S.C.C. 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))

FACTUM OF THE APPELLANTS (NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC and NFL PRODUCTIONS LLC)

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

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PART I—OVERVIEW AND FACTS

1. Overview

1. When the first broadcasting legislation was introduced to Canada in 1932, Prime Minister Bennett declared that the new technology was to "become a great agency for the communication of matters of national concern and for the diffusion of national thought and ideals… by which national consciousness may be fostered and sustained and national unity still further strengthened".[1] While the broadcasting system has weathered tremendous changes since that time, Parliament has never wavered from its commitment to this vision. Today, the *Broadcasting Act* provides that the Canadian broadcasting system is "a public service essential to the maintenance and enhancement of national identity and cultural sovereignty" (s. 3(1)(b)). To ensure the system is effective, it requires that "[t]his Act shall be construed and applied in a manner that is consistent with ***the freedom of expression and*** journalistic, ***creative and programming independence enjoyed by broadcasting undertakings***" (s. 2(3)). The CRTC Instruments[2] here are a direct challenge to Parliament's intent.

2. At the root of these appeals lies the CRTC's decision to exclude the Super Bowl – a single program, owned by a single copyright holder (the NFL), broadcast in Canada on a single day by a single exclusive licensee (Bell) – from the protections offered by its generally applicable *Sim Sub Regulations*. In doing so, the CRTC has ordered that any BDU which distributes the Canadian Super Bowl must also distribute the U.S. version with the U.S. advertisements on every applicable U.S. station it offers. In other words, the CRTC has assumed the power to dictate a specific, individual program that broadcasters must distribute, not merely to establish broadcasting standards of general application. The CRTC's unilateral assumption of this authority has far-reaching implications for freedom of expression and the jurisdiction of the CRTC. As the Attorney General conceded below, it means the CRTC can "prohibit a particular channel from carrying a particular program altogether".[3]

3. The CRTC purports to draw this extraordinary authority from s. 9(1)(h) of the *Broadcasting Act*. However, this provision only allows the CRTC to require that BDUs carry "***programming services***" specified by it, not target individual "***programs***" like the Super Bowl.

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[1] *House of Commons Debates*, 17th Parl., 3rd Sess., Vol. 3 (15 May 1932) at 3035 (Hon. R.B. Bennett), Joint Book of Authorities ("**JA**"), Tab 49.
[2] The NFL hereby adopts and incorporates the defined terms and submissions in the Bell Factum.
[3] FCA Transcript Excerpt, Exhibit "A", Atwell Affidavit, Joint Record ("**JR**"), Tab 26, p. 143.

4. The text, context and purpose of the *Broadcasting Act* are all overwhelmingly clear. When the ordinary tools of statutory interpretation are applied to s. 9(1)(h), the only meaning a prudent, independent observer would spend "good money"[4] backing is the one that limits the CRTC's authority to what the statute plainly says: "programming services". It does not grant the CRTC the Orwellian power to reach down into the specific shows that broadcasters create and decide which ones are worthy of distribution to the public. In short, the CRTC Instruments are not only incorrect but ***unreasonable***, and both the rule of law and legislative supremacy require that they be set aside.

5. ***First***, as to text, a "programming service" has an ordinary meaning that is very different from an individual "program". Even standard, non-legal reference works such as the *Oxford English Dictionary* recognize that a "program" in the broadcasting context means "[a] broadcast presentation treated as ***a single item*** for scheduling purposes", whereas a "programme service" means "***a service providing*** a regularly broadcast ***series*** of radio or television programmes to the public".

6. In other words, a "programming service" is an entire television channel on which individual programs are broadcast, and as such cannot be an individual program itself. This understanding of "programming services" is the one repeatedly applied by Canadian courts, including by this Court in *Cogeco*, and until this litigation was the meaning consistently given to it by the CRTC. In fact, the CRTC Notice that launched the proceedings which led to the CRTC Instruments – released before any dispute about its jurisdiction over "programming services" had arisen – stated that "***[p]rogramming services aggregate programs***", viewers "are increasingly seeking out ***individual programs rather than programming services***", and as a result ,"Canadian consumption of video content [will] mov[e] more and more ***from… packaged programming services to on-demand and tailored programs***". Parliament could not have been more clear in its choice of language in s. 9(1)(h).

7. ***Second***, as to context, the scheme of the *Broadcasting Act* provides ample confirmation that the term "programming services" in s. 9(1)(h) was not used with the intent to depart from this ordinary meaning. To the contrary, numerous provisions throughout the statute distinguish a "programming service" from a "program". The *Broadcasting Act* speaks of the "programming ***provided by***… programming services" (s. 3(1)(r)), equates "programming services" with "***stations***" (s. 3(1)(t)(i)), and refers to the "programming services" supplied to BDUs "pursuant to ***contractual*** arrangements" (s. 3(l)(t)(iii)). Once again, Parliament's intention is unmistakable.

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[4] Bell Factum, ¶98.

8. In fact, the CRTC has never suggested before now that s. 9(1)(h) gives it the power to make orders about individual programs. Instead, the CRTC has always used the provision to require that BDUs distribute – in its words – "certain ***channels (or programming services)***" on basic cable, which it calls "s. 9(1)(h) services", like CPAC and APTN. This, of course, is entirely different from requiring that BDUs broadcast a specific version of a single program, as the CRTC did here.

9. The magnitude of the CRTC's reversal is illustrated by its own prior decision in *Star Choice*. Even though the CRTC was interpreting "programming services" in its *Broadcasting Distribution Regulations* there – where, unlike in the *Broadcasting Act*, the term is actually defined to "mea[n] a program" – the CRTC still held that "programming services" means "the ***entire output*** transmitted by the operator of a programming undertaking for reception by the public" instead of a single show.

10. Any lingering doubt on this issue is eliminated by Parliament's decision to give the power to require the broadcast of "any program" ***solely to the Governor in Council*** in s. 26(2) of the *Broadcasting Act*. By contrast, the predecessor provision, in the former 1968 *Broadcasting Act*,[5] had given this same power to both the Governor in Council ***and the CRTC***. It is inconceivable that Parliament would have ***removed*** the CRTC from the provision that expressly grants this authority while intending to confer the same power on it – obliquely – through s. 9(1)(h).

11. ***Third***, as to purpose, the legislative history demonstrates that Parliament's use of the term "programming services" in s. 9(1)(h) was not fortuitous. The multiple bills,[6] government reports and parliamentary debates that led to the *Broadcasting Act* in 1991 are unusually clear on this point.

12. The reason for s. 9(1)(h) was to fill a gap in the 1968 *Broadcasting Act*, under which the CRTC had no express ability to make orders requiring that BDUs distribute ***entire television channels*** – repeatedly referred to as "programming services" – that were deemed important for the Act's policy objectives. Parliament was concerned that cable providers may act as "gatekeepers", and prevent homegrown Canadian channels from accessing much-needed viewers because cable providers preferred to carry more popular U.S. channels instead. The power in s. 9(1)(h) was granted

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[5] S.C. 1967-68, c. 25, consolidated as R.S.C. 1970, c. B-11, reconsolidated as R.S.C. 1985, c. B-9, JA Tab 58.

[6] Bill C-136, *Broadcasting Act*, 33rd Parl., 2nd Sess., 1988 ("**Bill C-136**"), JA Tab 40; Bill C-40, *Broadcasting Act*, 34th Parl., 2nd Sess., 1989-1990 ("**Bill C-40**"), JA Tab 43.

so that the CRTC could prevent this by ensuring that BDUs carry these homegrown channels. It was ***not*** granted so that the CRTC could dictate the individual programs that BDUs distribute.

13. Any other interpretation would undermine Parliament's decision to elevate freedom of expression from a mere ***policy declaration*** in the 1968 *Broadcasting Act* – where it was "subject" to the CRTC's own instruments – into a ***mandatory rule*** in s. 2(3), with the *Broadcasting Act* now ***requiring*** that "[t]his Act ***shall*** be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings". This freedom of expression was regarded as so important that Parliament inserted it directly into the *Broadcasting Act* so that it could not be limited under s. 1 of the *Charter*.

14. Critically, the wording in s. 2(3) was chosen over a draft provision which would have read "***[n]othing in this Act shall be construed as requiring any person to obtain the approval of the Commission for the broadcasting of any particular program***". This proposed s. 2(3), which is directly responsive to the CRTC Instruments here, was rejected because its language was viewed as being ***too weak*** to protect broadcasters from CRTC interference with program content.

15. Accordingly , any interpretation of s. 9(1)(h) that suggests it gives the CRTC the authority to make distribution orders about individual programs is inconsistent with Parliament's decision to expressly remove the CRTC from the provision that actually grants that power in s. 26(2), and instead limit that power to the ***democratically accountable*** Governor in Council while enshrining freedom of expression as a mandatory rule in s. 2(3).

16. The unreasonableness of the CRTC's interpretation of s. 9(1)(h) is laid bare by the reasons given in the CRTC Instruments. After receiving extensive submissions on s. 9(1)(h) from Bell and the NFL, which set forth why the provision does not give the CRTC the authority to make a distribution order about a single program, the CRTC simply sidestepped those arguments by denying that the CRTC Order did so. It asserted that the CRTC Order was within its s. 9(1)(h) power because the Order purports to prohibit the Sim Sub of a "programming service", i.e., "the entire output of a programming service," but only during the broadcast of ***"a particular program***" – the Super Bowl. This strained rationale cannot disguise the basic truth that the CRTC Order targets and regulates only a single program, and instead makes clear that the CRTC has attempted to do indirectly what it could not intelligibly justify doing directly under s. 9(1)(h).

17. Finally, independently of whether the CRTC Instruments are authorized under s. 9(1)(h) of the *Broadcasting Act* – and they are not – the CRTC Instruments are also unreasonable for conflicting with s. 31(2) of the *Copyright Act*. By prohibiting Sim Sub for a program owned by a single ***U.S.*** copyright holder due to the Super Bowl's ***American cultural significance***, while permitting Sim Sub to continue for all other copyright holders, including all ***Canadian*** copyright holders, the CRTC has discriminated against the NFL contrary to the principle of national treatment in the treaties that s. 31(2) of the *Copyright Act* implements. This is confirmed by the language of s. 31(2)(c) itself, which creates a retransmission exception to copyright infringement only if BDUs alter the signal when "required… by or under ***the laws of Canada***", i.e., by ***laws of general application*** such as the *Sim Sub Regulations*, not by an order that purports to modify the *Sim Sub Regulations* by targeting a single program like the CRTC Instruments do to the detriment of a single U.S. copyright holder. The NFL therefore respectfully requests that the CRTC Instruments be set aside and its rights in the Super Bowl be restored to an equal footing with those of all other copyright holders in Canada.

2. The Facts

18. The CRTC Order is made under s. 9(1)(h) of the *Broadcasting Act* and targets only the Super Bowl. The Third CRTC Decision, headed "Simultaneous substitution ***for the Super Bowl***", states:

> The Commission issues a distribution order ***pursuant to section 9(1)(h) of the Broadcasting Act***, which, ***in effect, will remove authorization for simultaneous substitution for the Super Bowl***, effective 1 January 2017.
> …
> …[T]he Commission… invited comments on a proposed distribution order that would ***effectively exclude the Super Bowl from the simultaneous substitution regime***.
> …
> …***[P]ursuant to section 9(1)(h) of the Act… simultaneous substitution will no longer be authorized for the Super Bowl…***[7]

19. The CRTC Order that is appended to the Third CRTC Decision – headed "Distribution of Canadian television stations ***that broadcast the Super Bowl***" – provides that any BDU distributing the Canadian Super Bowl program must also carry the U.S. Super Bowl program on every applicable U.S. station it offers, despite the requirement for Sim Sub in the *Sim Sub Regulations*, SOR/2015-240. The effect is to order that the U.S. Super Bowl be broadcast in Canada. As the CRTC said:

> … ***Through this order, Canadians will be able to view the U.S. Super Bowl commercials*** – an integral element of the event – broadcast on U.S. television stations rebroadcast in Canada

[7] Third CRTC Decision, Preamble, ¶12, 69 (and ¶40), JR Tab 1, *emphasis added*.

> by television service providers (cable, direct-to-home satellite or Internet Protocol television). Canadians may also choose to watch the Super Bowl on Canadian television stations with Canadian advertisements. Ultimately, Canadians will have the right to choose the stations on which they will watch the Super Bowl. …[8]

20. While the CRTC Order is framed to create the appearance that it prohibits the Sim Sub of "programming services", it is self-evident that this only applies to the Super Bowl program itself:

> ***Pursuant to section 9(1)(h) of the Broadcasting Act***, the Commission orders licensees of broadcasting distribution undertakings to distribute the programming services of Canadian television stations ***that broadcast the Super Bowl*** on the following terms and conditions:
> …
> 2. ***For the purposes of this order, "Super Bowl" is defined as*** the championship game of the National Football League…
>
> 3. Effective 1 January 2017:
>
> > a. A distribution undertaking subject to this order may only distribute the programming service of a Canadian television station ***that broadcasts the Super Bowl*** if that distribution undertaking does not carry out a request made by that Canadian television station pursuant to section 3 of the *Simultaneous Programming Service Deletion and Substitution Regulations* to delete the programming service of another Canadian television station or a non-Canadian television station and substitute for it the programming service of a local television station or regional television station ***during any period in which the Super Bowl is being broadcast*** on the requesting Canadian television station.[9]

21. The CRTC Instruments thus squarely raise the issue of whether the jurisdiction to make distribution orders against "programming services" in s. 9(1)(h) of the *Broadcasting Act* empowers the CRTC to issue a distribution order against a single program. The CRTC received extensive submissions on this matter by the parties below.[10] However, the reasons the CRTC gave for rejecting this argument make no reference to the specific points raised by the parties, such as the Governor in Council's individual program power in s. 26(2) or its own prior inconsistent decision in *Star Choice*.

22. Rather than undertake this review of the entire context of s. 9(1)(h), and intelligibly justify why the provision authorizes distribution orders against individual programs, the CRTC took the

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[8] *Ibid*, Preamble, *emphasis added*. BDUs must generally distribute local and regional stations on their basic service, including CTV if it is included in their licensed area: *BD Regulations*, ss. 17(1)(c) and (e). Therefore, the CRTC Order requires that such BDUs distribute the U.S. Super Bowl on every U.S. station they offer that carries the Super Bowl.

[9] CRTC Order, JR Tab 1, *emphasis added*.

[10] Third CRTC Decision, ¶42, 52, JR Tab 1.

formalistic position that "the ***wording*** of the proposed order adequately responds" to the parties' argument, because it speaks of prohibiting Sim Sub for a "programming service". Nonetheless, in the very same passage, the CRTC acknowledged that the CRTC Order only spoke of a "programming service" in the sense of "[t]he entire output of a programming service… ***for a particular program***" – "***such as the Super Bowl***" – "***during***" and "***until that program ends***", making clear that its target remains the individual Super Bowl program:

> Paragraph 3.a. of the proposed distribution order reads as follows:
>
> > A distribution undertaking subject to this order may only distribute the programming service of a Canadian television station that broadcasts the Super Bowl if that distribution undertaking does not carry out a request made by that Canadian television station pursuant to section 3 of the *Simultaneous Programming Service Deletion and Substitution Regulations* to delete the programming service of another Canadian television station or a non-Canadian television station and substitute for it the programming service of a local television station or regional television station ***during any period in which the Super Bowl is being broadcast*** on the requesting Canadian television station. …
>
> The proposed distribution order relates to the distribution of "a Canadian television station that broadcasts the Super Bowl," a distinction contemplated by the Act, and then imposes a condition on that distribution, specifically, that the simultaneous substitution shall not be performed ***during the Super Bowl***. Further, ***the wording of the proposed order adequately responds*** to the contention that section 9(1)(h) can only operate with respect to a programming service, as opposed to ***a particular program (such as the Super Bowl).***
>
> Moreover, the distribution order reflects the way simultaneous substitution is actually performed. 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.*** The distribution order reflects the notion that the entire output of the programming service of a television station will not be deleted and substituted ***for the Super Bowl, a particular program.***[11]

23. In addition to arguing that the CRTC Order is not authorized by s. 9(1)(h) of the *Broadcasting Act*, the NFL also argued that the CRTC Order is invalid for conflicting with s. 31(2) of the *Copyright Act* and the international treaty obligations it implements.[12] However, the CRTC rejected this argument after once again failing to review the entire statutory context. Instead, it inexplicably asserted that the CRTC Order has no effect on the NFL's copyright, and declared itself free from Canada's international treaty commitments while baldly concluding that they have no impact on the CRTC's ability to modify the Sim Sub regime:

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[11] *Ibid*, ¶53-55, *underlining in original, bolding and italics added.*
[12] *Ibid*, ¶43 (and ¶57).

> *…**[T]he Commission['s]… policy determinations regarding simultaneous substitution do not affect the NFL's copyright in its programs**…*
>
> In regard to conflicts with NAFTA and CUSFTA… ***trade agreements do not apply directly to the Commission without specific legislation to this effect**. …**[E]ven if those treaties were directly applicable*** to the Commission, they would simply provide Canada with the ability to create a simultaneous substitution regime; ***they would in no way limit the Commission's ability to modify or even remove this regime.***[13]

PART II—ISSUES

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

(a) Are the CRTC Instruments *ultra vires* the jurisdiction of the CRTC under s. 9(1)(h) of the *Broadcasting Act*?

(b) Are the CRTC Instruments invalid based on their conflict with s. 31(2) of the *Copyright Act*?

PART III—ARGUMENT

1. The CRTC Instruments Are *Ultra Vires* Section 9(1)(h) of the *Broadcasting Act*

A. Introduction

25. As discussed in the Bell Factum, the standard of review applicable to the *Broadcasting Act* issue in this case is correctness. However, even if the Court rejects that submission, the interpretation of s. 9(1)(h) given by the CRTC is not only incorrect but is unreasonable.

26. The CRTC's interpretation – that "programming services" in s. 9(1)(h) extends to a single program, i.e., "[t]he entire output of a programming service… for a particular program… until that program ends" – does not produce a genuine ambiguity. No prudent, independent observer would "spend good money" backing the CRTC's interpretation against the one outlined below when the entire context of the provision is reviewed. Instead, the ordinary tools of statutory interpretation point to only one reasonable construction of s. 9(1)(h) – the one offered by Bell and the NFL – so the doctrine of curial deference is not engaged. This Court explained the governing principle in *Cogeco*:

> ***The scope of the CRTC's jurisdiction under the Broadcasting Act must be interpreted according to the modern approach to statutory interpretation***. Per Elmer A. Driedger's formulation, adopted multiple times by this Court,

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[13] *Ibid*, ¶58-59, *emphasis added*.

> the words of an Act are to be ***read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament***.

(See, e.g., ***Bell ExpressVu***, at para. 26, per Iacobucci J…) [14]

27. Further, even if the Court were to find that the CRTC's interpretive outcome is reasonable, the ***reasons*** the CRTC gave in support of it still cannot satisfy the requirements of justification, transparency and intelligibility. On either basis therefore, the CRTC Instruments must be set aside.

B. The Meaning of s. 9(1)(h) is Not Ambiguous

i. The Text of s. 9(1)(h)

28. The "starting point of the analysis requires that the Court examine the ordinary meaning of the sections at the centre of the dispute".[15] Section 9(1)(h) of the *Broadcasting Act* provides:

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

29. The provision by its plain terms gives the CRTC authority to make distribution orders only about "programming services". The term "programming service" ("services de programmation") is not defined in the *Broadcasting Act*, in contrast to the term "program" ("émission") in s. 2(1):

> **program** means ***sounds or visual images***, ***or a combination of sounds and visual images, that are intended to inform, enlighten or entertain***, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text; [*emphasis added*]

30. While the noun "programming" in "programming services" is one method of referring to "programmes collectively",[16] and thus corresponds to the plural of the "program" definition above,[17] the addition of the modifying word "service" after it makes clear that the concepts of "programming service" and "program" are distinct. The *Oxford English Dictionary* defines the modern meanings of the nouns "program" and "program service" in relation to broadcasting as follows:

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[14] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, ¶11 ("***Cogeco (SCC 2012)***"), *emphasis added*.
[15] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, ¶41 ("***ATCO (SCC 2006)***").
[16] *Oxford English Dictionary*, online ed. (New York: Oxford University Press), *s.v.* "programming", s. 2(b) ("***Oxford English Dictionary***"), JA Tab 33.
[17] *Interpretation Act*, ss. 33(2), (3).

> programme | ***program***, *n.*
>
> …
>
> *7. Broadcasting.*
>
> a. ***A broadcast presentation treated as a single item for scheduling purposes*** and usually transmitted at a stated time and without interruption, other than for advertisements or news bulletins.
>
> …
>
> Compounds
>
> …
>
> ***programme service*** *n. Broadcasting* ***a service providing a regularly broadcast series of radio or television programmes*** to the public.[18]

31. A "programming service" is therefore not a single "program". Instead, as the CRTC itself said in *Star Choice*, a "programming service" is "the ***entire output*** transmitted by the operator of a programming undertaking for reception by the public",[19] i.e., a television channel like TSN. It is thus also to be distinguished from the "programming undertaking" that transmits it, a type of "broadcasting undertaking" that is defined in s. 2(1) of the *Broadcasting Act* as follows:

> **programming undertaking** means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus;

32. This ordinary meaning of a "programming service" – i.e., an ***entire television channel***, broadcast by a programming undertaking, that ***provides*** individual programs instead of ***being*** an individual program itself – is routinely used by the courts,[20] as illustrated by the following excerpts from three separate decisions of the Federal Court of Appeal:

> In its decision 84-445 rendered in May, 1984, the Respondent approved an application by ***Chinavision*** for a licence to carry on a network for the distribution of ***a national speciality programming service consisting of predominantly Chinese-language programming***, to be distributed to cable television affiliates on a discretionary user-pay basis. …[21]

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[18] *Oxford English Dictionary*, *supra* note 16, *s.v.* "program", *emphasis added*, JA Tab 33. **See also** *Canada v. Montreal Stock Exchange*, [1935] S.C.R. 614 at 616.

[19] *Distribution of omnibus high definition channels by Star Choice and Cancom* – Broadcasting Decision CRTC 2005-195, 12 May 2005, ¶27 ("***Star Choice (CRTC 2005)***"), *emphasis added*.

[20] *WIC Premium Television v. Levin*, [1999] F.C.J. No. 652 (T.D.), ¶8; *Interbox Promotion Corp. v. 9012-4314 Québec Inc. (Hippo Club)*, 2003 FC 1254, ¶4, 27; *2251723 Ontario Inc. (c.o.b. VMedia) v. Rogers Media Inc.*, 2017 FCA 186, ¶3, 28.

[21] *Cathay International Television Inc. v. C.R.T.C.*, 1987 CarswellNat 919 (F.C.A.), ¶3, *emphasis added*, JA Tab 2.

> The appellant is an American company which produces in the United States of America ***a country music video television program service, known as "Country Music Television" (CMT)…***[22]
>
> Netstar offers broadcasting undertakings ***two sports programming services: RDS in French and TSN in English.*** ….[23]

33. This Court also applied the same meaning to "programming service" in *Cogeco*, where it was referred to as the entire suite of programs a BDU ***contracts*** with a programming undertaking to distribute as a channel, in contrast to the ***individual programs*** that are carried on such a service:

> … The proposed regime would enable broadcasters to control the simultaneous retransmission of programs, by granting them ***the right to require deletion of any program*** in which they own or control the copyright from all signals distributed by the BDU, ***if no agreement is reached on compensation for the simultaneous retransmission of the broadcaster's programming services.***[24]

34. Finally, ***the CRTC itself*** has consistently understood and defined "programming services" in this way. In addition to its decision in *Star Choice*, discussed at paragraphs 64-73 below, the Notice of Consultation that launched phase three of the *Let's Talk TV* proceedings – which led to the decision to prohibit Sim Sub for the Super Bowl, but was released before any dispute had arisen about the CRTC's ability to make such an order under its "programming services" power in s. 9(1)(h) – acknowledges that a programming service is a television channel, not an individual program:

> … ***Programming services aggregate programs*** for broadcast to the public, while BDUs aggregate programming services for distribution to subscribers. …

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[22] *Country Music Television, Inc. v. Canada (C.R.T.C.)*, [1994] F.C.J. No. 1957 (C.A.), ¶3, *emphasis added*, JA Tab 5.

[23] *Vidéotron Ltée v. Netstar Communications Inc.*, 2004 FCA 299, ¶16, *emphasis added*.

[24] *Cogeco (SCC 2012)*, *supra* note 14, ¶52 (and ¶7, 69), *underlining in original, bolding and italics added*. **See also:** *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, ¶133, per McLachlin J. (as she then was) (dissenting on other grounds); *Reference re Broadcasting Act*, 2012 SCC 4, ¶2 ("***ISP Reference (SCC 2012)***"). The *Cogeco* Court did go on to say that "[o]n their face, ss. 9(1)(h) and 10(1)(g) could, for example, allow the CRTC to require the BDUs to distribute to Canadians certain types of ***programs***, arguably, because they are deemed to be important for the country's cultural fabric": *Cogeco (SCC 2012)*, *supra* note 14, ¶31. However, the Court was simply rejecting the suggestion that s. 9(1)(h) granted the broader power to create exclusive control rights for broadcasters; no issue about the meaning of "programming services" in s. 9(1)(h) arose for consideration in *Cogeco* itself.

> …
> … ***U.S. programming is widely available*** in the English-language market ***from both Canadian and U.S. programming services***. …
> …
> …[M]any Canadians… stated that they are increasingly seeking out ***individual programs rather than programming services.*** …
> …
> The trend to targeted and customizable viewing experiences will continue as ***Canadian consumption of video content moves more and more from***:
>
> > ● scheduled and packaged ***programming services to on-demand and tailored programs***; …[25]

35. Accordingly, the text of s. 9(1)(h) is clear: it allows the CRTC to make distribution orders requiring that BDUs carry "programming services" on certain terms and conditions it sets. Section 9(1)(h) does not allow the CRTC to require that BDUs carry a specific program, or set terms and conditions for the carriage of a single program like the Super Bowl.

ii. The Statutory Context

a. "Programming Services" and "Programs" in the *Broadcasting Act*

36. The larger context of the *Broadcasting Act* confirms that Parliament intended to use this ordinary meaning of "programming services" in s. 9(1)(h), because "words, like people, take their colour from their surroundings".[26] Indeed, several other provisions in the statute distinguish "programming services" from "programs" or "programming", and make clear that these terms serve different purposes within the scheme of the Act.[27]

37. Section 3(1)(r), for instance, refers to the "programming" that is "***provided by***" a "programming service", and identifies what that programming should "***include***":

> 3 (1) It is hereby declared as the broadcasting policy for Canada that
> …
> (r) the ***programming provided by alternative television programming services should***
> …
> (ii) cater to tastes and interests not adequately provided for by the

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[25] BNC 2014-190, ¶15, 17, 28, 31 (and ¶114), JR Tab 14, *emphasis added*.
[26] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, ¶27 ("***Bell ExpressVu (SCC 2002)***"). **See also** *ATCO (SCC 2006)*, *supra* note 15, ¶48.
[27] *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, ¶27-36.

> programming provided for mass audiences, and ***include programming devoted to culture and the arts***,[28] [*emphasis added*]

38. As well, s. 3(1)(t)(i), uses the term "programming service" interchangeably with a television "***station***" or channel:

> 3 (1) It is hereby declared as the broadcasting policy for Canada that
>
> …
>
> (t) distribution undertakings
>
> (i) should give priority to the carriage of Canadian ***programming services and, in particular***, to the carriage of ***local Canadian stations***, [*emphasis added*]

39. Sections 3(1)(t)(ii) and (iii) also differentiate between the "programming" or shows that BDUs deliver to consumers, and the "programming services" containing them that BDUs carry under ***contracts*** with programming undertakings for entire channels, which is the same point this Court recognized in the *Cogeco* case quoted at paragraph 33 above:[29]

> 3 (1) It is hereby declared as the broadcasting policy for Canada that
>
> …
>
> (t) distribution undertakings
>
> …
>
> (ii) should provide efficient ***delivery of programming*** at affordable rates, using the most effective technologies available at reasonable cost,
>
> (iii) should, where ***programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements***, provide reasonable terms for the carriage, packaging and retailing of those programming services [*emphasis added*]

40. The *Broadcasting Act* thus uses the words "programming service" and "program" very differently. In contrast to a "programming service", the Act does not equate a "program" with the ***entire output*** of a programming undertaking, but with the ***individual shows*** that are transmitted during the broadcasting process. Pursuant to s. 2(1):

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[28] **See also** Canada, Department of Communications, *Canadian Voices, Canadian Choices: A New Broadcasting Policy for Canada* (Ottawa: Minister of Supply and Services Canada, 1988) at 33-35.

[29] **See also:** Government of Canada, Task Force on Broadcasting Policy, *Report of the Task Force on Broadcasting Policy* (Ottawa: Minister of Supply and Services Canada, 1986) at 192 (and 190-191) ("***Task Force Report (1986)***"), JA Tab 37; Canada, 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 73 ("***Sixth Committee Report (1987)***"), JA Tab 46.

> **broadcasting** ***means any transmission of programs***, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place; [*emphasis added*]

41. The *Broadcasting Act* even refers to "***a particular program***" in the "temporary network operator" definition in s. 2(1):

> **temporary network operation** means a network operation with respect to ***a particular program*** or a series of programs that extends over a period not exceeding sixty days. [*emphasis added*]

42. Tellingly, the Department of Communications said that this reference to "a particular program" in the "temporary network operator" definition was designed precisely to capture ***an individual sporting event*** like the Super Bowl when explaining the first *Broadcasting Act* bill:

> …The presence of ***this definition permits the CRTC*** to make use of a streamlined licensing process for temporary networks such as those set up, for example, ***to cover a championship sporting event*** like the World Series.[30]

43. It is evident from this that, had Parliament intended in s. 9(1)(h) to grant the CRTC authority to make distribution orders about a particular program, it would have said so expressly, like it did in the "temporary network operator" definition in s. 2(1) or s. 3(1). Parliament knew very well how to refer to a "program" instead of a "programming service", and did so directly in two other jurisdiction-conferring provisions of s. 9,[31] which "enric[h]" the meaning of s. 9(1)(h) itself:[32]

> 9 (1) Subject to this Part, the Commission may, in furtherance of its objects,
>
> …
>
> (b) issue licences for such terms not exceeding seven years and subject to such conditions related to the circumstances of the licensee
>
> …
>
> (ii) in the case of licences issued to the Corporation, as the Commission deems consistent with the provision, through the Corporation, of the ***programming*** contemplated by paragraphs 3(1)(l) and (m);
>
> …
>
> (f) require any licensee to obtain the approval of the Commission before entering into any contract with a telecommunications common carrier for the distribution of ***programming*** directly to the public using the facilities of that common carrier; [*emphasis added*]

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[30] Canada, Department of Communications, *The Broadcasting Act 1988: A Clause-by-Clause Analysis of Bill C-136* (Ottawa: Department of Communications, 1988), s. 2(1), *s.v.* "temporary network operation" ("***Clause-by-Clause Analysis (1988)***"), *emphasis added*, JA Tab 45.

[31] **See also** *Broadcasting Act*, ss. 10(1)(a)-(c), (e)-(f), (h)-(i).

[32] *Cogeco (SCC 2012)*, *supra* note 14, ¶29.

44. Rather than follow this pattern of language in s. 9(1)(h), Parliament chose to define the CRTC's authority there by using the term "programming ***services***", similar to the analogous carriage power it granted in the jurisdiction-conferring provision of s. 10(1)(g):

> 10 (1) The Commission may, in furtherance of its objects, make regulations
>
> …
>
> (g) respecting the carriage of any foreign or other ***programming services*** by distribution undertakings; [*emphasis added*]

45. The necessary inference is that the power to make distribution orders about "programming services" in s. 9(1)(h) cannot mean the power to make orders applicable to only an individual "program", as the CRTC held here. The "*Broadcasting Act* nowhere gives such a power expressly; and in view of the range of authority" it provides to the CRTC elsewhere, it cannot be implied.[33]

46. Interpreting the term "programming services" in s. 9(1)(h) as equivalent to a "program" would make Parliament's independent use of the term "program" in other provisions of the *Broadcasting Act* superfluous. Further, it would require holding that Parliament meant something different by "programming services" in s. 9(1)(h) than everywhere else in the *Broadcasting Act*, where the term is clearly distinguished from individual programs. This would simultaneously violate two fundamental precepts of statutory interpretation recently applied by this Court:

> …[I]t is a "well-accepted principle of statutory interpretation that ***no legislative provision should be interpreted so as to render it mere surplusage***"…
>
> ***Additionally***, Philip Morris's interpretation is caught by the "basic principle of statutory interpretation" that "***words [should be given] the same meaning throughout a statute***"…[34]

47. Accordingly, "[t]here is no reason to think that the legislature chose to use two different drafting techniques to achieve the same result in the same statute", and "[t]o conclude that it did so would be inconsistent with the presumption that a change in the term used to express a legal concept indicates a change in meaning and that a term generally retains the same meaning throughout a statute".[35] This Court unanimously emphasized that point in the *Agraira* judicial review:

> As the Court noted in ***Bell ExpressVu***… "[t]he preferred approach [to statutory interpretation] recognizes the ***important role that context must inevitably play*** when a court construes the written words of a statute"… The context of s. 34(2) provides much guidance for the interpretation of the term "national interest".

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[33] *Confederation Broadcasting (Ottawa) Ltd. v. C.R.T.C.*, [1971] S.C.R. 906 at 931 (and 917).
[34] *British Columbia v. Philip Morris International, Inc.*, 2018 SCC 36, ¶29-30, *emphasis added*.
[35] *Syndicat de la fonction publique du Québec v. Quebec (A.G.)*, 2010 SCC 28, ¶37.

> First, according to the presumption of consistent expression, ***when different terms are used in a single piece of legislation, they must be understood to have different meanings***. ***If Parliament has chosen to use different terms, it must have done so intentionally in order to indicate different meanings.*** The term "national interest" is used in s. 34(2), which suggests that what is to be considered by the Minister under that provision is broader than the considerations of whether the individual is "a danger to the security of Canada" (s. 34(1)(d)) or whether he or she "might endanger the lives or safety of persons in Canada" (s. 34(1)(e)), both of which appear in s. 34(1). ***If Parliament had intended*** national security and public safety to be the only considerations under s. 34(2), ***it could have said so using the type of language found in*** s. 34(1). ***It did not*** do so, however.[36]

b. The Governor in Council's Power Over "Any Program"

48. That Parliament did not intend to give the CRTC jurisdiction to make distribution orders in relation to individual "programs" as opposed to "programming services" in s. 9(1)(h) is reinforced by the fact that Parliament ***did*** expressly grant this power to the Governor in Council in s. 26(2):

> [26](2) Where the ***Governor in Council*** deems the broadcast of ***any program*** to be of ***urgent importance*** to Canadians generally or to persons resident in any area of Canada, the Governor in Council may, by order, direct the Commission to issue a notice to licensees throughout Canada or throughout any area of Canada, of any class specified in the order, ***requiring the licensees to broadcast the program*** in accordance with the order, and licensees to whom any such notice is addressed shall comply with the notice. [*emphasis added*]

49. Section 26(2) is thus another example, similar to the provisions discussed at paragraphs 41-43 above, of Parliament using words like "any program" ("toute émission") rather than "programming services" ("services de programmation") when conferring a power over individual programs in the *Broadcasting Act*. However, s. 26(2) is of particular importance within the scheme of the Act because it gives the Governor in Council the ***same power*** asserted by the CRTC, i.e., the ability to require that a specific program be broadcast to Canadians, in this case the U.S. version of the Super Bowl.[37]

50. The following features of s. 26(2) show that Parliament could not have intended to give the CRTC this important authority indirectly, via s. 9(1)(h), when it did so expressly for the Governor in Council using carefully tailored terms that deliberately exclude any similar role for the CRTC.

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[36] *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, ¶80-81, *emphasis added*. **See also:** *Canada (Canadian Human Rights Commission) v. Canada (A.G.)*, 2011 SCC 53 ¶37-38 ("***Mowat (SCC 2011)***"); *John Doe v. Ontario (Finance)*, 2014 SCC 36, ¶24, 53.

[37] House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-136*, 33rd Parl., 2nd Sess. ("**Bill C-136 Legislative Committee**"), No. 10 (30 August 1988) at 139-140 (Philip Palmer), JA Tab 56J.

51. ***First***, the power is given only to the Governor in Council, a ***democratically accountable body***, in reflection of the significant infringement it authorizes on freedom of expression. In contrast to the members of a subordinate agency like the CRTC, the constitutional principle of responsible government requires that the members of the Governor in Council, or "Cabinet", remain in office only for so long as they hold the confidence of Parliament:

> It is also a ***constitutional requirement*** that ***the person who is appointed prime minister***… and who is the effective head of the government ***should have the support of the elected branch of the legislature***; in practice this means in most cases the leader of the political party which has won a majority of seats at a general election. ***Other ministers are appointed by the Crown on the advice of the prime minister… when he forms or reshuffles his cabinet. Ministers must continuously have the confidence of the elected branch of the legislature, individually and collectively. Should they lose it, they must either resign or ask the Crown for a dissolution of the legislature and the holding of a general election***. Most of the powers of the Crown under the prerogative are exercised only upon the advice of the prime minister of the ***cabinet*** which means that they are effectively exercised by the latter, together with the innumerable statutory powers delegated to the ***Crown in council.***[38]

52. It is noteworthy that, when the *Broadcasting Act* bills were before Parliament, concerns were expressed that this power could permit "partisan" definitions of when an "urgent" broadcast was required, with some recommending that the power rest with the CRTC.[39] However, these "pleas… went unanswered", demonstrating that the scope of s. 26(2) "was specific and deliberate".[40] Rather than remove this power from the Governor in Council, Parliament accepted the competing view:

> ...***[T]he Coalition is concerned by the scope of the power of direction given to the government over the CRTC***. The Coalition fears, for instance, that it might be tempted, through the CRTC, to force on the CBC guidelines which would be incompatible with the principle of ***freedom of expression*** and independence of which we have just spoken.
>
> ***However, the Coalition is in favour of the government's directional or instructional powers over the CRTC, if only because the government is elected and must regularly answer to the***

---

[38] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 878, *emphasis added*. **See also:** *R. v. Arseneau*, [1979] 2 S.C.R. 136 at 149; *Blaikie v. Quebec (A.G.)*, [1981] 1 S.C.R. 312 at 320; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶68.

[39] *House of Commons Debates*, 33rd Parl., 2nd Sess., Vol. 14 (19 July 1988) at 17750 (Sheila Finestone), JA Tab 51A; Bill C-136 Legislative Committee, *supra* note 37, No. 6 (23 August 1988) at 29, 34-36 (Esther Désilets, Sheila Finestone, Edith Parizeau) , JA Tab 56F; House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-40*, 34th Parl., 2nd Sess. ("**Bill C-40 Legislative Committee**"), No. 9 (22 February 1990) at 13 (Keith Spicer), JA Tab 55C.

[40] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, ¶53 ("***SODRAC (SCC 2015)***"). **See also** *Cogeco (SCC 2012)*, *supra* note 14, ¶72-73.

> ***public for its actions and decisions, whereas the CRTC is an unelected regulatory body. That is an undeniable fact of democracy.***[41]

53. Thus, as a member of the Legislative Committee opined:

> I would like to go to the question of ***the power of direction***. You suggest that it does not arise out of any ***great matter of principle***. I suggest to you that, yes, it does. ***It is the principle of representative and responsible government.***
>
> …[I]f you examine the legislation and examine the history behind this principle you will find that ***it was at the initiative of parliamentarians that this was put in there.***
>
> …
>
> …[I]t would be the Governor in Council. In other words, ***it would be the Cabinet responsible to Parliament that would be doing the directing***, not just the Minister of Communications.[42]

54. ***Second***, the exclusive reservation of this power to the Governor in Council is confirmed by the fact that the prior 1968 *Broadcasting Act* granted the ***same*** authority to both it ***and the CRTC***:

> [18](2) ***The Executive Committee [of the CRTC] may*** from time to time ***and shall, in accordance with any direction to the Commission issued by the Governor in Council*** under the authority of this Act, by notice to all licensees throughout Canada or throughout any area of Canada specified in the notice, ***require the licensees to broadcast any program that the Executive Committee or the Governor in Council, as the case may be, deems to be of urgent importance*** to Canadians generally or to persons resident in the area to which the notice relates.[43] [*emphasis added*]

55. However, Parliament changed this provision in the current *Broadcasting Act* to grant the power ***only*** to the Governor in Council and to remove it from the CRTC. This reflected the grant of other new Cabinet powers designed "to ensure that there is some degree of accountability to the elected representatives of the people in the regulation of Canadian broadcasting"[44] (e.g., the power to issue directions of general application to the CRTC in s. 7),[45] along with the elevation of freedom of expression to a mandatory rule of interpretation in s. 2(3). In light of this, Parliament could not have intended to confer the same power upon the CRTC ***indirectly***, via s. 9(1)(h), particularly when the

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[41] Bill C-136 Legislative Committee, *supra* note 37, No. 9 (29 August 1988) at 25 (Robert Gagnon), *emphasis added*, JA Tab 56I.

[42] Bill C-40 Legislative Committee, *supra* note 39, No. 8 (21 February 1990) at 41-42 (Jim Edwards), *emphasis added*, JA Tab 55B. **See also** *House of Commons Debates*, 33rd Parl., 2nd Sess., Vol. 15 (20 September 1988) at 19739 (Jean-Robert Gauthier), JA Tab 51B.

[43] *Broadcasting Act*, S.C. 1967-68, c. 25, JA Tab 58. **See also** *Broadcasting Act*, R.S.C. 1985, c. B-9, s. 9(2), JA Tab 59.

[44] Bill C-136 Legislative Committee, *supra* note 37, No. 10 (30 August 1988) at 32 (Hon. Flora MacDonald), JA Tab 56J.

[45] *Clause-by-Clause Analysis (1988)*, *supra* note 30, s. 7, JA Tab 45.

courts had already interpreted the CRTC's power in s. 18(2) of the 1968 Act ***narrowly*** to prevent any interference in individual programs beyond that ***expressly*** set out (e.g., censorship).[46]

56. ***Third***, the s. 26(2) power is limited to programs that the Governor in Council deems to be of "***urgent importance***". This wording may be traced to the 1968 *Broadcasting Act*, where the original bill proposed that s. 18(2) apply to any program of "special significance".[47] Several Parliamentarians expressed concerns about the impact this draft language could have on freedom of expression,[48] with one noting that "section 18 clearly states that ***if they deem it of special significance to broadcast the Twilight Zone, then it will be broadcast***".[49] The provision was therefore changed to require that the programs be of "urgent importance", in order to better reflect Parliament's intent that it be limited to national emergencies like war.[50] Since being enacted in 1968, the power has only ever been used ***once***, to require that television networks carry the Prime Minister's plea for national unity on the eve of the Quebec referendum.[51] The less than 100 consumer complaints the CRTC received here expressing a desire to view the Super Bowl with U.S. ads cannot similarly rise to the level of a matter of "urgent importance", and in any event, is not a decision the CRTC has authority to make.

57. ***Fourth***, the power is constrained by strict procedural requirements in s. 26(3) that are absent in s. 9(1)(h), which are designed to enhance the Governor in Council's democratic accountability:[52]

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[46] *National Indian Brotherhood v. Juneau*, [1971] F.C.J. No. 42 (T.D.), ¶18, 20-21, 23, JA Tab 10; *Turmel v. C.R.T.C.*, 1983 CarswellNat 1372 (F.C.T.D.), ¶10, JA Tab 17; *Federal Liberal Agency of Canada v. CTV Television Network Ltd.*, [1989] 1 F.C. 319 (T.D.), ¶9, aff'd, [1988] F.C.J. No. 1220 (C.A.), leave to appeal refused, [1989] S.C.C.A. No. 23, JA Tab 6.

[47] Bill C-163, *Broadcasting Act*, 27th Parl., 2nd Sess. (First Reading, October 17, 1967), JA Tab 42.

[48] *House of Commons Debates*, 27th Parl., 2nd Sess., Vol. 4 (1 November 1967) at 3760 (R. Gordon L. Fairweather), Vol. 4 (3 November 1967) at 3885-3886 (Eric Nielsen), Vol. 4 (6 November 1967) at 3935 (L.M. Brand), JA Tab 50A, B, C.

[49] *House of Commons Debates*, 27th Parl., 2nd Sess., Vol. 4 (3 November 1967) at 3886 (Eric Nielsen), *emphasis added*, JA Tab 50B.

[50] House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Broadcasting, Films and Assistance to the Arts*, 27th Parl., 2nd Sess., No. 1 (14 November 1967) at 23 (Mr. Jamieson), No. 4. (23 November 1967) at 127 (Mr. Mcleave, Hon. Judy LaMarsh), No. 7 (15 December 1967) at 13, JA Tabs 57A, B, C.

[51] *Order Directing the CRTC to Issue a Notice to all Television Networks throughout Canada to Broadcast a Special Message from the Prime Minister*, P.C. 1995-1761, (1995) C. Gaz. II, 2986, S.O.R./95-503, JA Tab 32; P.S. Grant and G. Buchanan, *Canadian Broadcasting Regulatory Handbook, 2016*, 13th ed. (Toronto: McCarthy Tétrault LLP, 2016) at 50, JA Tab 34.

[52] *Debates of the Senate*, 34th Parl., 2nd Sess., Vol. 5 (19 December 1990) at 4946 (Sen. Atkins), JA Tab 48.

> [26](3) An order made under subsection (1) or (2) ***shall be published forthwith in the Canada Gazette and*** a copy thereof ***shall be laid before each House of Parliament*** on any of the first fifteen days on which that House is sitting after the making of the order. [*emphasis added*]

58. ***Fifth***, the power is exercised by the Governor in Council "***direct[ing] the Commission*** to issue a notice to licensees" to broadcast the program. However, s. 26(4) deliberately does not require that the Minister of Heritage ***consult*** with the CRTC about the substance of the order before issuing it, unlike the ***other*** orders the Governor in Council is empowered to give the CRTC under s. 26(1):[53]

> 26 (1) The Governor in Council may, by order, issue directions to the Commission…
> …
> (4) The Minister ***shall consult with the Commission with regard to any order*** proposed to be made by the Governor in Council ***under subsection (1)***. [*emphasis added*]

59. Accordingly, the CRTC cannot, under s. 9(1)(h), reasonably be found to possess the same power as the Governor in Council does in s. 26(2).

c. The CRTC's Own Prior Interpretations of "Programming Services"

60. The true ambit of the CRTC's authority in s. 9(1)(h), as a jurisdiction to make distribution orders applicable to entire television channels, rather than orders that target individual programs, reflects the interpretation repeatedly given to it by the CRTC itself before the commencement of this litigation. In *Mowat*, where this Court found the CHRC failed to adopt the only reasonable interpretation of its home statute, LeBel and Cromwell JJ. pointed to the inconsistency of the CHRC's decision with its own prior ones, stating that "this Court has permitted consideration of an administrative body's own interpretation of its enabling legislation" and confirming that this is "an important factor in case of doubt about the meaning of legislation".[54] These comments apply here.

61. The function of s. 9(1)(h), as traditionally understood by the CRTC, is to make orders requiring BDUs to distribute particular channels whose carriage the CRTC deems beneficial for the fulfilment of its policy objects, and to set terms and conditions for such carriage.[55] These "***9(1)(h)***

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[53] House of Commons, *Journals*, 33rd Parl., 2nd Sess., No. 381 (20 September 1988) at 3577-3578 (Mr. Riis), JA Tab 54; *House of Commons Debates*, 33rd Parl., 2nd Sess., Vol. 15 (20 September 1988) at 19425-19426 (Jean-Robert Gauthier), JA Tab 51B.

[54] *Mowat (SCC 2011)*, *supra* note 36, ¶53.

[55] *Distribution of Canadian Category C national news specialty services* – Broadcasting Order CRTC 2013-735, 19 December 2013; P.S. Grant and G. Buchanan, *Canadian Broadcasting*

services represent the services designated by the Commission under section 9(1)(h) of the Act to receive mandatory distribution on the basic service", and "[t]he current services provide, among other things, programming for Aboriginal peoples, OLMCs and persons with disabilities".[56] The CRTC explained this as recently as April, 2018:

> When Canadians buy television services from a BDU, there are ***certain channels (or programming services)*** that automatically come with the basic service package. A few of these channels ***are mandated by the Commission to be part of every Canadian's basic service package pursuant to section 9(1)(h)*** of the *Broadcasting Act* (the Act). [T]he Commission may also set a minimum rate that must be paid by the BDU to the programming service to distribute that service. …
> …
> … ***Currently, the following services have mandatory distribution*** on the basic service at the following per subscriber monthly wholesale rates:
>
> …
> ● ***CPAC***: $0.12
> …[57]

62. In fact, this is the example the CRTC gave in the CRTC Instruments of how s. 9(1)(h) is used:

> See… Public Notice 1999-27, in which ***the Commission issued a 9(1)(h) order requiring the distribution of TVA Group Inc.'s French-language television station on the basic service*** in a way that was not provided for in the *Broadcasting Distribution Regulations*.[58]

63. The CRTC's attempt to use this distribution power for programming services to impose a condition solely applicable to a single program is a significant departure from its own prior interpretations and applications of its s. 9(1)(h) authority. Until now, the CRTC has never made an order under s. 9(1)(h) requiring that BDUs carry a particular program, like the U.S. Super Bowl.

64. The unprecedented nature of the CRTC's interpretation here is underscored by the fact that it is ***contrary*** to the meaning the CRTC has given "programming services" in other contexts – like *Star Choice* – which raised much more difficult questions about its scope than this case.

Regulatory Handbook, 2016, 13th ed. (Toronto: McCarthy Tétrault LLP, 2016) at 35, 240-241, JA Tab 34.

[56] BNC 2014-190, ¶41, footnote 10, JR Tab 14, *emphasis added*. **See also** *BD Regulations*, ss. 17(1)(g), 41(1)(b), 46(1)(3)(b).

[57] *Applications for the renewal of services with mandatory distribution on the basic service pursuant to section 9(1)(h) of the Broadcasting Act* – Broadcasting Notice of Consultation CRTC 2017-365, 17 October 2017, p. 1-2, *emphasis added*.

[58] Third CRTC Decision, ¶47, footnote 8, JR Tab 1, *emphasis added*.

65. In *Star Choice*, the CRTC was asked to decide whether the Star Choice satellite BDU violated s. 7 of the *BD Regulations* – which prohibits BDUs from altering a "programming service" except in circumstances such as Sim Sub – when it compiled high-definition programs from various channels it distributed and aggregated them into an omnibus high-definition channel. Star Choice attempted to make the same argument the Court of Appeal accepted here,[59] i.e., that the definition of "programming service" in s. 1 of the *BD Regulations* "means a program", such that it was permitted to take programs from channels so long as it did not alter the individual programs themselves:

> …[T]he Star Choice opinion noted that ***the definition of "programming service" contained in the Regulations states that a "programming service means a program*** that is distributed by a licensee" and, although a program is not defined in the Regulations, the *Broadcasting Act* (the Act) refers to a program as "sounds or visual images, or a combination of sounds and visual images ." ***On this basis, the Star Choice opinion took the position that section 7 should be applied as a prohibition against altering or deleting individual programs, or television shows, offered on a programming service, rather than a prohibition against the alteration or deletion of the entire signal offered by the programming service.***[60]

66. However, this argument was rejected by the CRTC. Citing the same provisions of the *Broadcasting Act* as those discussed at paragraphs 37-39 above, the CRTC held that while the meaning of "programming services" was contextual, it could not mean an individual "program" in s. 7 of the *BD Regulations*, ***even though s. 1 of the BD Regulations – unlike the Broadcasting Act – expressly defines a "programing service" to mean a "program":***

> ***The position of Star Choice*** that it has the authority to distribute, on its omnibus channels, particular programs taken from programming services distributed on other channels ***is based, in part, on an interpretation of the word "program" in the definition of "programming service"*** to the effect that a programming service consists solely of a program, in the colloquial sense - that is, a television show.
>
> …
>
> ***The Act, in section 3(1)(t)(i), equates "programming services" to Canadian stations, that is, the entire broadcasting output of an undertaking. A similar use is found in section 3(1)(t)(iii).***
>
> …[S]ection 33(2) of the *Interpretation Act* states that, in any statute or regulation, "Words in the singular include the plural, and words in the plural include the singular." Accordingly, the Commission considers that "***programming service," depending upon the context in which it is used, may be taken to include all programs, i.e., the entire output transmitted by the operator of a programming undertaking for reception by the public.*** "Programming service" is used in the same sense… in many other sections of the Regulations. …[T]he Commission

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[59] Appeal Decision, ¶16-17, 19, 28, JR Tab 8.
[60] *Star Choice (CRTC 2015)*, *supra* note 19, ¶12, *emphasis added*.

> considers that ***the context in which the term "programming service" is used in section 7 makes it clear that the term refers to the entire output of an undertaking, and not part of it.***
>
> ***A contrary interpretation*** would defeat the Commission's intentions in making the Regulations… The novel interpretation proposed by Star Choice would allow operators of BDUs to dismantle a broadcasting undertaking's broadcast day and create new channels that have little resemblance to the ones received. This ***would defeat the BDU's primary function in the Canadian broadcasting system as a receiver and distributor of broadcasting and undermine broadcasters' ability to promote their brands and program schedules.***
>
> …
>
> …[T]he Commission finds that section 7 of the Regulations, which prohibits alteration or deletion of ***a programming service, pertains to the entire output transmitted by a programming service and includes all broadcasting material received by a BDU from that programming service, as received, for distribution to subscribers***. …[61]

67. Critically, the CRTC rejected the ***very same interpretation*** it purported to rely on in the CRTC Instruments here, i.e., that the term "programming service" may be construed to mean a service being broadcast only at a particular, finite time:

> The Commission considers that it is incorrect to interpret this definition to mean that a programming service is ***only a single television show, or only a particular show broadcast at a given time.***[62]

68. Despite the clear inconsistency with the CRTC's interpretation here, the CRTC did not even refer to *Star Choice* in the CRTC Instruments, even after receiving detailed submissions on this issue from the NFL. This reflects the unreasonableness of the CRTC Instruments, as *Star Choice* is directly applicable. Further, the CRTC's decision in this matter cannot be distinguished from *Star Choice* based on the sole reason offered by the Court of Appeal, i.e., that s. 1 of the *BD Regulations* defines a "programming service" to mean a "program". In fact, if that point were material, it would have applied with even ***greater force*** in *Star Choice* itself, because there the CRTC was actually interpreting the meaning of "programming services" ***in the BD Regulations themselves*** – where that definition applies directly – not in the *Broadcasting Act*, where the only issue is ***Parliament's*** intent.

69. Further, regulations are not determinative of the meaning of their enabling statute, particularly in a case like this where they are ***not tightly linked***.[63] The *BD Regulations* were made under s. 10 of the *Broadcasting Act*, not s. 9, and did not come into force until 1997, more than ***six years after*** the enactment of the *Broadcasting Act* in 1991. The subsequently enacted *BD Regulation*s cannot

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[61] *Ibid*, ¶25, 27-31, *emphasis added*.
[62] *Ibid*, ¶26, *emphasis added*.
[63] *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, ¶31. **See also** *Miln-Bingham Printing Co. Ltd. v. The King*, [1930] S.C.R. 282 at 283.

change the meaning of the *Broadcasting Act* or the CRTC's powers under it, particularly when the *Broadcasting Act* was never amended in response.

70. As well, the definition of "programming service" in s. 1 of the *BD Regulations* is inapplicable to many provisions in the *BD Regulations* themselves. These include not just s. 7 in *Star Choice*, but also the following other provisions that use "programming service" to refer to entire channels:

> 1 The definitions in this section apply in these Regulations.
>
> …
>
> **high definition service** means ***a programming service that provides any amount of its programming*** in high definition and includes a high definition version of a programming service.
>
> …
>
> **on-demand service** means a pay-per-view service, a video-on-demand service or any other ***programming service that provides programs*** that are accessed individually at the request of a subscriber.
>
> …
>
> **third-language service** means ***a programming service that provides at least 90% of its programming*** over the broadcast week in one or more languages other than English or French, exclusive of secondary audio programming and subtitles.
>
> …
>
> 27 (1) In this section, principal language means a language in which 40% or more of ***the programming of a programming service*** is provided over the course of a broadcast week. [*emphasis added*]

71. Finally, a regulation cannot be used to arrive at an interpretation of the statute it is made under that is inconsistent with the statute's broader legislative context.[64] This is underscored by s. 15(2) of the *Interpretation Act*, which provides that an interpretation section in an enactment, like s. 1 of the *BD Regulations*, only applies "if a contrary intention does not appear".

72. For the reasons given at paragraphs 36-63 above, the context of s. 9(1)(h) of the *Broadcasting Act* clearly demonstrates that the term "programming services" in that section cannot mean an individual "program". Numerous other provisions in the *Broadcasting Act* differentiate between these two concepts, and Parliament was careful to choose between them when conferring specific types of powers on the CRTC. Further, Parliament expressly granted a distribution order power over "any program" only to the democratically accountable Governor in Council, and only then in cases of "urgent importance", after having given it to both the Governor in Council ***and*** the CRTC in the

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[64] *Alberta (Solicitor General) v. C.J.*, 2011 ABQB 192, ¶45; *Zhang v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 882, ¶48.

former *Broadcasting Act*. To construe "programming services" in s. 9(1)(h) as giving the same power to the CRTC *sub silento* would frustrate Parliament's intent, and even more so than in *Star Choice* "defeat the BDU's primary function in the Canadian broadcasting system as a receiver and distributor of broadcasting and undermine broadcasters' ability to promote their brands and program schedules".

73. Therefore, while "programming services" may have a contextual meaning in CRTC regulations and is used by it to refer to a "program" in some instances there – as in ss. 3-5 of the *Sim Sub Regulations* – it cannot have that meaning in the context of s. 9(1)(h) of the *Broadcasting Act*. This is also confirmed by the legislative history and purposes discussed below.

iii. The Legislative Purpose

a. Legislative History of s. 9(1)(h)

74. In *Mowat*, this Court recognized that "[t]he legislative evolution and history of a provision may often be important parts of the context to be examined as part of the modern approach to statutory interpretation", including "material relating to the conception, preparation and passage of the enactment" such as government reports, Parliamentary debates and legislative committees.[65]

75. The 1968 *Broadcasting Act* that preceded the current one in 1991 gave limited licensing powers to the CRTC, and no express authority over the carriage of programming services by BDUs.[66]

76. The government reports that led to the new *Broadcasting Act* recommended that the CRTC's licensing powers be expanded, partly because – unlike its regulation-making powers – licensing orders allow it to address individual circumstances.[67] However, this was recommended only so that the CRTC could "adjust its requirements for each ***undertaking***", and make orders "appropriate to the circumstances of individual ***licensees***".[68] The purpose of the CRTC's new licensing powers in s. 9 was not to target the individual ***programs*** that licensees broadcast.

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[65] *Mowat (SCC 2011)*, *supra* note 36, ¶43-44, 63. **See also:** *R. v. Lavigne*, 2006 SCC 10, ¶9; *H.J. Heinz Co. of Canada Ltd. v. Canada (A.G.)*, 2006 SCC 13, ¶22-24, 34; *Cogeco (SCC 2012)*, *supra* note 14, ¶75.

[66] *Broadcasting Act*, R.S.C. 1985, c. B-9, ss. 6-7, JA Tab 59.

[67] *Task Force Report (1986)*, *supra* note 29, at 191, JA Tab 37.

[68] *Sixth Committee Report (1987)*, *supra* note 29, at 93, JA Tab 46; **See also:** Canada, House of Commons Standing Committee on Communications and Culture, *Fifteenth Report to the House: A Broadcasting Policy for Canada* (Hull, Quebec: Queen's Printer for Canada, 1988) at 106 ("***Fifteenth Committee Report (1988)***"), JA Tab 47; Canada, Department of Communications,

77. Further, with respect to s. 9(1)(h) specifically, the legislative history is clear that the purpose of the provision was to allow the CRTC to require that BDUs carry Canadian ***television channels*** over U.S. ones – which were repeatedly referred to as "programming services" in both the government reports,[69] and by the Minister and Deputy Minister of Communications in Parliament[70] – not make orders about individual ***programs***. This was done in order to fill the gap in the 1968 *Broadcasting Act* noted above, i.e., the CRTC's lack of an express power to regulate the carriage of channels by BDUs, and to avoid conflicts of interest by ensuring that BDUs who were also involved in programming did not prefer their own services to those of other programming undertakings:[71]

> …[N]othing is more important to broadcasting policy than the principles and regulations governing ***the channels that cable television and other distribution undertakings are required or permitted to carry***. For cable television, these regulations represent obligations that ***are parallel in their importance to the Canadian content requirements that apply to individual licensed broadcasters***. …
>
> …The Act contains no clear basis for regulating cable and other distribution undertakings. …***[J]ust as it is appropriate and important to establish a basis for requiring that licensed broadcasters give priority to carrying Canadian programs, it is at least as important to establish a legislative basis for requiring that distribution undertakings give priority to carrying Canadian stations and networks.*** …
>
> The importance of this aspect of cable policy, particularly as it affects ***satellite-to-cable television services***, was emphasized by the Minister of Communications… [who] noted that "The new generation of satellite delivered services ***depend on cable distribution to reach their audiences***" and that "***cable can act either as a gateway for exciting new services or it can close the door on them***." The Committee shares the Minister's concern…
>
> … The CCTA agreed that… ***it makes sense for the CRTC to require that cable operators not carry foreign satellite-to-cable services such as Home Box Office or ESPN if there is a***

Government Response to the Fifteenth Report of the Standing Committee on Communications and Culture: A Broadcasting Policy for Canada (Ottawa: Department of Communications, 1988) at 95-96, ("***Fifteenth Committee Response (1988)***"), JA Tab 44.

[69] *Sixth Committee Report (1987)*, *supra* note 29, at 71-73, JA Tab 46; *Fifteenth Committee Report*, *supra* note 68, at 95-96, 98-101, 176-177, JA Tab 47.

[70] Bill C-136 Legislative Committee, *supra* note 37, No. 1 (10 August 1988) at 37 (Hon. Flora MacDonald), No. 10 (30 August 1988) at 87 (Hon. Flora MacDonald), JA Tab 56A, J; Bill C-40 Legislative Committee, *supra* note 39, No. 2 (31 January 1990) at 25-26 (Hon. Alain Gourd), JA Tab 55A; *House of Commons Debates*, 34th Parl., 2nd Sess., Vol. 12 (4 December 1990) at 16224 (Hon. Marcel Masse), JA Tab 52B. **See also** Bill C-136 Legislative Committee, *supra* note 37, No. 7 (24 August 1988) at 23-24 (Jean-Pierre Mongeau), JA Tab 56G.

[71] Bill C-136 Legislative Committee, *supra* note 37, No. 1 (10 August 1988) at 27 (Hon. Flora MacDonald), No. 5 (18 August 1988) at 38-39 (Jim Caldwell, Murray Chercover), No. 10 (30 August 1988) at 89 (Hon. Flora MacDonald, Jeremy Kinsman), JA Tabs 56A, E, J.

> ***licensed Canadian equivalent***.
>
> …
>
> …***[T]he Act should be drafted so as to provide authorization for the Commission to establish any conditions respecting the carriage of programming services*** that are necessary to further the objectives of the Act.
>
> **Recommendation 57**
>
> The Commission should continue to ***have the power to establish conditions respecting the carriage of programming services by distribution undertakings***.[72]

78. Thus, the Department of Communications said of s. 9(1)(h) in the first *Broadcasting Act* bill:

> ***This clause*** provides a clear statutory basis for the Commission's priority carriage regulations (already enacted in the Cable Regulations). The 1968 Act was silent on such a power. It would also ***allow the CRTC to require carriage of a particular service such as, for example, TV-5, a second CBC service, or the alternative programmer.***[73]

79. The Department also linked s. 9(1)(h) to "***licensed*** programming services", which cannot mean individual shows like the Super Bowl since they are not licensed under the *Broadcasting Act*:

> ***The new Bill provides for a package of measures to ensure that conflicts of interest*** can be resolved in the public interest and ***will not be detrimental to the interests of licensed Canadian programming services.*** The expectations of distribution undertakings in clause 3.1(q)(iii) [now s. 3(1)(t)(iii)] requires them to provide reasonable access. … ***Under clause 9.(1)(h), the CRTC can require carriage of specified services***.[74]

80. Accordingly, Parliament clearly intended that s. 9(1)(h) be used by the CRTC to regulate the television channels that BDUs distribute, not the individual programs carried within those channels.

b. Freedom of Expression and the Purposes of the *Broadcasting Act*

81. The CRTC's contrary interpretation must be rejected as "too great a stretch from the core purposes intended by Parliament"[75] under the *Broadcasting Act* and the freedom of expression it guarantees subject only to the democratically accountable Governor in Council in urgent cases.

82. This Court has repeatedly emphasized that "Canada's broadcasting policy… evinces a decidedly ***cultural*** orientation".[76] As Rothstein J. stated in *Cogeco*:

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[72] *Sixth Committee Report (1987)*, *supra* note 68, at 77-78, *emphasis added*, JA Tab 46. **See also:** *Fifteenth Committee Report (1988)*, *supra* note 68, at 182-184, 217, JA Tab 47; *Fifteenth Committee Response (1988)*, *supra* note 68, at 89, JA Tab 44.
[73] *Clause-by-Clause Analysis (1988)*, *supra* note 30, s. 9(1)(h), *emphasis added*, JA Tab 45.
[74] *Fifteenth Committee Response (1988)*, *supra* note 68, at 27 (and 56, 90), *emphasis added*, Tab 44.
[75] *Cogeco (SCC 2012)*, *supra* note 14, ¶33.
[76] *Bell ExpressVu (SCC 2002)*, *supra* note 26, ¶47 *emphasis added*.

> … ***The Broadcasting Act has a primarily cultural aim***. ...[T]he objectives of the *Broadcasting Act*, declared in s. 3(1), when read together, ***target "the cultural enrichment of Canada,*** the promotion of Canadian content, establishing a high standard for original programming, and ***ensuring that programming is diverse***"…[77]

83. The fundamental purpose of the *Broadcasting Act* is therefore to ensure that the Canadian broadcasting system – which "provides, through its ***programming***, a public service ***essential to the maintenance and enhancement of national identity and cultural sovereignty***"[78] – facilitates the free expression of a diverse and culturally enriching array of programs. This is evident throughout s. 3(1):

> 3 (1) It is hereby declared as the broadcasting policy for Canada that
>
> …
>
> (d) the Canadian broadcasting system should
>
> …
>
> (ii) ***encourage the development of Canadian expression by providing a wide range of programming*** that reflects Canadian attitudes, opinions, ideas, values and artistic creativity…
>
> …
>
> (i) the ***programming*** provided by the Canadian broadcasting system should
>
> (i) ***be varied and comprehensive***, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes,
>
> …
>
> (iv) provide a reasonable opportunity for the public to be ***exposed to the expression of differing views*** on matters of public concern… [*emphasis added*]

84. To achieve this goal, "[t]he Act makes it clear that ***'broadcasting undertakings' are assumed to have some measure of control over programming***".[79] Indeed, s. 3(1)(h) expressly provides that "all persons who are licensed to carry on ***broadcasting undertakings have a responsibility for the programs they broadcast***", in contrast to s. 36 of the *Telecommunications Act*, which states that "[e]xcept where the Commission approves otherwise, ***a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications*** carried by it for the public".

85. Parliament went to great effort to emphasize this, stating in s. 2(3) of the *Broadcasting Act*:

> [2](3) ***This Act shall be construed and applied*** in a manner that is ***consistent with the freedom of expression and*** journalistic, ***creative and programming independence enjoyed by broadcasting undertakings.*** [*emphasis added*]

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[77] *Cogeco (SCC 2012)*, *supra* note 14, ¶32, *emphasis added*.
[78] *Broadcasting Act*, s. 3(1)(b), *emphasis added*.
[79] *ISP Reference (SCC 2012)*, *supra* note 24, ¶4, *emphasis added*.

86. Accordingly, "[s]ince 1991, the amendments to the new *Broadcasting Act* have the effect of strengthening the rights of the broadcasters to enjoy freedom of expression",[80] with "Parliament recogniz[ing] that the broadcast media must be free from government interference – a touchstone of a democratic society".[81] In introducing the second *Broadcasting Act* bill on Second Reading, the Minister of Communications heralded s. 2(3) as one of the "major improvements over the 1968 Act",[82] elevating what had previously been a mere policy declaration in s. 3(c) – where it was "subject" to the CRTC's own instruments,[83] along with its authority over individual programs in s. 18(2) – into a mandatory rule of statutory construction that gives "explicit recognition of freedom of expression and of journalistic, creative and programming independence".[84]

87. Further, the First Reading of the first bill originally proposed that s. 2(3) read as follows:

> 2(3) ***Nothing in this Act shall be construed as requiring any person to obtain the approval of the Commission for the broadcasting of any particular program***.[85]

88. This draft wording – which included commercials in a "program",[86] like s. 2(b) of the *Charter*[87] – runs directly contrary to the CRTC's interpretation here. Despite this, it was viewed as providing even ***weaker*** protection for freedom of expression than s. 2(3) as ultimately enacted.[88]

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[80] *Natural Law Party of Canada v. Canadian Broadcasting Corp.*, [1994] 1 F.C. 580 at 586-587 (T.D.), ¶18, JA Tab 12.
[81] *National Party of Canada v. Canadian Broadcasting Corp.*, [1993] A.J. No. 677 (Q.B.), ¶24 (and ¶18), aff'd, [1993] A.J. No. 715 (C.A.), ¶2, leave to appeal refused, [1993] S.C.C.A. No. 369, JA Tab 11.
[82] *House of Commons Debates*, 34th Parl., 2nd Sess., Vol. 4 (3 November 1989) at 5548 (Hon. Marcel Masse), JA Tab 52A.
[83] *House of Commons Debates*, 27th Parl., 2nd Sess., Vol. 6 (24 January 1968) at 5915 (Mr. Nugent), Vol. 6 (25 January 1968) at 5978 (Mr. Cowan), JA Tabs 50D, E; *Capital Cities Communications Inc. v. C.R.T.C.*, [1978] 2 S.C.R. 141 at 167-168; *R. v. CKOY Ltd.*, [1979] 1 S.C.R. 2 at 15.
[84] *House of Commons Debates*, 34th Parl., 2nd Sess., Vol. 4 (3 November 1989) at 5548 (Hon. Marcel Masse), JA Tab 52A.
[85] Bill C-136, (First Reading, June 23, 1988), JA Tab 40. **See also** *Mowat (SCC 2011)*, *supra* note 36, ¶44 ("***[T]here is no reason to exclude proposed, but unenacted, provisions to the extent they may shed light on the purpose of the legislation***").
[86] Bill C-136 Legislative Committee, *supra* note 37, No. 8 (25 August 1988) at 14-16 (Sheila Finestone, Pierre Juneau), No. 10 (30 August 1988) at 55 (Ian Waddell, Hon. Flora MacDonald, Sheila Finestone), JA Tabs 56H, J.
[87] *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 957, 968-969.
[88] Bill C-136 Legislative Committee, *supra* note 37, No. 1 (10 August 1988) at 29-31, JA Tab 56A.

89. The weaker language in the draft s. 2(3) was introduced on the theory that the new freedom of expression guarantee in the *Charter* for "the press ***and other media of communication***" made the express reference to it in the *Broadcasting Act* ***unnecessary*** for all broadcasters except the Canadian Broadcasting Corporation ("**CBC**") given its relationship to the government.[89] However, the provision was changed to its enacted form on Third Reading of the first bill,[90] based on the report of the Legislative Committee to which it had been referred,[91] before whom numerous parties objected to the absence of a freedom of expression guarantee for private broadcasters.[92] These parties complained of "Draconian limitations" on programming content proposed by the CRTC,[93] and recommended that the freedom of expression be guaranteed directly in the *Broadcasting Act* so that it could not be limited under s. 1 of the *Charter*.[94] As the President of the CBC testified:

> …[W]e have drawn attention to a change of wording in the new bill that could interfere with the broadcaster's time-honoured right to freedom of expression. The present act states that
>
> > the right to ***freedom of expression*** and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestionable.
>
> In the new bill this section appears to have been replaced by ***much weaker language*** which provides that
>
> > ***Nothing in this Act shall be construed as requiring any person to obtain approval of the Commission for the broadcasting of any particular program***.
>
> Prior approval of the commission? We would hope, indeed, that nobody would have to obtain such approval.

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[89] *Clause-by-Clause Analysis (1988), supra* note 30, ss. 2(3), 34(2), 45(4), 51(1), JA Tab 45. **See also** *Broadcasting Act*, ss. 35(2), 46(5), 52(1).

[90] Bill C-136, (Third Reading, September 28, 1988), JA Tab 41. **See also** Bill C-136 Legislative Committee, *supra* note 37, No. 10 (30 August 1988) at 3, 12, 58-59 (Roger Clinch, Sheila Finestone, Hon. Flora MacDonald), JA Tab 56J.

[91] House of Commons, *Journals*, 33rd Parl., 2nd Sess., No. 374 (31 August 1988) at 3497, JA Tab 53.

[92] Bill C-136 Legislative Committee, *supra* note 37, No. 2 (11 August 1988) at 34 (Elmer Hildebrand), No. 3 (16 August 1988) at 13-14 (Sheila Finestone, Garry Neil), No. 4A (17 August 1988) at 10 , No. 5 (18 August 1988) at 22 (Murray Chercover, John Coleman), No. 6 (23 August 1998) at 132 (Sheila Finestone, André Bureau); No. 7 (24 August 1988) at 10 (Ian Waddell, J.R. Peters, Grant Buchanan), JA Tabs 56B, C, D, E, F, G; *House of Commons Debates*, 33rd Parl., 2nd Sess., Vol. 15 (20 September 1988) at 19676 (Sheila Finestone), JA Tab 51B. **See also** Bill C-40 Legislative Committee, *supra* note 39, No. 9 (22 February 1990) at 31-32 (Keith Spicer), Tab 55C.

[93] Bill C-136 Legislative Committee, *supra* note 37, No. 2 (11 August 1988) at 40 (Michael McCabe), JA Tab 56B.

[94] Bill C-136 Legislative Committee, *supra* note 37, No. 8 (25 August 1988) at 30-31 (Ian Waddell, Pierre Juneau, Jacques Alleyn), JA Tab 56H.

> ***The problem with this wording is that it would not preclude, it seems to us, the possibility of the commission intruding into the substance of individual programs by regulation***. We must remember… that ***if such powers exist then someone someday, irrespective of the attitude of the commission, will insist that they be used***.
> …
> … We do not mean 50% or 60% Canadian content, or 30% on radio; that sort of thing. We agree with that. ***It is the substance of programs.*** As you know, in Canadian society today, and in other societies, ***there is a trend to return to old forms of censorship under new vocabulary. Pressures are exerted on the CRTC to that effect.*** We have demonstrations of that from the letters ***we get from the CRTC***. We have ***long letters asking us to defend why a radio program had the following script, and so on and so forth***. …[95]

90. In responding to this testimony, the Legislative Committee member primarily responsible for changing the language of proposed s. 2(3) to that ultimately enacted in the *Broadcasting Act* stated:

> ***You bring out a totally new dimension*** in your brief that was not mentioned before. You talk about the fact that ***the problem with the wording in subclause 2.(3) is that it would not preclude the possibility of the commission, under pressure from various groups in society, from intruding into program content, other than by means of general applicable regulations.***[96]

91. Parliament therefore clearly intended that broadcasting undertakings remain free to determine for themselves the individual programs they broadcast to Canadians, subject to general standards the CRTC promulgates for all programs *en masse*. Parliament did not intend that the CRTC, a subordinate agency, should have the Orwellian power to reach down into the specific shows that broadcasters create and decide which ones are worthy of distribution to the public. Instead, insofar as ***programs*** rather than "programming services" in s. 9(1)(h) are concerned, it only gave the CRTC authority to set ***general*** standards for ***all*** programs through its regulation-making power in s. 10.[97]

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[95] Bill C-136 Legislative Committee, *supra* note 37, No. 8 (25 August 1988) at 9-10, 36 (and 17-18) (Pierre Juneau), *emphasis added*, JA Tab 56H.
[96] *Ibid*, at 15 (Sheila Finestone), *emphasis added*, JA Tab 56H.
[97] The application of these general regulatory standards may, of course, produce consequences which differ between individual programs: *Nottinghamshire County Council v. Secretary of State for the Environment*, [1986] A.C. 240 (H.L.) at 266, per Lord Templeman, JA Tab 15. For instance, if a BDU broadcasts a specific program that fails to comply with the obscenity standards in s. 8(1)(c) of the *BD Regulations*, the CRTC can issue a mandatory order prohibiting it ***under s. 12(2)*** of the *Broadcasting Act*. However, that is a power exercised to enforce the CRTC's general regulation-making authority in s. 10, not an order directly targeting a single program under s. 9(1)(h).

92. However, the assertion of a power to determine the individual programs that broadcasting undertakings distribute is the very consequence of the CRTC's interpretation here. While the CRTC Order requires that BDUs distributing the Canadian Super Bowl also distribute the unaltered U.S. version on every applicable U.S. station they offer, which is something BDUs would be required to do for all programs were it not for the *Sim Sub Regulations*,[98] it does so by ***targeting a single program*** under s. 9(1)(h) and excluding it from the generally applicable Sim Sub regime in its entirety. The necessary implication is that the CRTC can make ***any*** distribution order against a program via s. 9(1)(h), as the Attorney General conceded below:

> Justice Near: ***So, in your view, they could also use 9(1)(h) to prohibit a particular channel from carrying a particular program altogether***…
> …
> Mr. Morris: Um, I would say, ***the answer's yes. They can***. I'd reconsider and see why I'm wrong and let you know. But, at the moment, I'd say yes. ***There is no limitation to what they can do under that power in relation to a term and condition.***[99]

93. In fact, the CRTC did not just use s. 9(1)(h) to dictate the distribution of a specific ***program*** – NFL football – it did so for a specific ***episode*** of that program, the Super Bowl, and then for a specific ***segment*** of that episode, stating that "the distribution order will not apply to pre- and post-Super Bowl game components" such as "the singing of the national anthem or the trophy presentation ceremonies".[100] The CRTC has thus arrogated to itself the power to ***rewrite the very content*** of the programs that broadcasters distribute according to its own arbitrary likes and dislikes.

94. This cannot be reconciled with the purposes of the *Broadcasting Act* and the guarantee of freedom of expression in s. 2(3). Television is one of the single largest platforms of expression in modern society, reaching millions of Canadians.[101] If the CRTC can use s. 9(1)(h) to require that BDUs televising the Canadian Super Bowl program on one channel also televise the U.S. Super Bowl program on another, there is nothing to stop it from relying on s. 9(1)(h) to order that any program it chooses be televised, or that any portion of a program it chooses be deleted or replaced with another. In the words of the Parliamentarian who objected to such a power when it was actually

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[98] *BD Regulations*, s. 7.
[99] FCA Transcript Excerpt, Exhibit "A", Atwell Affidavit, JR Tab 26, p. 143, *emphasis added*.
[100] Third CRTC Decision, ¶65-66, JR Tab 1, *emphasis added*.
[101] BNI 2013-563, p. 1, JR Tab 13; BNC 2014-190, ¶13, JR Tab 14.

proposed for the CRTC in the 1968 Act, "***if they deem it of special significance to broadcast the Twilight Zone, then it will be broadcast***".[102]

95. In the end, there is no genuine ambiguity here. The CRTC's interpretation of s. 9(1)(h) is simply unreasonable.

C. The CRTC Did Not Intelligibly Justify Its Interpretation

96. The CRTC Instruments must also be set aside because they do not intelligibly justify its interpretation of s. 9(1)(h). As discussed at paragraph 21 above, the only rationale offered by the CRTC for why it could target the Super Bowl under s. 9(1)(h) is that "the wording of the proposed order" speaks of a "programming service" and requires that "the entire output of the programming service of a television station will not be deleted and substituted for the Super Bowl, a particular program". This contrived interpretation of the CRTC's s. 9(1)(h) authority with respect to programming services was clearly designed to justify its end goal of banning Sim Sub for only a single program. It simply ignores the textual, contextual and purposive considerations outlined above and the clear limits Parliament placed on the CRTC's authority under s. 9(1)(h), despite the fact that the CRTC received extensive submissions on this issue from the parties.

97. Further highlighting the unreasonableness of the CRTC Instruments, the CRTC's strained interpretation of s. 9(1)(h) squarely contradicts what the CRTC itself recognized in *Star Choice*, as discussed at paragraph 67 above: that it is nonsensical to speak of the "***entire***" output of a television station for "only a single television show, ***or only a particular show broadcast at a given time***".

98. It is plain that the CRTC's reasons are simply an attempt to do indirectly what it could not intelligibly justify doing directly under s. 9(1)(h), and should therefore be set aside by this Court. The majority's comments in *Cogeco*, rejecting a similar tactic by the CRTC in that case, apply here by analogy as well:

> My colleagues assert that there are functional differences between copyright and the proposed regulatory scheme. With respect, the differences that they point to ***do not alter the fundamental functional equivalence*** between the proposed regime and a copyright. Section 21 of the *Copyright Act* empowers broadcasters to prohibit the retransmission of their signals if certain conditions are met; the value for signal regime ***does exactly the same thing***. My colleagues are correct that the CRTC cannot, through the value for signal regime, amend s.

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[102] *House of Commons Debates*, 27th Parl., 2nd Sess., Vol. 4 (3 November 1967) at 3886 (Eric Nielsen), *emphasis added*, JA Tab 50B.

> 21 of the *Copyright Act*. However that is precisely what the proposed regime does. Parliament could have imposed conditions that are the same, or similar to the value for signal regime in s. 21 in the same way it imposed limits in s. 31 on the copyright it granted in respect of retransmission of works, had it intended broadcasters to have such a right. ***Describing this new right granted to broadcasters under the value for signal regime as a series of regulatory changes does not alter the true character of the right being created***. Not calling it copyright does not remove it from the scope of s. 89. ***If that type of repacking was all that was required, s. 89 would not serve its intended purpose*** of restricting the entitlement to copyright to grants under and in accordance with Acts of Parliament.[103]

D. Section 4(3) of the *Sim Sub Regulations* Is Irrelevant

99. The Court of Appeal also said the CRTC "exempt[ed] the Super Bowl from the simultaneous substitution regime under subsection 4(3) of the *Sim Sub Regulations*",[104] which provides:

> [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.*** [*emphasis added*]

100. This provision is irrelevant, because the CRTC did ***not*** rely on it to make the CRTC Instruments. Instead, it made the CRTC Instruments solely under s. 9(1)(h) of the *Broadcasting Act*: see paragraphs 18-20 above. The only reason the CRTC referred to s. 4(3) was to respond to Bell's ***alternative*** argument that the CRTC Instruments conflict with the *Sim Sub Regulations*.[105]

101. In response to questions at the hearing of the appeal, counsel for Bell and the NFL stated that they would have challenged the validity of s. 4(3) had it been relied on by the CRTC as the basis for the CRTC Instruments. Should the Court find this provision relevant and capable of being raised on appeal, the following are the reasons why the CRTC Instruments cannot be saved by s. 4(3).

102. In *Verdun*, this Court held that an administrative body given the authority to make delegated legislation, like the CRTC under s. 10 of the *Broadcasting Act*, cannot promulgate a regulation that confers an unfettered discretion, since this transforms the regulatory power into a discretionary one:

> The mere reading of section 76 is sufficient to conclude that in enacting it, ***the City did nothing in effect but to leave ultimately to the exclusive discretion of the members of the Council*** of the City, for the time being in office, ***what it was authorized by the provincial Legislature***, under section 426, ***to actually regulate by by-law.*** Thus, section 76 effectively ***transforms an authority to regulate by legislation into a mere administrative and discretionary power*** to cancel by resolution a right which, untrammelled in the absence of

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[103] *Cogeco (SCC 2012)*, *supra* note 14, ¶82, *emphasis added*.
[104] Appeal Decision, ¶25, JR Tab 8, *emphasis added*.
[105] Third CRTC Decision, ¶45-46, JR Tab 1. **See also** Appeal Decision, ¶12, 14, 27, JR Tab 8.

> any by-law, could only, in a proper one, be regulated. ***This is not what section 426 authorizes***… [O]nce exercised, ***the delegated right to regulate***, in the matters mentioned in paragraph 1 of section 426, ***is to be maintained at the legislative level and not to be brought down exclusively within the administrative field***, as it was in the present instance.[106]

103. Justice Laskin (as he then was) reiterated this point for the Court in *Brant Dairy*:

> A statutory body which is empowered to do something by regulation does not act within its authority by simply repeating the power in a regulation in the words in which it was conferred. That evades exercise of the power and, indeed, ***turns a legislative power into an administrative one***. ***It amounts to a redelegation by the Board to itself in a form different from that originally authorized… [T]his is illegal***…
>
> In the *Brent* case… [t]his was held to be an invalid subdelegation; it ***converted the required reflection in a regulation of the opinion of the Governor in Council into an unregulated exercise from time to time of the opinion of a special inquiry officer.***
>
> The principle is the same here. ***The Board was required to legislate by regulation. Instead, it has purported to give itself random power to administer as it sees fit without any reference point in standards fixed by regulation***.[107]

104. This is precisely the effect of s. 4(3) of the *Sim Sub Regulations* here, had it been relied on by the CRTC to support its jurisdiction to make the CRTC Order. It purports to allow the CRTC to pick and choose when to allow and when to prohibit Sim Sub at its discretion for any individual program, series of programs or programming service, based on nothing more than the CRTC's own unfettered view of what is in the "public interest". Because the "regulation appear[s] to leave the matter entirely to the Commission and ***[does] not direct it to receive any particular means of demonstrating the public interest***… ***[it] closely resembles the void regulation in the Brant Dairy case***".[108] As McLachlin J. (as she then was) held for this Court in the freedom of expression case of *Zundel*:

> … ***It is difficult to see how a broad, undefined phrase such as "public interest" can on its face constitute a restrained, appropriately limited measure*** which impairs the right infringed to the minimum degree consistent with securing the legislation's objectives. … ***The interpretation given to "public interest" in this case may not have been objectionable. But that is not the issue*** in determining whether a legislative restriction of rights is overbroad. The issue is whether ***the provision permits the state to restrict constitutional rights in circumstances and ways that may not be justifiable. The vague and broad wording of s. 181 leaves open that possibility.***[109]

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[106] *City of Verdun v. Sun Oil Co.*(1951), [1952] 1 S.C.R. 222 at 229, *emphasis added*.
[107] *Brant Dairy Co. v. Milk Commission of Ontario* (1972), [1973] S.C.R. 131 at 146-147, *emphasis added*.
[108] *C.E. Jamieson & Co. (Dominion) v. Canada (Attorney General),* [1988] 1 FC 590 (T.D.), ¶117, *emphasis added*.
[109] *R. v. Zundel*, [1992] 2 S.C.R. 731 at 769-770, *emphasis added*.

105. Similarly, in *Sparrow*, Dickson C.J.C. and La Forest J. said for the unanimous Court:

> ***The Court of Appeal below held… that regulations could be valid if reasonably justified*** as "necessary for the proper management and conservation of the resource or ***in the public interest***". … ***We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable*** as a test for the justification of a limitation on constitutional rights.[110]

106. Further, the record is clear that the CRTC ***deliberately*** enacted s. 4(3) in these broad terms to grant itself an unfettered discretion. The old Sim Sub provisions in the *BD Regulations* only allowed the CRTC to prohibit Sim Sub in the "public interest" where ***additional specified criteria*** were met, as with numerous other regulations that confer public interest powers on administrative bodies:[111]

> [38](4) A licensee shall not delete the programming service of a television station under subsection (2) if the Commission notifies the licensee that the deletion is ***not in the public interest because***
>
> > (a) ***undue financial hardship would result*** for the operator of the television station; or
> >
> > (b) the programming service to be deleted contains subsidiary signals designed to inform or entertain and ***the programming service to be substituted for it does not contain similar signals.***
>
> …
>
> [51](3) A licensee shall not delete a programming service if the Commission notifies the licensee that the deletion is ***not in the public interest because*** the programming service to be deleted contains subsidiary signals that are designed to inform or entertain and ***the simultaneously broadcast programming service does not contain similar signals.*** [*emphasis added*]

107. However, the CRTC removed these limits on its public interest discretion to give itself an "open-ended" power exercisable on a "case-by-case" basis, contrary to *Brant Dairy* and *Verdun*:

> Regarding the term "not in the public interest," the current simultaneous substitution regime set out in ***sections 38 and 51 of the Broadcasting Distribution Regulations*** already provides that the Commission may order that simultaneous substitution not be performed where it finds that to do so would not be in the public interest. ***These sections specify that the substitution would not be in the public interest where it would cause undue financial hardship or where the signal to be substituted does not contain the same subsidiary signals*** as the signal being substituted. For purposes of interpreting the new Regulations, the Commission clarifies that the above-noted reasons for finding a substitution not in the public interest will continue to apply and that recurring substantial errors on the part of a broadcaster

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[110] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1113, *underlining in original, bolding and italics added.*
[111] *Canada Oil and Gas Land Regulations*, C.R.C., c. 1518, s. 30(7)(a); *Canadian Aviation Regulations*, S.O.R./96-433, s. 302.05(1)(b); *Marine Transportation Security Regulations*, S.O.R./2004-144, s. 352(1).

> may also constitute a circumstance where the simultaneous substitution would not be in the public interest. ***Leaving the provision open-ended in the Regulations in this respect will ensure that the Commission is better able to deal with simultaneous substitution issues on a case-by-case basis***.[112]

108. Finally, s. 4(3) cannot be supported by s. 18(3) of the *Broadcasting Act*, as Near J.A. seemed to suggest.[113] The *Sim Sub Regulations* were enacted under s. 10 of the *Broadcasting Act*, not s. 18(3), and the latter provision only gives the CRTC a ***procedural*** power to hold public hearings and take similar actions in the public interest.[114] If s. 18(3) were read more broadly, to give the CRTC a ***substantive*** power to do whatever it deems to be in the public interest, it would make the carefully tailored substantive powers the CRTC ***was*** given in ss. 9-10 redundant. In *Cogeco*, this Court held it "fundamental" that the *Broadcasting Act* does not give the CRTC such an "unfettered discretion".[115]

2. The CRTC Instruments Conflict with Section 31(2) of the *Copyright Act*

A. Introduction

109. In addition to being *ultra vires* s. 9(1)(h) of the *Broadcasting Act*, the CRTC Instruments are also invalid because they conflict with the operation and purpose of s. 31(2) of the *Copyright Act*. In *Cogeco*, this Court was clear that "the CRTC… cannot… attach conditions to licences under the *Broadcasting Act* that conflict with provisions of another related statute" like the *Copyright Act*, even if those conditions are valid having regard to the *Broadcasting Act* alone:

> …***[T]he open-ended jurisdiction-conferring provisions of the Broadcasting Act cannot be interpreted as allowing the CRTC to create conflicts with the Copyright Act.***
> …
> … For the purposes of the doctrine of paramountcy, this Court has recognized ***two types of conflict. Operational conflict arises when there is an impossibility of compliance with both provisions. The other type of conflict is incompatibility of purpose.*** In the latter type, there is no impossibility of dual compliance with the letter of both laws; rather, ***the conflict arises because applying one provision would frustrate the purpose intended by Parliament in another***. …
>
> … ***The CRTC's powers to impose licensing conditions*** and make regulations ***should be understood as constrained by each type of conflict.*** …[I]n seeking to achieve its objects, ***the***

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[112] Second CRTC Decision, ¶16, JR Tab 22, *emphasis added*.
[113] Appeal Decision, ¶25, 27, JR Tab 8.
[114] *Clause-by-Clause Analysis (1988)*, *supra* note 30, s. 17, JA Tab 45.
[115] *Cogeco (SCC 2012)*, *supra* note 14, ¶28.

> ***CRTC may not choose means that either operationally conflict with specific provisions of… the Copyright Act; or which would be incompatible with the purposes of those Acts.***[116]

110. For the reasons below, the CRTC Instruments conflict with the *Copyright Act* in both ways.

B. The Operational Conflict

111. The NFL owns the copyright in television productions of the Super Bowl broadcast, and therefore has the exclusive right to authorize their public telecommunication.[117] As *Cogeco* holds:

> ***The Copyright Act in s. 3(1)(f) confers on the owner of copyright in a work the exclusive right to communicate it to the public by telecommunication***. Section 3(1)(f) provides:
>
> > 3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right…
> >
> > …
> >
> > (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,
> >
> > …
> >
> > [and to authorize any such acts.]
>
> …
> …***"[P]rogram[s]" are often "work[s]" within the meaning of the Copyright Act.*** …[118]

112. This copyright is modified by the "retransmission regime" in s. 31(2) of the *Copyright Act*, which permits BDUs to retransmit signals containing copyrighted works without copyright holder consent and liability for infringement ***provided the BDUs comply with specific requirements:***

> …[Section] 31(2) of the *Copyright Act* proceeds in detailed fashion to circumscribe the right of copyright owners to control the retransmission of literary, dramatic, musical or artistic works carried in signals. ..
>
> Section 31(2) provides:
>
> > [31](2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if
> >
> > (a) the communication is a retransmission of a local or distant signal;
> >
> > (b) the retransmission is lawful under the *Broadcasting Act*;

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[116] *Cogeco (SCC 2012)*, *supra* note 14, ¶39, 44-45, 69 (and ¶2, 12-13, 34-38, 61, 76), *emphasis added*.

[117] Appeal Decision, ¶3, 33, JR Tab 8. **See also:** *FWS Joint Sports Claimants v. Canada (Copyright Board)*, 1991 CarswellNat 157 (F.C.A.), ¶9-10, leave to appeal refused, [1991] S.C.C.A. No. 367, JA Tab 7; *NFL Enterprises L.P. v. 1019491 Ontario Ltd. (c.o.b. Wrigley's Field Sports Bar & Grill)*, [1998] F.C.J. No. 1063 (C.A.), ¶2-3, 7, JA Tab 13; *NFL Enterprises L.P. v. Sotirios and Peter Restaurant Co. (c.o.b. J.J. Kapps Pasta Bar & Grill)*, [1999] F.C.J. No. 1209 (Referee), ¶7, JA Tab 14.

[118] *Cogeco (SCC 2012)*, *supra* note 14, ¶53, 69 (and ¶36, 51, 58), *emphasis added*.

> (c) ***the signal is retransmitted*** simultaneously and ***without alteration, except as otherwise required*** or permitted ***by or under the laws of Canada***;
>
> (d) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act; and
>
> (e) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(b).
>
> Read together, ss. 31(1) and 31(2) create an exception to the exclusive right of the copyright owners of literary, dramatic, musical or artistic works to control the communication of their works to the public by telecommunication. ***The exception, or user's right, in effect, entitles BDUs to retransmit those works without the copyright owners' consent, where the conditions set out in paras. (a) through (e) are met***. …[119]

113. ***All*** of the requirements in s. 31(2) must be met before BDUs can retransmit Super Bowl signals without infringing the NFL's copyright, including s. 31(2)(c), which mandates the signals be retransmitted "***without alteration, except as otherwise required… by or under the laws of Canada***".

114. The *Sim Sub Regulations* are one such "law of Canada", and provide in s. 4(1):

> 4 (1) Except as otherwise provided under these Regulations or in a condition of its licence, ***a licensee that receives a request referred to in section 3 must carry out the requested deletion and substitution*** if the following conditions are met… [*emphasis added*]

115. The *Sim Sub Regulations* thus constitute a "law of Canada" that "requires" BDUs to alter the signals they retransmit if they wish to take the benefit of the user right in s. 31(2) of the *Copyright Act*. The CRTC itself recognized this point in the *BD Regulations*:

> 7 Subject to section 7.2, ***a licensee shall not alter the content or format of a programming service*** or delete a programming service in a licensed area in the course of its distribution ***except***
>
> > (a) ***as required*** or authorized by a condition of its licence or ***under the Simultaneous Programming Service Deletion and Substitution Regulations***. [*emphasis added*]

116. Therefore, by virtue of s. 31(2)(c) of the *Copyright Act*, the only exception to this requirement can be if ***another "law of Canada"*** relieves BDUs of their obligation to conduct Sim Sub under the *Sim Sub Regulations*, i.e., ***another law of general application***:[120]

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[119] *Ibid*, ¶54-56, *underlining in original, bolding and italics added*.

[120] The fact that s. 31(2) refers to alteration requirements arising "by ***or under***" the laws of Canada does not affect this, because a general reference to something "under" a law does not include acts taken pursuant to it by a subordinate administrative body: *Cogeco (SCC 2012)*, *supra* note 14, ¶80.

> … In assessing whether the impugned policies satisfy the "prescribed by law" requirement, ***it must first be determined whether the policies come within the meaning of the word "law"*** in s. 1 of the *Charter*. To do this, ***it must be asked*…** ***whether the policies are binding rules of general application***…
> …
> …***[T]he policies can be said to be general in scope, since they establish standards which are applicable to all… rather than to a specific case. They therefore fall within the meaning of the word "law"*** for the purposes of s. 1…
> …
> … ***A binding rule of general application is not an individualized form of government action like*** an adjudicator's decision or ***a decision by a government agency concerning a particular individual or a particular set of circumstances***. Rules of general application can have wide-ranging effects…[121]

117. This is confirmed by the French version of s. 31(2)(c) of the *Copyright Act*, which requires that any alteration exception issue from "légale ou réglementaire", i.e., ***laws or regulations*:**

> [31](2) Ne constitue pas une violation du droit d'auteur le fait, pour le retransmetteur, de communiquer une oeuvre au public par télécommunication si, à la fois:
> …
> c) le signal est retransmis, sauf obligation ou permission ***légale ou réglementaire***, simultanément et sans modification; [*emphasis added*]

118. The CRTC Order is not a law of general application, like a regulation. Instead, it targets ***one*** specific program, of ***one*** specific copyright owner, on ***one*** specific day of the year, and purports to exclude it alone from the *Sim Sub Regulations* in its entirety. As this Court held in *Kruger*:

> …[T]he fact that a law may have graver consequence to one person than to another does not, on that account alone, make the law ***other than one of general application***. … The line is crossed, however, when an enactment, though in relation to another matter, by its effect, ***impairs the status or capacity of a particular group***.[122]

119. Indeed, in deciding to prohibit Sim Sub for the Super Bowl broadcast only, the CRTC deliberately chose ***not*** to amend the applicable law of Canada – the *Sim Sub Regulations* themselves – because it recognized that it lacks the jurisdiction to discriminate in its regulation making powers:

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[121] *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component*, 2009 SCC 31, ¶50, 72, 88 (and ¶64), *emphasis added*. **See also:** *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212 at 224-225, 226-227; *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, ¶36; *Doré v. Barreau du Québec*, 2012 SCC 12, ¶37.

[122] *R. v. Kruger*, [1978] 1 S.C.R. 104 at 110, *emphasis added*. **See also:** *R. v. Dick*, [1985] 2 S.C.R. 309 at 321, 323-326; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, ¶68.

> With respect to the Super Bowl… Unlike ***the Commission's powers to make regulations pursuant to section 10 of the Act***, which ***are to be exercised with respect to all licensees or classes of licensees***, section 9 of the Act relates to conditions which are by definition targeted, including conditions of licence specific to the circumstances of individual licensees.[123]

120. Accordingly, the CRTC Order creates an operational conflict with the *Copyright Act*. It purports to authorize the retransmission of Super Bowl signals by BDUs without the permission of the copyright holder even though the requirement of s. 31(2)(c) is not met. A BDU cannot take advantage of the retransmission exception and comply with the CRTC Order at the same time.

121. The fact that s. 4(1) of the *Sim Sub Regulations* purports to relieve BDUs from their signal alteration requirement if a licence condition provides otherwise is immaterial, because the CRTC – a subordinate administrative body – cannot amend Parliament's command in s. 31(2)(c) of the *Copyright Act* that exceptions to signal alteration requirements take the form of ***laws of general application***,[124] which is clearly not the case here where the licence condition ***targets a single program***. That would allow the CRTC to create a new user right outside the *Copyright Act* itself, which is also prohibited by s. 89 of that Act.[125] Nor can such an exception arise through the *Sim Sub Regulations* directly, pursuant to s. 4(3) as the Court of Appeal held below,[126] because the CRTC did not make the CRTC Instruments under s. 4(3) and it is *ultra vires*: see paragraphs 99-108 above.

C. The Purpose Conflict

122. Even if the CRTC Instruments did not conflict with the operation of s. 31(2) of the *Copyright Act*, they are still invalid for frustrating its ***purpose***.[127] This Court has recognized that s. 31(2) was enacted to implement Canada's commitments under the *Canada-United States Free Trade Agreement* ("***CUSFTA***"),[128] pursuant to the *Canada-United States Free Trade Agreement*

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[123] Second CRTC Decision, ¶26, JR Tab 22, *emphasis added*.
[124] *Cogeco (SCC 2012)*, *supra* note 14, ¶77-78.
[125] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, ¶9, 11-13; *Cogeco (SCC 2012)*, *supra* note 14, ¶36, 66, 80-81.
[126] Appeal Decision, ¶49, JR Tab 8.
[127] *Cogeco (SCC 2012)*, *supra* note 14, ¶63-64, 70, 76.
[128] *Entertainment Software Association v. S.O.C.A.N.*, 2012 SCC 34, ¶24 ("***ESA (SCC 2012)***"); *Rogers Communications Inc. v. S.O.C.A.N.*, 2012 SCC 35, ¶36-37 ("***Rogers (SCC 2012)***"); *Cogeco (SCC 2012)*, *supra* note 14, ¶74-75.

Implementation Act.[129] Accordingly, *CUSFTA* is central to s. 31(2)'s purpose and the provision "***must***" be interpreted in a manner consistent with it.[130]

123. The explanatory notes to Part 7 of *CUSFTA* – which addresses the retransmission regime in art. 2006, an "irritant in bilateral relations"[131] – emphasize Canada's commitment to give U.S. copyright holders "***non-discriminatory***" protection, calling it an exception to "the ability of either Party to pursue ***cultural policies***" like the CRTC sought to do for the Super Bowl here:

> …***[B]oth parties will provide copyright protection to owners of programs*** broadcast by distant signals and retransmitted by cable companies; this undertaking will be ***on a non-discriminatory basis***; after Canadian legislation is implemented there will be an opportunity for further review of outstanding issues in both countries (Article 2006);[132]

124. As one example of this, art. 2006(1) of *CUSFTA* speaks of the "***non-discriminatory***" nature of the copyright holder's right to remuneration for retransmission of distant signals containing its programs, before art. 2006(3) goes on to specifically reference the Sim Sub Regime:

> [2006]1. Each Party's copyright law shall provide a copyright holder of the other Party with a right of equitable and ***non-discriminatory*** remuneration for any retransmission to the public of the copyright holder's program where the original transmission of the program is carried in distant signals intended for free, over-the-air reception by the general public**.** Each Party may determine the conditions under which the right shall be exercised. …
>
> 2. Each Party's copyright law shall provide that:
>
> …
>
> b) where the original transmission of the program is carried in signals intended for free, over-the-air reception by the general public, wilful retransmission in ***altered form*** or non-simultaneous retransmission of signals carrying a copyright holder's program shall be permitted only with the authorization of the holder of copyright in the program.
>
> 3. ***Nothing in paragraph 2(b) shall be construed to prevent a Party from***:
>
> a) ***maintaining those measures in effect on October 4, 1987 that***

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[129] *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65.
[130] *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, ¶31.
[131] *CUSFTA*, p. 291-292.
[132] *Ibid*, p. 292, *emphasis added*. These explanatory notes are critical to art. 2006, as the *Vienna Convention on the Law of Treaties* requires that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", including "supplementary means of interpretation": *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19, ¶11; *World Bank Group v. Wallace*, 2016 SCC 15, ¶47.

> i) ***require cable systems to substitute a higher priority or non-distant signal broadcast by a television station for a simultaneous lower priority or distant signal when the lower priority or distant signal carries programming substantially identical to the higher priority or non-distant signal.***
>
> …
>
> b) ***introducing measures, including measures such as those specified in subparagraphs (a)(i)*** and (a)(ii)(B), ***to enable the local licensee of the copyrighted programs to exploit fully the commercial value of the licence***. [*emphasis added*]

125. Accordingly, Sim Sub was part of the non-discriminatory suite of copyright protections – and a very significant one at that – which the parties intended would counterbalance the retransmission user right agreed to in *CUSFTA*, consistent with the balance between copyright holder and user rights in the *Copyright Act*.[133] Government reports from the period when *CUSFTA* was signed specifically link it to the protections afforded to foreign copyright holders and their exclusive Canadian licensees:

> …***[S]imultaneous substitution must be maintained.*** Apart from the practical concern to protect the revenues of Canadian broadcasters, which remained in spite of these measures at half the U.S. per capita level, the Committee believes that ***the importation of these signals without regard to copyright is in principle unfair both to program producers selling rights for the Canadian market and to the Canadian stations which purchase those rights.***
>
> …
>
> ***Article 2006 specifically permits the imposition of simultaneous substitution rules***…[134]

126. It is not surprising that Canada agreed its copyright law would not discriminate, because the value of non-discrimination runs throughout Canadian law, from s. 15 of the *Charter* and s. 1 of the *Canadian Bill of Rights* – both of which prohibit discrimination based on "national origin" – to the common law's constraints on administrative authority.[135]

127. This non-discrimination principle in art. 2006 of the *CUSFTA* reflects the "national treatment" principle embodied under numerous international copyright treaties ratified by Canada that apply to the right to communicate a work,[136] i.e., "treatment as favourable for nationals of other

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[133] *Cogeco (SCC 2012)*, *supra* note 14, ¶36, 64-66; *SODRAC (SCC 2015)*, *supra* note 39, ¶66, 74.
[134] *Fifteenth Committee Report (1988)*, *supra* note 68, at 151, 342, *emphasis added*, JA Tab 47. **See also** *Fifteenth Committee Response (1988)*, *supra* note 68, at 19, 55, JA Tab 44.
[135] *C.F.R.B. Ltd. v. Canada (A.G.)*, [1972] O.J. No. 1931 (H.C.J.), ¶10, aff'd, [1973] O.J. No. 2098 (C.A.), JA Tab 1; *Forget v. Quebec (A.G.)*, [1988] 2 S.C.R. 90 at 105-106; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, ¶47.
[136] *Berne Convention for the Protection of Literary and Artistic Works*, arts. 5, 11*bis*; *Agreement on Trade-Related Aspects of Intellectual Property Rights*, arts. 1, 3, 4, 9; *WIPO Copyright Treaty*, arts. 3, 8.

parties to the conventions as is accorded to a member's nationals by that member".[137] This Court has frequently relied on these treaties to interpret the *Copyright Act*,[138] consistent with the presumption of statutory compliance with international treaty commitments.[139] Further, the national treatment principle is set out in art. 105 of *CUSFTA* itself:

> [105] ***Each Party shall,*** to the extent provided in this Agreement, ***accord national treatment*** with respect to investment and to trade in goods and services.[140] [*emphasis added*]

128. The *North American Free Trade Agreement* ("***NAFTA***"), where *CUSFTA* is incorporated,[141] recognizes the importance of national treatment directly for copyright, stating in art. 1703:

> [1703] 1. ***Each Party shall accord to nationals of another Party treatment no less favorable than that it accords to its own nationals*** with regard to the protection and enforcement of ***all intellectual property rights***. … [*emphasis added*]

129. The CRTC Instruments are contrary to the principle of non-discrimination based on nationality. They prohibit a single ***U.S.*** copyright holder, the NFL, from asserting the same copyright protections under the Sim Sub regime as are available to all ***Canadian*** nationals, because of the cultural significance of ***U.S.*** Super Bowl ads ***in America***:

> …[[T]he Commission heard that the commercials during the Super Bowl were integral to the event itself, which reflected the view expressed by the Commission in Broadcasting Regulatory Policy 2015-25. …
>
> This view is summed up by the following statement from an intervener to this proceeding:
>
> > … ***The Super Bowl is a global level event each year and a celebration of American culture, which needs to be viewed in its entirety (including the advertising)***. And because of ***the cultural significance of this event to our American neighbours and allies*** it is in fact important that Canadians also be able to view and enjoy this cultural event as a way to better foster relations and dialogue between our countries.[142]

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[137] *Pfizer Canada Inc. v. Canada (A.G.)*, 2003 FCA 138, ¶23, leave to appeal refused, [2003] S.C.C.A. No. 224. **See also:** *S.O.C.A.N. v. C.A.I.P.*, 2004 SCC 45, ¶56 ("***SOCAN (SCC 2004)***"); *Copyright Act*, s. 73(2).

[138] *SOCAN (SCC 2004)*, *supra* note 137, ¶65, 97; *ESA (SCC 2012)*, *supra* note 128, ¶13-20; *Rogers (SCC 2012)*, *supra* note 128, ¶36, 41-49.

[139] *Re:Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38, ¶47-51; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, ¶47-48.

[140] **See also** *CUSFTA*, p. 66-67.

[141] *North American Free Trade Agreement*, Annex 2106; *North American Free Trade Implementation Act*, S.C. 1993, c. 44; *Rogers (SCC 2012)*, *supra* 128, ¶37.

[142] Third CRTC Decision, ¶26-27, *emphasis added*, JR Tab 1.

130. Therefore, the CRTC Instruments frustrate the purpose of s. 31(2) to implement the *CUSFTA* retransmission regime subject to non-discriminatory copyright protections for U.S. nationals. While the CRTC is not obligated to maintain the Sim Sub regime under *CUSFTA* and s. 31(2), it must apply it in a non-discriminatory fashion should it choose to do so, as it has under the *Sim Sub Regulations*.

131. It is important to appreciate here that the Super Bowl is the most watched television program in Canada. Given its unique popularity, there is no better example of the importance of the copyright protections that Sim Sub provides. The lack of Sim Sub during the 2017 Super Bowl caused CTV's viewership to plummet by ***39%*** from 2016.[143] If the CRTC Instruments are upheld by this Court, then the CRTC can target other significant programs on similarly weak grounds, further frustrating the purpose of the *Copyright Act* and Canada's commitments under the *CUSFTA*.

132. Finally, even if the Court were to find that the CRTC Instruments do not conflict with the *Copyright Act* itself, they still plainly conflict with Canada's non-discrimination and national treatment obligations under the *CUSFTA*, *NAFTA* other copyright treaties as outlined above. This Court has recognized that even ***unimplemented*** treaty obligations can "help show the values that are central in determining whether [a] decision was a reasonable exercise" of administrative power.[144]

PART IV—COSTS

133. The NFL requests costs in this Court pursuant to s. 47 of the *Supreme Court Act*.

PART V—ORDERS SOUGHT

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

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

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Steven G. Mason
Brandon Kain
Joanna Nairn
James S.S. Holtom

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[143] E. Jackson, "Bell's Super Bowl TV audience drops 39 per cent after new CRTC ad policy", Financial Post (7 February 2017).
[144] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, ¶71.

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