

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

B E T W E E N:

BELL CANADA and BELL MEDIA INC.

Appellants (Appellants)

- and -

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

- and -

CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION

Intervener (pursuant to Rule 22(3)(c)(iv))*

**FACTUM OF THE JOINT INTERVENERS,
THE ALLIANCE OF CANADIAN CINEMA, TELEVISION AND RADIO ARTISTS AND
THE ASSOCIATION OF CANADIAN ADVERTISERS**
(Pursuant to Rule 42 of the *Rules of The Supreme Court of Canada*, S.O.R./2002-156)

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[Style of cause continued on next page.]

*Continued from page 1

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Interveners

- and -

DANIEL JUTRAS AND AUDREY BOCTOR

Amici curiae

SCC Court File No.: 37897

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

B E T W E E N:

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC
and NFL PRODUCTIONS LLC

Appellants (Appellants)

- and -

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

- and -

CANADIAN RADIO-TELEVISION AND
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Intervener (pursuant to Rule 22(3)(c)(iv))

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TABLE OF CONTENTS

PART I – OVERVIEW AND FACTS	1
PART II – ISSUES	3
PART III – ARGUMENT	3
A. Review for Reasonableness	3
B. Very Narrow Range of Reasonable Outcomes	4
C. The Policy of the Broadcasting Act	5
D. Inadequate Explanation of the CRTC’s Policy Reasoning	7
E. Impact of the CRTC’s Decision.....	8
PART IV – COSTS	10
PART V – ORDER SOUGHT	10
PART VI – TABLE OF AUTHORITIES	11

PART I - OVERVIEW AND FACTS

1. The Interveners, the Alliance of Canadian Cinema, Television and Radio Artists (“ACTRA”) and the Association of Canadian Advertisers (the “ACA”) deliver this factum in support of the appeals initiated by the appellants Bell Canada and Bell Media Inc. (collectively “Bell”) and the National Football League, NFL International LLC and NFL Productions LLC (collectively the “NFL”) of the decision of the Federal Court of Appeal dated December 18, 2017 (the “Appeal Decision”).

2. These submissions address the issue of whether paragraph 9(1)(h) of the *Broadcasting Act* authorizes the Canadian Radio-Television and Telecommunications Commission (the “CRTC”) to require a licensee to carry a single program, in this case the American broadcast of the Super Bowl. Relying on its determination that paragraph 9(1)(h) gave it this power, the CRTC decided on August 19, 2016 to cease authorizing simultaneous substitution of the feed of a Canadian licensee for that of the American broadcaster of the same program (the “CRTC Decision”).

3. ACTRA and the ACA say that Simultaneous Substitution (“SimSub”) is an important component of the social contract among participants in the television broadcasting industry in Canada. It ensures that the broadcast of non-Canadian programming does not deprive Canadian advertisers of revenue, some of which supports the generation of original Canadian content. The CRTC Decision relies upon a flawed interpretation of a single paragraph of the *Broadcasting Act* to undermine SimSub in a manner that deprives Canadian advertisers (and indirectly, content providers) of significant advertising revenue from one of the most watched broadcasting events of the year.

4. The CRTC Decision is unreasonable because it is founded upon a flawed premise. Instead of giving appropriate weight to the policy objectives underlying SimSub, the CRTC began with the premise that broadcasting distribution undertakings (“BDUs”) generally cannot alter or delete signals, and then elevated that principle to one of superordinate importance. The CRTC treated the SimSub regime as an exception that required special justification, and then, without a reasonable basis, found this justification lacking with respect to a single program.

5. The creation of this hierarchy of policy objectives produced an arbitrary result that is indefensible with regard to the policy objectives of the *Broadcasting Act* as a whole. These objectives, codified in section 3 of the *Broadcasting Act*, affirm that the Canadian broadcasting system should safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada, and should encourage the development of Canadian expression. In spite of these objectives, the CRTC Decision has stressed the superordinate importance of making available to Canadians foreign-produced advertisements.

6. To be intelligible and defensible with regard to the scheme of the Act as a whole, the CRTC decision needed to explain why exactly the need to see American advertisements is so compelling a policy objective that it should prevail. Yet such a justification is lacking. The decision is explained only on the basis that “other policy objectives and concerns” prevail over the policy considerations that are expressly referenced in section 3 of the *Broadcasting Act*.

7. The CRTC Decision is so far outside the range of acceptable outcomes that it cannot survive review for reasonableness. That it should have survived review in the Federal Court of Appeal invites reflection about the standards applicable to substantive judicial review of the decisions of administrative tribunals. The CRTC Decision illustrates that Courts still have a role

to play in ensuring that the decisions of administrative tribunals stay within the boundaries set for them by Parliament.

8. In this case, applying either a traditional *Dunsmuir* analysis or any framework that may be substituted for it, the CRTC Decision cannot be rationally justified and must be set aside.

PART II - ISSUES

9. This factum addresses the principal issue in this case, which is:

- (a) Can the result reached in this case by the Court below and the CRTC be supported on any applicable test?

PART III - ARGUMENT

A. Review for Reasonableness

10. The decision under appeal found the CRTC Decision to be a reasonable exercise of the CRTC's powers under paragraph 9(1)(h) of the *Broadcasting Act*.

11. The jurisprudence of this Court has established that review for reasonableness involves the following principles:

- (a) Reasonableness review is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome. The reasoning must exhibit “justification, transparency and intelligibility within the decision-making process”¹

¹ *Dunsmuir v. New Brunswick*, [2008 SCC 9](#) at para. 47; *Canada (Attorney General) v. Igloo Vikski Inc.*, [2016 SCC 38](#) at para 56.

- (b) The substantive outcome and the reasons, considered together, must serve the purpose of showing whether the result falls within a range of possible outcomes;²
- (c) The reasons must adequately explain the basis for the decision;³

12. On the face of it, the CRTC's decision is unreasonable.

B. Very Narrow Range of Reasonable Outcomes

13. In this case, the weight of the relevant contextual factors points to a very narrow range of acceptable and defensible outcomes. These contextual factors include:

- (a) the statutory right of appeal contained in subsection 31(2) of the *Broadcasting Act* (the "Act") is broadly worded - "question[s] of law or question[s] of jurisdiction".⁴ This demonstrates Parliament's intention that decisions and orders of the CRTC that involve questions of law or jurisdiction be carefully overseen, and corrected as necessary, by the Federal Court of Appeal;
- (b) that the Act specifies that the CRTC is permitted to make orders under paragraph 9(1)(h) only "in furtherance of its objects" and only in respect of "programming services". The objectives and definitions contained within the Act must therefore serve to narrow the scope of reasonable orders which can be made pursuant to paragraph 9(1)(h), a paragraph that is embedded in the broader context of the Act;

² *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011 SCC 62](#) at para 14.

³ *Canada (Attorney General) v. Igloo Vikski Inc.*, [2016 SCC 38](#) at para. 18

⁴ *Broadcasting Act*, [SC 1991, c 11](#), s 31(2); *CKLN Radio Inc. v. Canada (Attorney General)*, [2011 FCA 135](#) at paras 5-6.

- (c) that there is a clear statutory purpose underlying paragraph 9(1)(h) of the Act which narrows the reasonableness range of allowable orders;
- (d) the CRTC's own policies, as well as legislation relating to the advertisement of alcohol and drugs in Canada, form part of the context for assessment of the CRTC Order and limit the scope of reasonable outcomes; and
- (e) the reality that the CRTC Order, which weakens the simultaneous substitution regime, undermines and damages the Canadian content industry.

14. Collectively, these contextual factors support the necessity for a probing, exacting review and collectively narrow the range of reasonable outcomes.

C. The Policy of the *Broadcasting Act*

15. The CRTC Decision, while it does refer to “potential negative impacts” of its decision, does not disclose that the CRTC weighed the important policy objectives of the *Broadcasting Act* and considered the loss of revenues to Canadian advertisers within the context of those objectives.

16. Section 3 of the *Broadcasting Act* stresses the importance of support for Canadian culture and content as an overriding policy objective of the Act, declaring as the broadcasting policy for Canada that:

- (a) “the Canadian broadcasting system shall be effectively owned and controlled by Canadians” (par. 3(1)(a));
- (b) the Canadian broadcasting system is “a public service essential to the maintenance and enhancement of national identity and cultural sovereignty” (par. 3(1)(b));

- (c) the Canadian Broadcasting system should
 - (i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;
 - (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view; and
 - (iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society; (par. 3(1)(d))
- (d) “each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming” (par. 3(1)(e));
- (e) “each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other

than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources” (par. 3(1)(f)).

D. Inadequate Explanation of the CRTC’s Policy Reasoning

17. The CRTC Decision alludes to “concerns relating to, among other things, revenue losses for local television stations; the ability of Canadian broadcasters to produce and acquire Canadian programming; the loss of advertising opportunities for Canadian companies and the promotion of Canadian programming; and the danger that U.S. commercials being broadcast in Canada are inconsistent with this country’s regulatory regime.”⁵ But its reasons do not disclose *how* the Commission weighed these factors in the context of the statutory policy objectives it was bound to apply. It merely states in a conclusory manner that it considered them.⁶

18. In the absence of a coherent explanation as to why unnamed “objectives of the Act” justified privileging unparticularized “frustrations of viewers” over the fundamental policy objectives set out above, the CRTC Decision does not withstand scrutiny. A decision that simply enumerates factors and privileges one over others can be justly characterized as arbitrary. One of the purposes of reasonableness review is to allow courts to control arbitrary administrative decision-making.⁷

⁵ *Simultaneous substitution for the Super Bowl*, [Broadcasting Regulatory Policy CRTC 2016-334](#) (“CRTC Decision”) at para. 35.

⁶ CRTC Decision at paras. 38-39.

⁷ *Cooper v. British Columbia (Liquor Control and Licensing Branch)*, [2017 BCCA 451](#) at paras 38-42.

E. Impact of the CRTC's Decision

19. The CRTC's unreasonable interpretation of paragraph 9(1)(h) prioritizes American advertisements over Canadian content and the Canadian production sector, contrary to the cultural purposes of the Act and contrary to the objects of the CRTC.⁸ As a consequence, the Canadian production sector, including performers, agencies and advertisers, is deprived of the revenues from simultaneous substitution during the Super Bowl. Canadian advertisers are deprived of the unique opportunity to capture the entire Canadian Super Bowl audience, now split between the American and Canadian broadcasts. The Order substantially weakens the simultaneous substitution regime, a regime that both ACTRA and the ACA's members depend on for their businesses and employment.

20. The reasons acknowledge that the CRTC received submissions that the Super Bowl was essential for businesses to grow and that funding of Canadian content production would be reduced by the decision.⁹ The CRTC's reasons state that these submissions "generally reiterate those expressed by interveners in the various phases of the Let's Talk TV proceeding" and that the potential impacts were "taken into consideration", but that "[n]o new evidence was provided" and harks back to another broadcasting policy which affirmed the importance of simultaneous substitution to the Canadian production sector.¹⁰ These reasons are insufficient to justify the severe impact of the decision on the livelihoods and businesses of the interveners' members.

⁸ *Montréal (City) v. Montreal Port Authority*, [2010 SCC 14](#) at paras 42-47; *Delios v. Canada (Attorney General)*, [2015 FCA 117](#) at para 27; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, [2014 FCA 245](#) at para. 69 (eighth bullet); *Canada (Attorney General) v. Almon Equipment Limited*, [2010 FCA 193](#) at para. 21.

⁹ CRTC Decision at paras 29, 32.

¹⁰ CRTC Decision at paras. 35-39.

21. The CRTC's unreasonable interpretation of paragraph 9(1)(h) has resulted in one of the largest broadcast audiences of the year being exposed to irrelevant advertisements (because the products advertised are either not sold in Canada or are sold on terms other than advertised), and advertisements contrary to standards and laws imposed in the public interest and implemented by the CRTC itself: the *Food and Drugs Act*, *Food and Drugs Regulations* and the *Code for broadcast advertising of alcoholic beverages*.¹¹ The CRTC has, in effect, ordered television stations to do that which would amount to violations of its own code.

22. Further, the CRTC Decision is predicated on an unreasonable interpretation and application of paragraph 9(1)(h) of the *Broadcasting Act*, which is inconsistent with the definition of "program" and "programming service" in the Act, the overall context of the Act, persuasive and binding jurisprudence and the CRTC's own policies and decisions, all of which signal a definition of "programming service" that is inapplicable to single programs like the Super Bowl. Worse still, the CRTC's reasons in support of the Order use a definition consistent with these authoritative sources; the Reasons themselves are at odds with the Order.¹²

23. In the face of these considerations, the CRTC's reasons do not provide an intelligible and rational justification for the extraordinary step it has taken of singling out a single program for exemption from the SimSub regime.

24. The CRTC's reasons state that "the Commission has considered the primary goal of enriching Canadian programming through the preservation of the simultaneous substitution regime, but has decided that it needs to recalibrate that regime to ensure that it is better balanced,

¹¹ Affidavit of Ronald S. Lund, sworn August 29, 2018, Book of authorities, Tab 1, paras. 37-40.

¹² *Broadcasting Act*, [SC 1991, c 11](#); CRTC Decision at paras 39, 47 (footnote 8).

and reflects the totality of the policy objectives of the Act.”¹³ Even if true, the CRTC’s considerations are not to be found in its reasons. The sole policy objective identified is “ensuring that Canadians have access to local, national and international programming”.¹⁴ The reasons go no further and make no attempt to explain why that objective, to the extent it operates, is entitled to priority over the overall purpose of the Act.

25. On any approach, deferring to the CRTC Decision in the face of the absence of any rational justification for the result reached would require what the majority of this Court in *Dunsmuir* characterized as “blind reverence” to the CRTC’s decision.¹⁵

PART IV - COSTS

26. As provided in its application for leave to intervene, ACTRA and the ACA do not ask for costs.

PART V - ORDERS SOUGHT

27. ACTRA and the ACA ask that the appeals be allowed and that this Court grant an order setting aside the CRTC Decision.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of October, 2018.



J. Thomas Curry/Sam Johansen

Counsel for the Joint Intervener, the Alliance
Of Canadian Cinema, Television and Radio
Artists and the Association of Canadian
Advertisers

¹³ CRTC Decision at para. 28.

¹⁴ CRTC Decision at para. 21.

¹⁵ *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 48.

PART VI - TABLE OF AUTHORITIES

Judicial Decisions	Paragraph(s) Referenced in Factum
<i>Dunsmuir v. New Brunswick</i> , 2008 SCC 9	11, 25
<i>Canada (Attorney General) v. Almon Equipment Limited</i> , 2010 FCA 193	19
<i>Canada (Attorney General) v. Igloo Vikski Inc.</i> , 2016 SCC 38	11
<i>CKLN Radio Inc. v. Canada (Attorney General)</i> , 2011 FCA 135	13
<i>Cooper v. British Columbia (Liquor Control and Licensing Branch)</i> , 2017 BCCA 45	18
<i>Delios v. Canada (Attorney General)</i> , 2015 FCA 117	19
<i>Forest Ethics Advocacy Association v. Canada (National Energy Board)</i> , 2014 FCA 245	19
<i>Montréal (City) v. Montreal Port Authority</i> , 2010 SCC 14	19
<i>Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)</i> , 2011 SCC 62	11
CRTC Decisions	
<i>Simultaneous substitution for the Super Bowl</i> , Broadcasting Regulatory Policy CRTC 2016-334 (“CRTC Decision”).	17, 20, 22, 24

PART VII - LEGISLATION RELIED UPON

Legislation and Statutes	Paragraph(s) Referenced in Factum
<i>Broadcasting Act</i> , SC 1991, c 11	13, 22