the appellant failed to identify a legitimate limiting factor on the CRTC's otherwise broad authority to impose conditions of licence. There, the appellant CTV challenged a condition of licence requiring that CTV present a certain number of hours of original new Canadian drama. At the relevant time, the *Broadcasting Act* provided that the CRTC may, in furtherance of its objects, issue licenses "subject to such conditions related to the circumstances of the licensee… as [the CRTC] deems appropriate."[94] On behalf of the Court, Chief Justice Laskin upheld the validity of the licence condition, noting that he saw "nothing in the Act that precludes the Executive Committee [of the CRTC] from imposing the kind of condition of licence renewal that it imposed here […]."[95]

68. More recently, in *Canadian National Railway v. Canada (Attorney General),*[96] this Court rejected an attempt to narrowly interpret the broad terms of an enabling provision that permitted the Governor in Council ("GIC") to vary or rescind "any" decision, order, rule or regulation of the Canadian Transportation Agency. The appellant there had urged the Court to accept that, in exercising this power, the *Canadian Transportation Act*[97] did not authorize the GIC to determine

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[92] See for *e.g., Bell (2016),* at para 51, citing *Aves v Nova Scotia (Public Utilities Board)* (1973), 39 DLR (3d) 266 (NSCA) at 273-4, **JAR, Vol I, Tab 5, pp 50**.
[93] [1982] 1 SCR 530 [*CTV Television*].
[94] *CTV Television,* at 543.
[95] *CTV Television,* at 545.
[96] 2014 SCC 40, [2014] 2 SCR 135 [*CN Rail*].
[97] SC 1996, c 10.

questions of law or jurisdiction, because by providing a right of appeal to the Federal Court of Appeal on questions of law or jurisdiction, Parliament implicitly excluded such questions from the scope of the GIC's authority. Justice Rothstein, writing for a unanimous Court, held that in the absence of express limitation on the GIC's power of review, its authority was not circumscribed or restricted to issues of fact and policy.[98] Rather, the provision provided an "unlimited or unconditional" right to petition the GIC.[99]

69. In the present case, there are no statutory limits on the types of terms or conditions which may be imposed on a distribution order issued pursuant to s. 9(1)(*h*) when the CRTC is acting "in furtherance of its objects," as explicitly set out in s. 9(1). It was thus open to the CRTC, in the exercise of its power, to impose a condition on the carriage of programming services (i.e. television stations) stipulating that a particular program be broadcast without alteration.

70. This case is therefore entirely distinguishable from *Cogeco,*[100] cited by the Appellants, in which this Court found the *Broadcasting Act* did not provide any foundation for the establishment of a regulatory regime that fundamentally altered the economic relationship between BDUs and broadcasters. On appeal of a reference to the Federal Court of Appeal, the Court concluded that the proposed regime fell outside the primarily cultural purposes of the *Broadcasting Act.*[101]

71. Neither the statutory context nor the legislative history of the *Broadcasting Act* assist the Appellants in challenging the CRTC's interpretation of s. 9(1)(*h*). In particular, the Appellants erroneously suggest that s. 26(2) of the *Broadcasting Act* circumscribes the scope of the CRTC's discretion under s. 9(1)(*h*). Subsection 26(2) permits the GIC to require the broadcast of "any program" deemed to be "of urgent importance to Canadians generally or to persons resident in any area of Canada." These are different powers serving different ends in different contexts. Although s. 26(2) grants the GIC the power to require the urgent broadcast of an individual program of its choice, it does not permit the GIC to impose terms and conditions on the distribution of

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[98] *CN Rail*, at para 37.
[99] *CN Rail*, at paras 38-39. See also *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 SCR 764 at paras 36-37; 50, 53 & 55-56.
[100] *Reference re: Broadcasting Act*, 2012 SCC 68, [2012] 3 SCR 489 [*Cogeco*]
[101] *Cogeco*, at paras 29-33.

programming services. By contrast, s. 9(1)(*h*) allows the CRTC to impose terms and conditions, in furtherance of its objectives, on the distribution of programming services.[102]

72. When Parliament intended to restrict the scope of the discretion vested in the CRTC and the GIC, it did so expressly.[103] Indeed, s. 26(2) requires that the GIC deem a program to be "of urgent importance to Canadians generally or to persons resident in any area of Canada" in order to justify its carriage. No such restrictions apply to the general powers of the CRTC under s. 9 of the *Broadcasting Act.* Other qualifications on the powers of the CRTC are explicit. For example, the CRTC may not issue licences for terms exceeding seven years and licence conditions must be "related to the circumstances of the licensee."[104] Such limits provide a "strong indication that Parliament directed its attention to the issue of restrictions […] and included intended limitations expressly."[105]

3) Legislative history does not contradict the CRTC's interpretation of s. 9(1)(*h*)

73. The scope of the discretion conferred on the CRTC by s. 9(1)(*h)* to impose terms and conditions is broad. The various legislative history materials cited by the Appellants do not undermine the reasonableness of the CRTC's interpretation of this authority. While Hansard evidence may be relevant to the background and purpose of legislation, courts must remain mindful of its limited reliability and weight.[106] References to Hansard evidence will not generally be helpful to the task of statutory interpretation if, as in this case, the references are themselves

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[102] See analysis in *CN Rail*, at paras 38-44 & 48-49.
[103] *CN Rail*, at para 41.
[104] *Broadcasting Act*, ss 9(1)(*b*) & 9(1)(*c*).
[105] *CN Rail*, at para 41.
[106] *CN Rail*, at para 47, citing *Rizzo & Rizzo Shoes Ltd, Re*, [1998] 1 SCR 27 at para 35, *R v Morgentaler*, [1993] 3 SCR 463 at 484; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, ON: LexisNexis, 2008) at 608-14, **AGC Auth, Tab 3**.

ambiguous.[107] The best indicator of the meaning of a legislative provision are the words in the provision itself.[108]

74. The CRTC has been delegated the task of regulating the field of broadcast communications in Canada and the legislature intentionally gave the CRTC broad powers to discharge its delegated responsibilities.[109] To the extent the Hansard evidence is relevant, it demonstrates that Parliament entrusted the CRTC with "all aspects of Canadian broadcasting."[110] The Senate report leading to the enactment of the *Broadcasting Act* and the establishment of the CRTC stated that the regulator's "main concern" should be "the quality, variety and excellence of the radio and television programs that reach Canadian receiving sets."[111] With the re-enactment of the *Broadcasting Act* in 1991, Parliament specifically empowered the CRTC to "control the entry" of foreign signals and "set the terms under which such signals are retransmitted."[112] Hansard does not show that Parliament intended to restrict the authority of the CRTC in the manner suggested by the Appellants.

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[107] *CN Rail*, at para 47, citing *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 SCR 715 at para 39. See also *R v Summers*, 2014 SCC 26, [2014] 1 SCR 575 at paras 6 & 54.

[108] *AYSA Amateur Youth Soccer Assn v Canada Revenue Agency*, 2007 SCC 42, [2007] 3 SCR 217 at paras 11-13 & 15 [*AYSA*]; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, ON: LexisNexis, 2014) at 700, citing *R v McDonald*, 2012 BCCA 475 at para 14, **AGC Auth, Tab 4**.

[109] Senate, Committee on Broadcasting, *Report of the Committee on Broadcasting* (1965) at 91-94, 96-99 & 119-120 (Chair: Robert M. Fowler), **AGC Auth, Tab 5**; *White Paper on Broadcasting* (1966) at 8-9, **AGC Auth, Tab 6**; *House of Commons Debates*, 27th Parl, 2nd Sess, No 4 (1 Nov 1967) at 3747-3748 (Hon Judy V LaMarsh, Secretary of State), **AGC Auth, Tab 7A**; *House of Commons Debates*, 34th Parl, 2nd Sess, Vol 4 (3 Nov 1989) at 5564 (Jim Edwards, Parliamentary Secretary to Minister of Communications), **AGC Auth, Tab 8A**; *House of Commons Debates*, 34th Parl, 2nd Sess (4 Dec 1990) at 16224 (Hon Marcel Masse, Minister of Communications), **App Auth, Vol III, Tab 52B**; Senate, Proceedings of the Standing Senate Committee on Transport and Communications, 34th Parl, 2nd Sess (14 Jan 1991) at 10:7 (Jim Edwards, Parliamentary Secretary to the Minister of Communications), **AGC Auth, Tab 8D**.

[110] Senate, Committee on Broadcasting, *Report of the Committee on Broadcasting* (1965) at 98 (Chair: Robert M. Fowler), **AGC Auth, Tab 5**; *Broadcasting Act*, s 5(1).

[111] Senate, Committee on Broadcasting, *Report of the Committee on Broadcasting* (1965) at 98 (Chair: Robert M. Fowler), **AGC Auth, Tab 5**.

[112] *House of Commons Debates*, 33rd Parl, 2nd Sess, Vol 12 (4 December 1990) at 16257, (Mr. Jim Edwards, Parliamentary Secretary to the Minister of Communications), **AGC Auth, Tab 8C**.

75. The debate around the enactment of s. 26(2) reveals that some participants in the legislative process were concerned about "partisan" use of the power to require the urgent broadcast of a program.[113] The evidence does not demonstrate that Parliament intended for s. 26(2) to restrict the CRTC's newly enacted ability to impose terms and conditions affecting the distribution of programming services in s. 9(1)(*h*). The only material cited in this respect is the testimony of two witnesses before the legislative committee studying proposed changes to the *Broadcasting Act*, an industry group representative[114] and the Parliamentary Secretary to the Minister of Communications, commenting solely on the GIC's power to issue general directions to the CRTC,[115] and a statement in the House by an opposition Member of Parliament.[116] These statements do not establish the legislative intent underlying either s. 26(2) or s. 9(1)(*h*) of the *Broadcasting Act.*

76. The legislative history leading to the enactment of s. 9(1)(*h*) in fact confirms that Parliament intended to leave wide scope for the CRTC to attach terms and conditions to the carriage of programming services. The Hansard evidence suggests that s. 9(1)(*h*) was adopted in response to a report of the Standing Committee on Communications and Culture, which recommended a legislative basis for requiring that BDUs give priority to the carriage of Canadian television stations and networks.[117] The report proposed, and Parliament enacted, legislative text

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[113] *House of Commons Debates*, 33rd Parl, 2nd Sess, Vol 14 (19 July 1988) at 17750 (Sheila Firestone), **App Auth, Vol III, Tab 51A**; Minutes of Proceedings and Evidence of the Legislative Committee, No 6 (23 August 1988) at 29, 34-36 (Esther Desilets, Sheila Firestone, Edith Parizeau), **App Auth, Vol III, Tab 56F**; *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 13 (Keith Spicer), **App Auth, Vol III, Tab 55C**.

[114] Minutes of Proceedings and Evidence of the Legislative Committee, No 9 (29 August 1988) at 25 (Robert Gagnon, Coalition pour la defense des services francais de Radio-Canada), **App Auth, Vol III, Tab 56I**.

[115] House of Commons, Bill C-40 Legislative Committee, No 8 (21 February 1990) at 41-42 (Jim Edwards, Parliamentary Secretary to the Minister of Communications), **App Auth, Vol III, Tab 55B**.

[116] *House of Commons Debates*, 33rd Parl, 2nd Sess, Vol 15 (28 September 1988) at 19738-19739 (Jean-Robert Gauthier), **App Auth, Vol III, Tab 51B**.

[117] *House of Commons*, Standing Committee on Communications and Culture, *Sixth Report to the House: Recommendations for a New Broadcasting Act* (Hull, Quebec: Queen's Printer for Canada, 1987) at 77, **App Auth, Vol II, Tab 46**.

that empowers the CRTC to attach "any conditions" to the carriage of programming services that it considers necessary to further the objectives of the statute.[118]

77. By contrast, s. 9(1)(*g*) of the *Broadcasting Act* contemplates an order requiring that a BDU "give priority" to the carriage of broadcasting. Had Parliament intended to restrict the CRTC's discretion under s. 9(1)(*h*) to orders that require the priority carriage of certain television stations or networks, it could have said so.[119] Instead, Parliament left considerable scope for the CRTC to impose terms and conditions that it considers appropriate to advance the numerous and diverse policy objectives set out in the statute. The legislative history simply does not contradict the clearly worded text of the legislation.[120]

78. When exercising its discretion to impose terms and conditions on the carriage of programming services pursuant to s. 9(1)(*h*), the CRTC must act "in furtherance of its objects," i.e., reasonably and for the purposes of the statutory scheme.[121] The CRTC did not act unreasonably by interpreting s. 9(1)(*h*) to mean that it may impose "any terms and conditions on the distribution of programming services it deems necessary in furtherance of its objects."[122] The Court should reject any attempt to artificially narrow the scope of the discretion vested by Parliament in the CRTC.

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[118] *House of Commons*, Standing Committee on Communications and Culture, *Sixth Report to the House: Recommendations for a New Broadcasting Act* (Hull, Quebec: Queen's Printer for Canada, 1987) at 78, **App Auth, Vol II, Tab 46**. See also the Commission's statement in BRP 2016-334, para 21 ["… the introduction of section 9(1)(*h*) into the Act was to clarify the Commission's broad power to regulate the cable industry and impose any conditions necessary to do so"], **JAR, Tab I, Vol 1, p 6**.

[119] In fact, a proposed amendment giving the CRTC direction on how to prioritize the carriage of programming services was rejected: *House of Commons Debates*, 34th Parl, 2nd Sess, Vol 12 (3 December 1990) at 16130-16132 (Sheila Firestone), **AGC Auth, Tab 8C**; *House of Commons Debates*, 34th Parl, 2nd Sess, Vol 12 (4 December 1990) at 16215, **AGC Auth, Tab 8C**.

[120] *AYSA*, at paras 11-13 & 15; *R v Gladue*, [1999] 1 SCR 688 at para 45; *Teva Canada Ltd v Sanofi-Aventis Canada Inc*, 2014 FCA 67 at para 77.

[121] *Broadcasting Act*, s 9(1).

[122] BRP 2015-513, para 26, **JAR, Vol II, Tab 22, p 130**.

4) Terms and conditions in furtherance of broadcasting objectives

79. In light of the evidence presented during the course of its extensive consultation process, the CRTC reasonably determined that the prohibition on simultaneous substitution during the Super Bowl would advance the policy objectives set out in the *Broadcasting Act.*[123] The Appellants argue that the 9(1)(*h*) order must be rejected as "too great a stretch" from the broadcasting objectives enumerated in s. 3(1) of the Act. However, it is for the CRTC to determine and weigh what is in the public interest under the *Broadcasting Act*. There is no merit to the Appellants' argument.

80. As the Federal Court of Appeal has previously observed, s. 3(1) of the *Broadcasting Act* contains "about forty sometimes conflicting objectives."[124] While some of the statute's stated objectives involve the promotion of Canadian content, other paragraphs suggest the programming provided by the Canadian broadcasting system should "be varied and comprehensive, providing a balance of information, enlightenment and entertainment" and "be drawn from local, regional, national and international sources."[125]

81. The CRTC must balance these competing priorities. To that end, s. 5(1) of the *Broadcasting Act* vests the CRTC with the mandate to "regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)." As part of its public interest mandate, the CRTC issued regulations permitting simultaneous substitution in specified circumstances. The general rule is that the signal of a programming service cannot be altered or deleted.[126] This is precisely the situation that now governs in respect of the Super Bowl broadcast. Simultaneous substitution constitutes an exception to this rule. The Appellants do not challenge the general rule prohibiting the alteration or deletion of a signal, nor have they disputed the CRTC's power to establish a simultaneous substitution regime generally.

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[123] BRP 2016-334, paras 21, 23-24, 28 & 39, **JAR, Vol I, Tab 1, pp 6, 7 & 10**.
[124] *Société Radio-Canada c Metromedia CMR Montreal Inc.*, 1999 CanLII 8947, 254 NR 266 (FCA) at para 5.
[125] *Broadcasting Act*, ss 3(1)(*i*)(i) & (ii).
[126] *Broadcasting Distribution Regulations*, s 7.

82. In its policy statement on simultaneous substitution at the conclusion of the Let's Talk TV consultation process, the CRTC expressed the overall view that the practice should be permitted to continue, recognizing its contribution to the achievement of several objectives under the *Broadcasting Act.*[127] However, consistent with the polycentric nature of its mandate, the CRTC determined as a matter of fact that American commercials produced for the Super Bowl were an "integral element of the event" itself – and part of its cultural significance – which simultaneous substitution denied to Canadians.[128]

83. The CRTC noted that while many of the policy objectives of the *Broadcasting Act* focused on Canadian content, other provisions aimed to ensure Canadians had access to a range of broadcasting options from local, regional and international sources.[129] To fulfil these objectives, and provide for a better balance amongst competing objectives, the CRTC decided to recalibrate the simultaneous substitution regime and give Canadians the option of watching the complete (unaltered) broadcast of the Super Bowl.[130] The CRTC thus determined it was in the public interest to remove authorization for simultaneous substitution during the Super Bowl, thereby ensuring Canadians have access to Super Bowl programming in its entirety.[131] Consistent with the cultural aims of the *Broadcasting Act,* this provided an entirely reasonable basis for the 9(1)(*h*) order.

5) The Appellants failed to raise freedom of expression considerations before the CRTC and in any event, the argument has no merit

84. This Court should not deal with the Appellants' alarmist and speculative argument that the 9(1)(*h*) order is "Orwellian" in nature and offends the "freedom of expression" interpretive principle found in s. 2(3) of the *Broadcasting Act.* The CRTC never had the opportunity to address this argument as it was not raised before them.

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[127] BRP 2015-25, pp 1-2, **JAR, Vol II, Tab 16, pp 72-3**.
[128] BRP 2015-25, para 22, **JAR, Vol II, Tab 16, p 79**; see also BRP 2016-334, para 26-28, **JAR, Vol I, Tab 1, p 7**.
[129] BRP 2016-334, paras 21, 26-28 & 39, **JAR, Vol I, Tab 1, pp 7 & 10**; *Broadcasting Act*, ss 3(1)(*g*), 3(1)(*i*)(i) & (ii).
[130] BRP 2016-334, p 1, **JAR, Vol I, Tab 1, p 1**.
[131] BRP 2016-334 at para 40, **JAR, Vol I, Tab 1, pp 10**.

85. It is well-established that, as a general rule, a reviewing court should not consider an issue raised for the first time on judicial review if the issue could have been raised before the first instance decision-maker.[132] The rationale for the rule is that courts should respect the legislature's decision to delegate by giving the appointed delegate "the opportunity to deal with the issue first and to make its views known."[133] While a reviewing court has a residual discretion to hear an issue that was not raised before the tribunal, this discretion will not typically be exercised in favour of an applicant who could have – but did not – draw the issue to the tribunal's attention.[134]

86. There is no reason to deviate from the general rule in this case. By failing to raise freedom of expression as an issue before the CRTC, the Appellants deprived the CRTC of the opportunity to engage in the balancing exercise called for by *Doré v. Barreau du Québec*[135] when *Charter* interests are engaged. In addition, irrespective of *Doré*, the Court does not have the benefit of the CRTC's rationale concerning the effect, if any, of s. 2(3) on its interpretation of s. 9(1)(*h*). This is not a case in which the CRTC addressed the issue in other decisions or rulings available to the Court.[136] In the absence of any rationale from the CRTC, a *de novo* consideration of the issue would be fundamentally inconsistent with the application of a deferential standard of review that requires respectful attention to the reasons offered by the CRTC.

87. Should the Court exercise its discretion in favour of hearing this issue, it should find that the argument has no merit. The 9(1)(*h*) order itself does not intrude on program substance or content. It does the opposite, by ensuring the *preservation* of the original programming. Accordingly, the rule of construction reflected in s. 2(3) should not upend the CRTC's interpretation of s. 9(1)(*h*). As the Appellants concede, the effect of the 9(1)(*h*) order is that both the Canadian and American signals carrying the Super Bowl are distributed by BDUs in their *unaltered* format. Canadians are now free to watch whichever signal they choose.

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[132] *ATA v Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 SCR 654 at paras 22-23.
[133] *ATA*, at para 24.
[134] *ATA*, at para 23.
[135] 2012 SCC 12, [2012] 1 SRC 395. See also *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at paras 37 & 40-45; *Okwuobi v Lester B Pearson School Board*, 2005 SCC 16, [2005] 1 SCR 257 at paras 37-40.
[136] *ATA*, at para 28.

6) The combined effect of subsection 18(3) of the *Broadcasting Act* and subsection 4(3) of the *Sim Sub Regulations*

88. In the Court below and before the CRTC, Bell argued that the 9(1)(*h*) order conflicted with the *Sim Sub Regulations* and, as a result, the Regulations prevailed to the exclusion of the order. However, s. 4(3) of the *Sim Sub Regulations* specifically provides for an exception to the simultaneous substitution regime if the CRTC determines that the deletion and substitution of a program are not in the public interest. The CRTC reasonably invoked s. 4(3). Contrary to the argument raised by the NFL for the first time on appeal, the principle precluding the transformation of a legislative power into an administrative power has no application.

89. The *Sim Sub Regulations* generally require that a BDU comply with a request for simultaneous substitution if certain conditions are met.[137] Subsection 4(3) sets out an exception:

4(3) A licensee must not delete a programming service and substitute another programming service for it if the Commission decides under subsection 18(3) of the *Broadcasting Act* that the deletion and substitution are not in the public interest.	**4(3)** Le titulaire ne peut retirer un service de programmation et y substituer un autre service de programmation si le Conseil rend une décision, en vertu du paragraphe 18(3) de la *Loi sur la radiodiffusion*, portant que le retrait et la substitution ne sont pas dans l'intérêt public.

90. Subsection 18(3) of the *Broadcasting Act*, meanwhile, states as follows[138]:

18(3) The Commission may hold a public hearing, make a report, issue any decision and give any approval in connection with any complaint or representation made to the Commission or in connection with any other matter within its jurisdiction under this Act if it is satisfied that it would be in the public interest to do so.	**18(3)** Les plaintes et les observations présentées au Conseil, de même que toute autre question relevant de sa compétence au titre de la présente loi, font l'objet de telles audiences, d'un rapport et d'une décision — notamment une approbation — si le Conseil l'estime dans l'intérêt public.

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[137] *Sim Sub Regulations*, s 4(1).

[138] The word "and" may be used to express alternatives: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, ON: LexisNexis, 2014) at 101, **AGC Auth, Tab 4**; *Seck v Canada (Procureur general)*, 2012 FCA 314 at para 47.

91. In its reasons accompanying the 9(1)(*h*) order, the CRTC found that simultaneous substitution for the Super Bowl was not in the public interest.[139] In so doing, the CRTC satisfied the requirements of s. 4(3) of the *Sim Sub Regulations*: following a public consultation process, the CRTC issued a decision, in accordance with the authority granted under s. 18(3) of the *Broadcasting Act*, that the deletion and substitution of the Super Bowl were not in the public interest.[140] Noting that neither of the Appellants raised the *vires* of s. 4(3) in the proceedings below, the Court of Appeal properly found that, once the CRTC decided under s. 18(3) of the *Broadcasting Act* that simultaneous substitution for the Super Bowl was not in the public interest, it was entitled to exempt the Super Bowl from the simultaneous substitution regime under s. 4(3) of the *Sim Sub Regulations*.[141]

92. The CRTC did not, therefore, unlawfully convert a legislative power to set standards into an administrative power to decide individual cases.[142] Subsection 18(3) of the *Broadcasting Act* explicitly authorized the CRTC to issue "any decision […] in connection with any matter within its jurisdiction […] if it is satisfied it would be in the public interest to do so." The CRTC was satisfied that it was in the public interest to issue a decision addressing simultaneous substitution for the Super Bowl and proceeded to do so. In that decision it determined that simultaneous substitution for the Super Bowl was not in the public interest. Far from granting itself an "unfettered discretion," s. 4(3) of the *Sim Sub Regulations* reflects the statutory power to decide individual cases specifically vested in the CRTC by Parliament.

93. In any event, courts have been hesitant to declare subordinate legislation *ultra vires* if a regulatory enactment does not simply repeat the language of the enabling provision but confers some measure of discretion on an administrative body, to be applied in individual cases.[143] When

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[139] BRP 2016-334, paras 40 & 46, **JAR, Vol I, Tab 1, p 10 & 11**.
[140] BRP 2016-334, para 46, **JAR, Vol I, Tab 1, p 11**.
[141] FCA Decision, para 25, **JAR, Vol I, Tab 5, p 35**; see also *TWU v Canadian Radio-Television and Telecommunications Commission*, 2003 FCA 381 at para 58 [referring to the "very broad terms" of subsection 18(3) of the *Broadcasting Act*].
[142] *Brant Dairy Co v Ontario (Milk Commission)*, [1973] SCR 131 at 146.
[143] See for *e.g.*, *Peralta v Ontario*, [1985] OJ No 2304, 16 DLR (4th) 259 at paras 34, 37 & 44-48, aff'd [1988] 2 SCR 1045; *Dynamex Canada Inc v CUPW*, [1999] 3 FC 349 (FCA) at paras 27 & 37-42; *Jackson v Ontario (Minister of Natural Resources)*, 2009 ONCA 846 at paras 44-45.

a regulation provides some structure for the exercise of administrative discretion, the *Brant Dairy* principle is not engaged.[144]

94. In this case, s. 10(1) of the *Broadcasting Act* permits the CRTC to make regulations on a number of subjects, including regulations "respecting the carriage of any foreign or other programming service by distribution undertakings." The CRTC acted within the scope of its regulation-making authority by creating a simultaneous substitution regime and then, as part of this regime, retaining some residual discretion to determine that simultaneous substitution is not appropriate in certain circumstances. The CRTC's enabling provisions are much broader than the discretion contemplated by s. 4(3) of the *Sim Sub Regulations*.

95. Although the Appellants cite this Court's decisions in *Sparrow*[145] and *Zundel*,[146] these cases have no application here. Both authorities concern whether the "public interest" may be used to justify an infringement of a constitutional right. The *Charter* analysis in those cases has no bearing on the interpretation of the CRTC's powers under the *Broadcasting Act*. No *Charter* breach has been alleged or established that requires justification.

7) The CRTC reasonably determined that its 9(1)(*h*) order was not in conflict with either the *Copyright Act* or the CUSFTA

96. The CRTC determined that its 9(1)(*h*) order did not undermine the NFL's copyright in Super Bowl programming or conflict with Canada's obligations under the CUSFTA. This decision was reasonable. It was made after due consideration of the Appellants' arguments on these issues prior to the promulgation of the *Sim Sub Regulations*, and again in making the 9(1)(*h*) order. Rather than establishing any lack of justification, transparency or intelligibility in the CRTC's determinations, the Appellants simply repeat their submissions before this Court. In so doing, however, they still fail to establish any conflict between the *Copyright Act* or the CUSFTA and the CRTC's prohibition on simultaneous substitution during the Super Bowl.

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144 *Peralta*, at para 48.
145 *R v Sparrow*, [1990] 1 SCR 1075.
146 *R v Zundel*, [1992] 2 SCR 731.

a) No operational conflict

97. The broadcasting signals at issue are transmitted over-the-air. The effect of the 9(1)(*h*) order is that these signals, those of both the Canadian and American television stations broadcasting the Super Bowl, will be retransmitted simultaneously by BDUs in their original, unaltered format. The owner of copyright in a work has the exclusive right under s. 3(1)(*f*) of the *Copyright Act* to communicate it to the public by telecommunication. However, this right is circumscribed by s. 31(2) of the *Copyright Act*, which carves out an exception to s. 3(1)(*f*) in the case of works that are retransmitted in local or distant signals. Subsection 31(2) specifically provides that it is not an infringement of copyright for a BDU to retransmit a signal if, among other things, the signal is retransmitted "simultaneously and without alteration." The assertion that the *Copyright Act* "requires" BDUs to alter the signals they retransmit cannot be sustained on a plain reading of s. 31(2).[147]

98. It follows that there is no conflict between the 9(1)(*h*) order and s. 31(2)(*c*) of the *Copyright Act.* When BDUs distribute the Canadian and American signals carrying the Super Bowl to their subscribers, the retransmissions will satisfy the condition in the first part of s. 31(2)(*c*) (the work is "retransmitted simultaneously and without alteration"). While in this case there is no need to resort or refer to the exception in the second part of s. 31(2)(*c*) (alteration is allowed if it is "required or permitted by or under the laws of Canada"), this language ensures that alterations under the *Broadcasting Act* do not infringe copyright.

99. The CRTC reasonably found that its policy determinations regarding simultaneous substitution did not affect the NFL's copyright and that, at most, its determinations would have a secondary impact on the amount Canadian broadcasters were willing to pay for the Super Bowl.[148] The statutory scheme confirms that the 9(1)(*h*) order is consistent with the limited nature of the NFL's interest in retransmitted programs and there is, accordingly, no basis to interfere with the CRTC's conclusion.

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[147] *Copyright Act*, RSC, 1985, c C-42, s 31(2)(c).
[148] BRP 2016-334, para 58, **JAR, Vol I, Tab 1, p 14**.

b) No conflict of purpose

100. The Appellants suggest the prohibition on simultaneous substitution during the Super Bowl cannot be reconciled with Canada's obligations under the CUSFTA. As found by the CRTC, this argument is unsustainable for two reasons: 1) the treaty obligations cited by the NFL are not binding on the CRTC; and 2) in any event, there is no conflict between the CUSFTA and the 9(1)(*h*) order.[149]

101. First, in *Capital Cities Communications Inc v. Canadian Radio-Television and Telecommunications Commission,*[150] this Court held that the CRTC is not bound, as a matter of domestic law, by treaty obligations entered into by Canada. That case involved a challenge to a decision of the CRTC, prior to the formal enactment of the simultaneous substitution regime, permitting a cable company to delete advertisements from American television channels. Writing for the majority, Chief Justice Laskin noted the CRTC is governed by the *Broadcasting Act*, not the provisions of an international convention.[151] The Appellants have not pointed to any section in the *Broadcasting Act* that would transform the treaty provisions cited by the NFL into obligations binding upon the CRTC under domestic law.

102. Second, to the extent the Appellants take the position that the CRTC's authority under s. 9(1)(*h*) of the *Broadcasting Act* should be interpreted in a manner consistent with Canada's treaty obligations, the prohibition on simultaneous substitution during the Super Bowl remains well within the parameters of the permissive and discretionary language used in the applicable CUSFTA provisions.

103. The CUSFTA, entered into prior to the *North American Free Trade Agreement*, continues to operate in respect of "cultural industries."[152] Article 2006(1) of the CUSFTA requires that a

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[149] BRP 2016-334, para 59, **JAR, Vol I, Tab 1, p 14**.
[150] [1978] 2 SCR 141 [*Capital Cities*].
[151] *Capital Cities*, at 172. See also *Kazemi (Estate) v Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 SCR 176 at para 149.
[152] *North American Free Trade Agreement*, Annex 2106 ["any measure adopted or maintained with respect to cultural industries… shall be governed under this Agreement exclusively in accordance with the provisions of the *Canada-United States Free Trade Agreement*"]. Article 2107

state party provide a copyright holder with "a right of equitable and non-discriminatory remuneration" for the retransmission of the copyright holder's program, if the program is carried in distant signals.[153] Parliament has provided for such remuneration by granting copyright owners a right to receive royalties, to be determined by the Copyright Board on the basis of the criteria outlined in ss. 71-74 of the *Copyright Act.*[154] The Appellants have not challenged this remuneration regime, nor have they claimed that it is discriminatory.

104. Article 2006(3) of the CUSFTA deals specifically with simultaneous substitution.[155] In particular, Article 2006(3)(a)(i) permits a state party to maintain a simultaneous substitution regime. Article 2006(3)(b) allows a state party to introduce measures, including simultaneous substitution, "to enable the local licensee of the copyrighted program to exploit fully the commercial value of its licence." These provisions are permissive; neither mandates any specific outcome or requirement in relation to simultaneous substitution. There is no inconsistency between these treaty terms and the 9(1)(*h*) order.

105. Finally, as the Court of Appeal correctly noted, there is no basis to conclude that a principle of non-discrimination has been elevated by virtue of the CUSFTA into a principle of general application across the *Copyright Act.*[156] This Court has stated that the purpose of the *Copyright Act* is to balance authors' and users' rights.[157] To that end, the rights of a copyright owner should be read together with the limitations on those rights to give "the fair and balanced reading that befits remedial legislation."[158]

106. The Appellants have not demonstrated how the 9(1)(*h*) order frustrates the purpose of the *Copyright Act*. To accept this submission, the Court would be required to endorse a number of unsupported propositions, including that the CUSFTA requires that simultaneous substitution be

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of the NAFTA defines "cultural industries" as including "… all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network service."

[153] *Canada-United States Free Trade Agreement* [CUSFTA], Article 2006.
[154] See *Cogeco,* at para 57.
[155] CUSFTA, Article 2006.
[156] FCA Decision, para 46, **JAR, Vol I, Tab 5, p 47**.
[157] *Cogeco,* at para 64.
[158] *Society of Composers, Authors & Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45, [2004] 2 SCR 427 at para 88.

performed on a non-discriminatory basis (which is not apparent from the text of the treaty); that s. 31(2)(*c*) of the *Copyright Act* incorporates the purported requirement that simultaneous substitution be non-discriminatory (despite the complete absence of legislative language to that effect); and that the alleged non-discrimination requirement is significant enough to form part of the overall purpose of the *Copyright Act.* The CRTC reasonably found that such leaps of logic do not, and should not, invalidate the 9(1)(*h*) order.

C. CONCLUSION

107. In the Let's Talk TV process, the CRTC undertook an extensive review of the entire framework for television regulation in Canada in the context of a rapidly changing broadcast environment. The review included an extensive public consultation process through which the CRTC heard from Canadians, including both Appellants. Responding to concerns raised and comments received by Canadians about simultaneous substitution, including as it related to the Super Bowl, the CRTC developed a new remedial regime to address repeated simultaneous substitution errors. The CRTC also issued the s. 9(1)(*h*) order at issue in this case.

108. In its reasons for decision, the CRTC addressed issues raised by participants in the consultation process, including Bell and the NFL. Considering what it clearly heard from Canadians, and in light of its finding that non-Canadian advertising produced for the Super Bowl is an "integral part" of the program, the CRTC determined it would remove authorization for simultaneous substitution during the Super Bowl beginning with the 2017 broadcast of the event. It concluded that simultaneous substitution for the Super Bowl is not in the public interest.

109. The CRTC is the authority entrusted by Parliament to determine the public interest in furtherance of the objects of the *Broadcasting Act* and to impose such terms and conditions as it deems appropriate on the distribution of programming services. The authority granted to the CRTC under s. 9(1)(*h*) is broad. The Appellants have not shown that the CRTC's determination of the public interest and its resulting order were unreasonable. The CRTC's decision was justified, transparent and intelligible. On a proper application of the proposed standard of review, consistent with the importance of deference to Parliament's chosen decision-maker, the 9(1)(*h*) order should be upheld.

PART IV – SUBMISSIONS CONCERNING COSTS

110. The Respondent seeks costs in both the *Bell* and *NFL* proceedings.

PART V – NATURE OF ORDER SOUGHT

111. The Respondent requests that both the *Bell* and *NFL* appeals be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 27th day of September, 2018

MICHAEL H. MORRIS

IAN DEMERS

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Of Counsel for the Respondent, the Attorney General of Canada

PART VI – TABLE OF AUTHORITIES

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