Court File No. 33884

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

BETWEEN:

ALLIANCE OF CANADIAN CINEMA, TELEVISION & RADIO ARTISTS (ACTRA), CANADIAN MEDIA PRODUCTION ASSOCIATION (CMPA), DIRECTORS GUILD OF CANADA (DGC) AND WRITERS GUILD OF CANADA (WGC) (THE "CULTURAL GROUPS")

Appellants

- and -

BELL ALIANT REGIONAL COMMUNICATIONS, LP, BELL CANADA, COGECO CABLE INC., MTS ALLSTREAM INC., ROGERS COMMUNICATIONS INC., TELUS COMMUNICATIONS COMPANY AND VIDEOTRON LTD. (THE "ISP COALITION") AND SHAW COMMUNICATIONS INC.

Respondents

- and -

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION (CRTC)
Intervener

FACTUM OF THE APPELLANTS,

ALLIANCE OF CANADIAN CINEMA, TELEVISION & RADIO ARTISTS (ACTRA), CANADIAN MEDIA PRODUCTION ASSOCIATION (CMPA), DIRECTORS GUILD OF CANADA (DGC) AND WRITERS GUILD OF CANADA (WGC)
(THE "CULTURAL GROUPS")
(Rule 35 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

1. This is an appeal by the Alliance of Canadian Cinema, Television and Radio Artists, the Canadian Media Production Association, the Directors Guild of Canada, and the Writers Guild of Canada (collectively, the "Cultural Groups") from a Decision of the Federal Court of Appeal dated July 7, 2010.

2. By its Decision, the Federal Court of Appeal answered "No" to the following question referred to that Court by the Canadian Radio-television and Telecommunications Commission (the "CRTC"):

> Do retail Internet Service Providers ("ISPs") carry on, in whole or in part, "broadcasting undertakings" subject to the *Broadcasting Act* when, in their role as ISPs, they provide access through the Internet to "broadcasting" requested by end-users?

3. The Cultural Groups respectfully submit that the Federal Court of Appeal erred in law and that the correct answer to this question is "Yes".

A. Overview

4. Today in Canada, a person can watch a television program by turning on a television set. Or that person can access a program through the Internet. For instance, he or she can turn on a computer and click on a link to that television program. Thus, for a Canadian Public Affairs Channel (CPAC) program, the person can click on <http://www.cpac.ca>. Similarly, a person can tune into the Ottawa radio affiliates of the Canadian Broadcasting Corporation and Société Radio-Canada at <http://www.cbc.ca/ottawa/audio>.

5. In addition to watching television programs or listening to the radio over the Internet, a person can access a growing variety of audiovisual materials over the Internet. Those materials include videos, music and films on YouTube, Netflix and other popular video or musical programming. Indeed, audiovisual material is forecast to constitute a large proportion, if not the majority, of traffic flowing to end-users.

6. If the viewer sees a program on a television set, the program usually arrives by way of a cable or satellite service to which the viewer subscribes. The cable or satellite service is a "broadcasting undertaking" regulated under the *Broadcasting Act* (the "Act" or "1991 Act").

7. If the identical program is delivered to a computer, the program arrives by way of an ISP to which the viewer subscribes. Increasingly, ISPs also deliver programs directly to television sets. But communications companies have asserted that the *Broadcasting Act* does not apply to these activities of ISPs.

8. This anomaly is at the heart of the question that the CRTC set forth in the Reference which is the subject of this Appeal. In 1999 and 2009, the CRTC issued decisions and orders which made the factual findings upon which the question was based. In those findings, the CRTC held that "broadcasting" is being transmitted over the Internet to subscribers of ISPs and that ISPs provide for the transmission of programs requested by their subscribers. The question asked by the CRTC was whether, based on these facts, the ISPs were acting as "broadcasting undertakings".

9. The Federal Court of Appeal acknowledged that the ordinary meaning of "transmission" includes the activity in question, namely the delivery of programs by ISPs to subscribers. The Court also acknowledged that it was bound by the factual findings of the CRTC. Nevertheless, the Federal Court of Appeal answered "No" to the question posed by the CRTC.

10. The Federal Court of Appeal arrived at that answer by holding that the policy focus of the *Broadcasting Act* is the cultural enrichment of Canada and that only undertakings which have control or input with respect to the content of programs can contribute to that policy and are within the purview of the Act. The Court found that ISPs do not exercise such control or input, referred to the type of transmission that they undertake as a "mode of transmission", and concluded that ISPs do not "transmit" programs.

11. The Federal Court of Appeal's decision is inconsistent with the findings of the CRTC upon which the question was based. Those findings assumed that broadcasting programs are

being transmitted over the Internet to subscribers and that the business of ISPs is to provide for the transmission of those programs to their subscribers. It was based on those findings that the Court was asked whether ISPs were "broadcasting undertakings".

12. The answer of the Federal Court of Appeal is also contrary to the structure and history of the *Broadcasting Act*. In 1968, the Act was amended specifically to include "broadcasting receiving undertakings" which simply receive signals and retransmit them. At that time these undertakings were subject to a long-standing Department of Transport policy not to alter broadcasting signals they received and retransmitted. In 1991, the Act was further amplified to include "distribution undertakings" which explicitly included undertakings for the reception and retransmission of broadcasting to end-users or to other such undertakings, by any means of telecommunication.

13. The inclusion within the Act of the broadcasting activity of ISPs follows the principle that the broadcasting system is a single system which includes everything from the dissemination of the broadcast to its reception by the listener or viewer. That principle was stated by the Privy Counsel in the *Radio Reference* decision in 1932, and again by this Court in 1977 in the *Dionne* and *Capital Cities* cases. It was adopted as a legislative principle in the 1968 *Broadcasting Act* and in a specific declaration in the 1991 Act. Including ISPs within the single broadcasting system ensures that a gap in the regulatory regime does not exist at the connection with the end-user, and provides for the CRTC to supervise, under the *Broadcasting Act,* the evolving role of ISPs in the delivery of broadcasting to Canadians. The single-system principle of the 1991 Act has been set aside by the decision of the Federal Court of Appeal.

14. The advent of change in the technologies that distribute broadcasting was foreseen by Parliament when it enacted the 1991 Act. Parliament intended that the Act be "technology neutral" and apply to any and all transmissions of audio and audiovisual programs to the public no matter what the technology might be for their delivery, in order to avoid risking erosion of regulatory jurisdiction. ISPs use new technology to allow their subscribers to receive programs over the Internet. Including these activities within the Act is consistent with Parliament's

intention that a supervisory body, the CRTC, have the ability to implement broadcasting policy with respect to all participants in the system.

15. The essence of the Federal Court of Appeal's decision rests in its conclusions that the policy focus of the Act is the cultural enrichment of Canada and that only those who exercise control or input over content can contribute to that policy. For these reasons, the Federal Court did not apply what it acknowledged was the ordinary meaning of the word "transmission".

16. The Federal Court of Appeal erred in law in adopting this approach to statutory interpretation. The Court did not find that there was any ambiguity in the word "transmission". Nor did it find that the structure of the Act was offended if the ordinary meaning of that word was used. In these circumstances, there was no basis for the Federal Court of Appeal to change the ordinary meaning of the word "transmission" in section 2 of the Act.

17. Furthermore, the Federal Court of Appeal's focus on one policy objective caused it to ignore the discretion that Parliament delegated to the CRTC as the supervisor of the broadcasting system. If policy is to be applied, it is to be applied by the CRTC, not by the Court in a manner that changes the plain meaning of the Act and eliminates the authority of the CRTC.

18. The Federal Court of Appeal's focus on one policy objective also caused it to ignore many policies in the Act which may be applied by the CRTC to ISPs, having regard to their role within the broadcasting system in Canada. Two of these applications were noted specifically by the CRTC in its decisions: the extension to ISPs of the obligation to fund Canadian creative expression, and the prohibition on anti-competitive behaviour by ISPs that impacts on the broadcasting system. Indeed, it is because ISPs oppose a contribution by them to the funding of Canadian programming that they argue that the Act does not apply to them.

19. Most particularly, the Federal Court of Appeal's policy-based decision contravened the fundamental policy, stated expressly in the Act, that the broadcasting system is a single system supervised by Parliament's delegate, the CRTC. By its decision, the Federal Court of Appeal has divided that system and placed outside the *Broadcasting Act* the program retransmitters using the

latest technology for delivering broadcasting.

B. Complementary Statutes

20. The *Broadcasting Act* and *Telecommunications Act,* which were enacted two years apart, create an integrated legislative scheme that sets out policy goals and empowers a single authority, the CRTC, to act, or refrain from acting, to achieve those goals.[1] The *Broadcasting Act* applies to transmissions to the public containing "broadcasting", and thus to "broadcasting undertakings" which form the "Canadian broadcasting system". Conversely, the *Telecommunications Act* applies to the transmissions that are not broadcasting.

21. Each Act features a reciprocal and complementary "carve-out" that ensures that neither Act interferes with the other. With respect to "broadcasting", the *Telecommunications Act* states that it does not apply "in respect of broadcasting by a broadcasting undertaking".[2] The *Broadcasting Act* states that, "for greater certainty", it applies in respect of broadcasting undertakings carried on "as part of any other undertaking or activity". With respect to other telecommunications, the *Broadcasting Act* further confirms that, "for greater certainty", it does not apply to a "telecommunications common carrier, as defined in the *Telecommunications Act,* when acting solely in that capacity."[3]

22. These carve-outs are based on terms defined in the respective Acts. They relate to the activities performed, not the entities who perform them. Different parts of an undertaking or activity are frequently regulated under both Acts.[4]

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[1] *Broadcasting Act*, S.C. 1991, c. 11, following Appellant's Book of Authorities ("**ABA**") t.5; *Telecommunications Act*, S.C. 1993, c. 38 [**ABA** t. 12].

[2] *Telecommunications Act* [**ABA** t. 12] s. 4.

[3] 1991 Act [**ABA** t. 5] at subs. 4(3) and 4(4).

[4] 1991 Act [**ABA** t. 5] at subs. 4(3); see e.g. *Regulation of broadcasting distribution undertakings that provide non-programming services,* Telecom Decision CRTC 96-1, 30 January 1996, **AR** Vol. II t.15 p.87: "[T]o determine whether the *Telecommunications Act* applies to the non-programming activities of an entity that is a broadcasting distribution undertaking, the Commission must first determine whether these activities involve 'broadcasting' by a 'broadcasting undertaking'."

C. The *Broadcasting Act*

23. The 1991 Act establishes policy goals and regulatory authority over the activity of broadcasting in Canada. The Act was passed following the report of an independent task force convened in 1985, and extensive Parliamentary proceedings beginning in 1987.[5]

(a) Prior Enactments

24. Prior to 1932, broadcasting was regulated under the *Radiotelegraphy Act* which, like the current *Radiocommunications Act*, related to the use of spectrum for both broadcasting and other telecommunications applications.[6]

25. In 1932, in the *Radio Reference*, the Privy Council held that Parliament had constitutional authority over radiocommunications. The Privy Council held that the broadcasting system consisted of one undertaking or system, from the original dissemination of the broadcast to the ultimate reception by the listener.[7]

26. In the same year, Parliament for the first time subjected the use of radiocommunications for broadcasting applications to an additional statute, the *Canadian Radio Broadcasting Act*. The 1932 Act defined "broadcasting" as "the dissemination of radio-electric communications intended to be received by the public, either directly or through the medium of relay stations".[8] It established a Canadian Radio Broadcasting Commission with the authority, "notwithstanding anything in the *Radiotelegraphy Act* ... to regulate and control broadcasting in Canada carried on

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[5] *Broadcasting Act*, S.C. 1991, c. 11 [**ABA** t.5]; Bill C-136, *An Act respecting broadcasting and to amend certain acts in relation thereto and in relation to radiocommunication*, 2nd Sess., 33rd Parl., 1986-1988 ("Bill C-136") [**ABA** t.1], which passed third reading in the House of Commons but was not approved by the Senate before prorogation; Bill C-40, *An Act respecting broadcasting and to amend certain acts in relation thereto and in relation to radiocommunication*, 2nd Sess., 34th Parl., 1989-1991 ("Bill C-40") [**ABA** t.2].

[6] R.S.C. 1985, c. R-2. Distinct statutory powers in respect of government licensing and regulation of spectrum originated in the 1905 *Wireless Telegraphy Act*, S.C. 1905, c. 49, was continued from 1906 to 1913 as Part IV of the *Telegraph Act*, R.S.C. 1906, c. 26, and was moved back into dedicated legislation in the *Radiotelegraph Act*, S.C. 1913, c. 43. That statute was replaced by enactments of the *Radio Act* in 1938 (S.C. 1938 c. 50) and 1985. The 1985 *Radio Act* was then renamed the *Radiocommunications Act* as part of the changes to that statute enacted, as consequential amendments, by the 1991 *Broadcasting Act.*

[7] *Re: Radio Reference*, [1932] A.C. 304 (P.C.) [**ABA** t.25] at 313-317.

[8] S.C. 1932, c. 51 [**ABA** t.8] at para. 2(a).

by any person whatever."[9] That Commission was responsible both for operating a national broadcaster, and regulating its private-sector competitors.[10]

27. The 1958 *Broadcasting Act* separated the regulator and public broadcaster by constituting an independent supervisory agency, the Board of Broadcast Governors. For the first time, the 1958 Act set out Objects and Purposes. The Board was to supervise the "national broadcasting system" by regulating the relationship between public and private broadcasting stations and providing for "the final determination of all matters and questions in relation thereto".[11]

28. The 1968 *Broadcasting Act* further extended the Act's regulatory authority. It did so in two ways. First, the 1968 Act adopted the "single system" principle as a legislative policy:

> [B]roadcasting undertakings in Canada make use of radio frequencies that are public property and those undertakings constitute a **single system**, in this Act referred to as the Canadian broadcasting system, comprising public and private elements. [12]

A Canadian Radio and Television Commission was constituted to "regulate and supervise all aspects of the Canadian broadcasting system" and implement the new Broadcasting Policy.[13]

29. Second, the 1968 Act expressly included "broadcasting undertakings" within its ambit, and defined those undertakings to include "a broadcasting transmitting undertaking, a broadcasting receiving undertaking and a network operation".[14] The inclusion of "broadcasting receiving undertakings" clarified the scope and application of the *Broadcasting Act*.

30. Until 1971, it was the policy of the Department of Transport ("DOT"), which licensed

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[9] *Ibid.* at s. 8.

[10] The 1936 *Canadian Broadcasting Act,* which renamed the Commission to the Canadian Broadcasting Corporation, maintained the same scheme. The CBC was authorized to oversee the entire broadcasting system in Canada: *Canadian Broadcasting Act*, S.C. 1936, c. 24 [**ABA** t.7] at para. 2(b) and ss. 20-21.

[11] *Broadcasting Act,* S.C. 1958, c. 22 [**ABA** t.4] at ss. 10, 11.

[12] S.C. 1968, c. 25 ("1968 Act"), as consolidated in R.S.C. 1985, c. 9 [**ABA** t.3] at para. 3(a). [emphasis added]

[13] *Ibid.* at s.4. This section was revised following the passage of the *Canadian Radio-television and Telecommunications Commission Act,* S.C. 1974-75-76, c. 49, in which the CRTC replaced the Canadian Transport Commission as telecommunications regulator.

[14] 1968 Act [**ABA** t.3] at s. 2 and para. 3(a).

such cable systems, that they not alter the content of the signals that they received and retransmitted. The CRTC then exercised its authority under the 1968 *Broadcasting Act* to find that, in specific circumstances, it was consistent with the Broadcasting Policy for Canada to curtail that neutrality. The CRTC authorized Rogers Cable to alter U.S. signals by substituting public service announcements for foreign commercial messages. In the *Capital Cities* case, the CRTC authorization was challenged in this Court.[15]

31. In *Capital Cities*, the Appellants argued that as long as cable systems abided by DOT's neutrality policy, those cable systems were mere conduits that were not subject to the *Broadcasting Act*. This Court adopted the description of a cable system as one which "receives signals and sends them through the system to the subscriber" and does nothing more than an enhanced antenna attached to the subscriber's television set. This Court held that, as such, cable systems were broadcasting undertakings that were subject to the 1968 Act as part of the single broadcasting system. Accordingly, the CRTC had the authority to authorize, and even to require, broadcasting receiving undertakings to make alterations or deletions in furtherance of broadcasting policy.[16]

(b) The 1991 Act

32. In 1985, the Canadian government commenced a major overhaul of broadcasting and telecommunication policy that led to the 1991 Act and to the 1993 *Telecommunications Act* (the "1993 Act").[17] An important thrust of that review was to clarify that there was a single system of Canadian broadcasting, for which policy goals were enunciated in the Act, and to ensure these goals could be effectively pursued by an agency regardless of changes in distribution technology.

33. When the federal Department of Communications announced the new broadcasting policy and proposed legislation in June 1988, it stated that the Bill had been "drafted to be

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[15] *Capital Cities Communications Inc. v. Canadian Radio-television Commission et al*., [1978] 2 S.C.R. 141 ("*Capital Cities*") [**ABA** t.16] at 149-150.

[16] *Ibid.* [**ABA** t.16] at 158-159, 166.

[17] S.C. 1993, c. 38 [**ABA** t.12].

'**technology neutral**'. It does not confine broadcasting to any one technology or set of technologies and it does not hinder the development of broadcasting technologies for non-broadcast purposes."[18] An accompanying Fact Sheet stated that the new Bill C-136 "will not distinguish among technologies, but among activities; definitions are not by signal, but by what the signal carries", and that "within the broad area of radiocommunication and telecommunication, broadcasting is distinguished by its programming".[19]

34. In August, 1988, the Minister of Communications stated to the House of Commons Legislative Committee studying the new Bill that it "addresses the activities of programming and programme distribution rather than the specific technologies involved. This will ensure the authority of the CRTC to regulate all players in the broadcasting system, while encouraging continued technological development".[20] Similarly, in November 1989, and when moving that the successor Bill C-40 be read for the second time and referred to legislative committee, the Minister of Communications stated that one of the major improvements in the proposed legislation was that it would ensure "**legal neutrality concerning distribution technologies**".[21]

(c) Jurisdiction under the 1991 Act

35. The 1991 Act applies to "broadcasting undertakings", which it defines as follows:

> "broadcasting undertaking" includes a distribution undertaking, a programming undertaking and a network.[22]

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[18] Communications Canada, News Release, NR-88-5302E (23 June 1998) at p.4, Appellants' Record ("**AR**") Vol. I t.9 p.84 [emphasis added]. On the same day, the Minister of Communication also announced the tabling of documents relating to the proposed amendments to the *Broadcasting Act*. In doing so, she stated as follows: "Equally important is the fact that the legislation is 'technology neutral'": Communications Canada, "Notes for a statement by the Hon. Flora MacDonald, Minister of Communications", **AR** Vol. I t.10 p. 93.

[19] Communications Canada, Fact Sheet, FS-88-3825E, "Technology", **AR** Vol. I t. 11 pp. 96-97; Communications Canada, *Canadian Voices, Canadian Choices: A New Broadcasting Policy for Canada* ("Canadian Voices"), **AR** Vol I t.12 pp. 187-188.

[20] Remarks of the Honourable F. MacDonald, Minister of Communications in House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-136 (Broadcasting Act),* 33rd Parl., 2nd Sess., No. 1 (27 July 1988), **AR** Vol. II t.13.

[21] *House of Commons Debates*, 34th Parl., 2nd Sess., (3 November 1989) (Hon. Marcel Masse and Jim Edwards), **AR** Vol. II t.13 p.18 and **AR** Vol. II t.14 pp. 67, 83-84 [emphasis added].

[22] 1991 Act [**ABA** t. 5] at subs. 2(1) ("broadcasting undertaking").

36. As in the 1968 Act, broadcasting undertakings are defined in the 1991 Act using the word "*includes*". As a result, broadcasting undertakings are not defined in a specific or limited fashion, but only by way of example.[23] The CRTC has from time to time defined classes of broadcasting undertaking that are not distribution, programming or network undertakings.[24]

37. The definition of "broadcasting" in the broadcasting statutes has been revised substantially over the years. At present it reads as follows:

> **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.

38. Each of the items underlined above is a defined term. Substituting the relevant definitions, "broadcasting" is defined as:

> **any transmission of** [any combination of **sounds and visual images**, other than text], whether or not encrypted, by ... [any wire, cable, radio, optical or other electromagnetic system, or any similar technical system] for reception by the public by means of [a device, or combination of devices … capable of being used for the reception of broadcasting], but does not include any such transmission of programs that is made solely for performance or display in a public place.[25]

39. The word "undertaking" is not defined in the Act. However, the Privy Council and this Court have defined it in the communications context as "not a physical thing but … an arrangement under which, of course, physical things are used".[26] The CRTC has described it as a set of activities.[27]

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[23] 1991 Act [**ABA** t. 5] at subs. 2(1). By contrast, in twelve of the fourteen other definitions in that subsection the word "means" is used (e.g., "program" means…), so that these definitions are limited.

[24] Broadcasting Public Notice CRTC 1999-197, **AR** Vol. III t.26, reaffirmed in *Review of broadcasting in new media,* Broadcasting Regulatory Policy CRTC 2009-329, 4 June 2009, **AR** Vol. III t.27 ("new media broadcasting undertaking"); *Distribution of satellite subscription radio services by direct-to-home broadcasting distribution undertakings*, Broadcasting Decision CRTC 2006-615, 3 November 2006, **AR** Vol. II t.17 p.111 [para. 28] ("satellite subscription radio undertaking").

[25] 1991 Act [**ABA** t. 5] at subs. 2(1) [emphasis added].

[26] *Re: Radio Reference* [**ABA** t.25] at 315; *Capital Cities* [**ABA** t.16] at 154-160; *R. v. Nipawin and District Satellite T.V. Inc.*, 42 C.C.C. (3d) 32 (Sask. C.A.), aff. [1991] 1 S.C.R. 64 [**ABA** t.24].

[27] Telecom Decision CRTC 96-1, **AR** Vol. II t.15 p.87 ("the Commission agrees with Stentor's submission that, since the term "broadcasting" forms the basis for the definition of "broadcasting undertaking", to the extent that the

40. As an example of a broadcasting undertaking, the 1991 Act defines a "distribution undertaking" to be "an undertaking **for the reception** of broadcasting and the **retransmission** thereof **by** radio waves or other **means of telecommunications** to … more than one dwelling unit **or to another such undertaking**". By the bolded words, this definition expressly includes undertakings which pass programs to another undertaking as well as to the ultimate viewer.

41. The defined term "distribution undertaking" also updates the 1968 definition of "broadcasting receiving undertaking" by revising all references to radio waves or radiocommunication to add "**or other means of telecommunication**".[28] The bolded words confirm that broadcasting includes any kind of telecommunications to the public, provided its content is audio or audiovisual programs: there need be no nexus with over-the-air radiocommunications.[29] By 2008, more than three quarters of the television services authorized by the CRTC to broadcast in Canada could be received only via distribution undertakings. These services are not broadcast over the air.[30]

42. The 1991 Act's expanded definition of "broadcasting" and "broadcasting undertaking" is accompanied by a declaration of the principle of a single broadcasting system. Subsection 3(2) declares expressly that:

> the Canadian broadcasting system constitutes a **single system** and that the objectives of the broadcasting policy set out in subsection [3](1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a **single independent public authority**." [emphasis added]

43. The Broadcasting Policy for Canada is set forth in subsection 3(1), and consists of 19 separate paragraphs and 28 additional subparagraphs. Subsection 5(1) states the "objects", and 5(2) the "regulatory policy", pursuant to which the CRTC is to regulate and supervise the

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activities of an undertaking do not involve "broadcasting," that undertaking does not operate as a "broadcasting undertaking" with respect to those activities.").

[28] 1991 Act [**ABA** t. 5] at subs. 2(1) ("distribution undertaking") [emphasis added].

[29] For instance, the *Pay Television Regulations, 1990,* SOR/90-105 and *Specialty Services Regulations, 1990*, SOR/90-106, regulate classes of programming services not authorized for transmission over the air.

[30] CRTC, *Communication Monitoring Report 2009* (Ottawa: CRTC, 2009) [**ABA** t.36] at 124*,* showing that of 707 such television services, 168 (23.8%) were over-the-air broadcasters and 539 (76.2%) were not.

Canadian broadcasting system with a view to implementing the subsection 3(1) policies. In exercising this authority, the CRTC is to have regard to the single-system declaration in subsection 3(2).

44. The Act grants broad licensing and regulatory powers to the CRTC to achieve these objects. The CRTC has used these powers, for example, to make the *Broadcasting Distribution Regulations*. Those regulations require licensees not to alter or delete a programming service. However, those regulations also establish exceptions to that neutrality: they permit or require alterations that the CRTC has found to be consistent with broadcasting policy. The same regulations require larger distribution undertakings to contribute a proportion of their gross revenues to the creation of Canadian programming, in furtherance of the objects of the Act.[31]

45. Several sections of the Act prescribe how the CRTC should exercise its regulatory discretion. First, subsections 5(2) and (3) require the CRTC, wherever possible, to undertake its duties in "a flexible manner" that, among other matters, is "readily adaptable to scientific and technological change" and "does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians".[32]

46. Second, the CRTC is required to exempt undertakings from regulatory requirements if satisfied that the undertakings' compliance with them will not contribute materially to implementing the broadcasting policy. This requirement is expanded from the 1968 Act, and counterbalances the broader net cast by the new definition of "broadcasting".[33] It ensures that, if services are technically classified as broadcasting but have little relevance to the statutory objectives, they are exempted from the Act.[34] It also allows the CRTC to supervise new

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[31] *Broadcasting Distribution Regulations*, SOR/97-555 [**ABA** t.6]; 1991 Act [**ABA** t. 5] at paras. 10(i), (k).

[32] 1991 Act [**ABA** t. 5] at subs. 5(3) and paras. 5(2)(c) and (f).

[33] The equivalent provision of the 1968 Act was discretionary, not mandatory, and applied only to classes of broadcasting receiving undertakings: **ABA** t.3 at para. 3(e).

[34] For instance: terrestrial relay distribution undertakings which transport video programming to distributors (Broadcasting Public Notice CRTC 2006-143 [**ABA** t.30]); radiocommunication distribution undertakings in rural and remote areas which distribute programming to subscribers, and originate none themselves (Broadcasting Public Notice CRTC 2002-45 [**ABA** t.31]); and Satellite Master Antenna Television (SMATV) systems which distribute

broadcasting technologies as they emerge.[35] For that reason, the CRTC reviews each exemption order periodically to take into account changing circumstances and review their effectiveness.[36]

D. The *Telecommunications Act*

47. The 1993 Act establishes policy goals for, and regulatory authority over, telecommunications services that are not "broadcasting". That Act consolidated the federal telecommunications regulatory framework previously set out in other statutes.

(a) Prior Enactments

48. Federal regulation of telecommunications has existed in various forms since the 1852 passage of the *Telegraph Act.*[37] The original antecedent to the *Telecommunications Act* is the 1906 *Railway Act,* which designated the Board of Railway Commissioners ("BRC") as the first independent federal telecommunications regulatory agency.[38] These functions of the BRC and its successors were moved in 1976 into the Canadian Radio and Television Commission, which was accordingly renamed the Canadian Radio-television and Telecommunications Commission.[39] In 1976, the CRTC became the first unified regulatory authority in Canada for telecommunications services including broadcasting services.[40]

49. Until 1993, the *Railway Act* continued to be the substantive federal statute governing telecommunications. The *Telecommunications Act* consolidated the relevant portions of the

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programming only within a condominium, apartment or educational building on campus (Broadcasting Public Notice CRTC 2002-35 [**ABA** t.28]).

[35] 1991 Act [**ABA** t. 5], at subs. 9(4).

[36] *Policy regarding the use of exemption orders*, Public Notice CRTC 1996-59, 26 April 1996 (**ABA** t.32) part II(e).

[37] S.P.C. 1852, c. X.

[38] R.S.C. 1906, c. 37.

[39] *Transportation Act,* S.C. 1938, c. 53, establishing the Board of Transport Commissioners; *National Transportation Act,* S.C. 1966-67, c. 69, establishing the Canadian Transport Commission, renamed in 1988 as the *National Telecommunications Powers and Procedures Act,* R.S.C. 1985, c. N-20 ("NTPPA"); *Canadian Radio-television and Telecommunications Commission Act*, *supra* note 13.

[40] Spectrum licensing and regulation continues to be administered separately by Industry Canada under the *Radiocommunications Act,* R.S.C. 1985, c. R-2. The services provided using spectrum are then mostly supervised under the *Telecommunications* and *Broadcasting Acts.*

Railway Act with related provisions from various other federal statutes, completing the scheme.[41]

(b) The 1993 Act

50. The *Telecommunications Act* defines "telecommunications" as "the emission, transmission or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system or by any other technical system".[42] In a similar fashion to the *Broadcasting Act*, the *Telecommunications Act* establishes broad policy objectives and mandates the CRTC to ensure that those policy objectives are realized,[43] but counterbalances this breadth by allowing regulation only where required to protect users' interests.[44]

(c) Jurisdiction under the 1993 Act

51. The *Telecommunications Act* assigns powers and duties to the CRTC in respect of telecommunications service in Canada. Section 4 excludes from that Act the transmission of audiovisual content to the public—"broadcasting"—by a "broadcasting undertaking".

52. The *Telecommunications Act* distinguishes between those persons who own and operate a type of telecommunications facility called a "transmission facility", and those who do not own or operate such facilities. A "transmission facility" is a physical network link, such as a wire or cable, between at least two points.

53. A person who owns or "operates" a transmission facility is a "telecommunications common carrier".[45] For instance, a fibre optic cable linking an end-user to a service provider is a

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[41] *Telecommunications Act* [**ABA** t. 12]. The *Telecommunications Act* consolidated and updated: the substantive telecommunication provisions in the *Railway Act,* R.S.C. 1906, c. 37, which it rescinded; the procedural provisions of the NTPPA, *supra* note 39, which was repealed; the international submarine cable provisions from the *Telegraphs Act,* R.S.C. 1906, c. 26, which was repealed; and certain company-specific statutes.

[42] *Telecommunications Act* [**ABA** t. 12], at subs. 2(1).

[43] 1991 Act [**ABA** t. 5], at subs. 5(1); *Telecommunications Act* [**ABA** t. 12], ss. 7 and 47. The *Telecommunications Act* also gives the Governor in Council authority to issue policy directives to the CRTC and to vary, rescind or refer back the CRTC decisions: ss. 8 and 12.

[44] *Telecommunications Act* [**ABA** t. 12], at subs. 34(2); see also 34(1) (discretionary power to refrain from regulation where doing so would be consistent with telecommunications policy objectives).

[45] *Telecommunications Act* [**ABA** t. 12], at subs. 2(1).

transmission facility: to own or "operate" it is to act as a telecommunications common carrier.[46] Only telecommunications common carriers can own physical network links used to provide telecommunication services to the public for compensation. The *Telecommunications Act* grants the CRTC broad authority over virtually all telecommunication services offered by these "facilities-based" telecommunications common carriers.

54. By virtue of the definitions in the 1993 Act, a router, which is the fundamental equipment used by ISPs to receive and retransmit packets, is not a transmission facility.[47] Accordingly, a service provider that owns or operates a router is not required to be a telecommunications common carrier.[48] A service provider that does not own or operate a transmission facility, but that does use equipment such as a router, is acting as a "telecommunications service provider", but is *not* a "telecommunications common carrier". A number of ISPs fall into this category.

55. *Telecommunications Act* authority over these non-carrier service providers is very limited.[49] To provide a basic service such as Internet access, such a telecommunications service provider must obtain the use of a physical network transmission facility owned by a carrier. The CRTC has from time to time sought to regulate non-carrier service providers indirectly, by stipulating terms that carriers must include in agreements with non-carrier service providers.[50]

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[46] The scope of the undefined term "operate" is narrow. The CRTC has found that persons who lease unlit fibre-optic cables, attach optical equipment to light them, attach transmission equipment, and transmit over them, *are not operating a transmission facility*. In so finding, the CRTC made note of submissions that the owner of the unlit fibre "retains operational responsibility of the fibre to the extent that it remains responsible for access to, and the maintenance, repair, and replacement of, the fibre." *Classification of service providers that light leased dark fibre for subsequent sale,* Telecom Decision CRTC 2010-930, 9 December 2010 [**ABA** t.29] at paras. 28-37 and 44.

[47] *Infra* at paras. 59-63.

[48] *Telecommunications Act* [**ABA** t. 12], at subs. 2(1) ("telecommunications common carrier"; "transmission facility"; "exempt transmission apparatus"). Similarly, software connection equipment, connectivity services facilities, and hosting facilities are not transmission facilities.

[49] The CRTC may require them to contribute to a fund for continuing access to basic telecommunications services (s. 46.5), and to be licensed to provide international services (para. 67(b.2)): *Telecommunications Act* [**ABA** t. 12].

[50] See, *e.g.*, *Review of the Internet traffic management practices of Internet service providers,* Telecom Regulatory Policy CRTC 2009-657, 21 Oct. 2009 [**ABA** t.35] at paras. 6, 13, 49-50 and 63-66 (re "secondary ISPs").

E. CRTC Decisions leading to the Reference

56. Beginning in 1999, the CRTC undertook public consultations regarding communications and information services delivered over the Internet. The CRTC received well in excess of 1000 submissions. Over 13 days of hearings, the CRTC heard from close to 100 parties.[51] In its conclusions, the CRTC made the following findings which are pertinent to the present appeal:

(1) Information transmitted on the Internet is not thereby displayed in a public place and is not therefore excluded from the definition of "broadcasting":

> [The Commission] considers that the Internet is not in and out of itself a "public place" in the sense intended by the Act. Programs are not transmitted to cyberspace, but through it, and are received in a physical place, e.g. in an office or home.[52]

(2) The fact that programs are transmitted to end-users by means of the Internet does not exclude the activity from the definition of "broadcasting":

> The Commission notes that the definition of "broadcasting" includes the transmission of programs, whether or not encrypted, by other means of telecommunication. This definition is, and was intended to be, technologically neutral. Accordingly, **the mere fact that [a] program is delivered by means of the Internet, rather than by means of the airwaves or by a cable company, does not exclude it from the definition of "broadcasting"**. [53]

(3) The delivery of content over the Internet to end-users involves the "transmission" of the content:

> The fact that an end-user activates the delivery of a program is not, in the Commission's view, determinative. As discussed below, **on-demand delivery is included in the definition of "broadcasting".** Further, the Commission considers that the particular technology used for the delivery of signals over the Internet cannot be determinative. **Based on a plain**

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[51] *New Media,* Broadcasting Public Notice CRTC 1999-84 and Telecom Public Notice CRTC 99-14, 17 May 1999, **AR** Vol III t.25 p.44-45 [paras. 2-5]. The CRTC also hosted an on-line forum which stimulated comment from across the nation and around the world.

[52] *Ibid.*, **AR** Vol III t.25 p.48 [para. 36].

[53] *Ibid.,* **AR** Vol III t.25 p.48-49 [para. 38] [emphasis added].

> **meaning of the word, and recognizing the intent that the definition be technologically neutral,** the Commission considers that the delivery of data signals from an origination point (e.g. a host server) to a reception point (e.g. an end-user's apparatus) **by means of the Internet involves the "transmission" of the content**. [54]

(4) The words "broadcasting receiving apparatus" include personal computers or Web TV boxes, which connect the Internet to television sets, when used to access the Internet:

> "The Commission notes that the definition of "broadcasting receiving apparatus" includes a "device, or combination of devices, intended for or capable of being used for the reception of broadcasting". The Commission considers that **an interpretation of this definition that includes only conventional televisions and radios is not supported by the plain meaning of the definition and would undermine the technological neutrality of the definition of "broadcasting"**. In the Commission's view, devices such as personal computers, or televisions equipped with Web TV boxes, fall within the definition of "broadcasting receiving apparatus" to the extent that they are or are capable of being used to receive broadcasting." [55]

(5) Programs which may be accessed by the end-user as and when the end-user accesses them are "for reception by the public":

> In the Commission's view, there is no explicit or implicit statutory requirement that broadcasting involve scheduled or simultaneous transmissions of programs. The Commission notes that the legislator could have, but did not, expressly exclude on-demand programs from the Act. As noted by one party, the mere ability of an end-user to select content on-demand does not by itself remove such content from the definition of broadcasting. **The Commission considers that programs that are transmitted to members of the public on-demand are transmitted "for reception by the public**". [56]

(6) Digital audio and video services transmitted over the Internet are "broadcasting":

> The Commission notes that digital television can be expected to allow this more limited degree of customization. In these circumstances, where the

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[54] Broadcasting Public Notice CRTC 1999-84, **AR** Vol III t.25 p.49 [para. 39] [emphasis added].

[55] *Ibid.*, **AR** Vol III t.25 p.49 [para. 40].

[56] *Ibid.,* **AR** Vol III t.25 p.49 [para. 44].

> experience of end-users with the program in question would be similar, if not the same, **there is nonetheless a transmission of the program** for reception by the public, and, therefore, such content would be "broadcasting". These types of programs would include, for example, those that consist of digital audio and video services.[57]

57. In June 2009 the CRTC affirmed its 1999 finding that there is "broadcasting" within the meaning of the Act with respect to audio and audiovisual materials transmitted over the Internet.[58] The CRTC repeated these findings in its July 2009 Order initiating this Reference and adopted this Court's findings in *SOCAN v. CAIP* in stating that "**transmission** on the Internet" occurs as "packets are **transmitted** through multiple routers until they reach the end-user's ISP **for delivery to** the computer or other Internet-aware device operated by the end-user." The CRTC stated that the "role of ISPs" is "to provide for the **transmission of content** requested by their end-users", and reiterated that:

> The fact that … ISPs provide end-users with access to [audio and audiovisual] content was not in dispute. The legal question that is currently unresolved in this proceeding is whether in providing access to broadcasting ISPs are subject, in whole or in part, to the *Broadcasting Act.*[59]

58. At the same time, the CRTC made a finding on levying ISPs' revenues. The CRTC already requires most distribution undertakings to contribute to the funding of Canadian program creation.[60] The CRTC was asked to find that the broadcasting-related revenues of ISPs should bear a proportionate responsibility for such funding. It decided that the evidence presented did not support establishing such a levy "at this time".[61] The CRTC also decided that, by 2014, it

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[57] *Ibid.* **AR** Vol III t.25 p.49-50 [para. 46] [emphasis added].

[58] Broadcasting Regulatory Policy CRTC 2009-329, **AR** Vol. III t.27 p.65-66, 70-71 [paras. 1-4, 28, 31]. In the process of arriving at this decision, the CRTC had undertaken a research compilation, solicited stakeholder views, undertaken a public proceeding to establish the scope of the CRTC's review and held a public proceeding in which the CRTC considered over 150 comments and over 70 final submissions from more than 50 parties; see also Broadcasting Public Notice CRTC 1999-84, **AR** Vol. III t.25 p.73-74 [paras. 47-52].

[59] *Reference to the Federal Court of Appeal – Applicability of the Broadcasting Act to Internet service providers,* Broadcasting Order CRTC 2009-452, 28 July 2009, **AR** Vol. I t.4 p.58-59 [paras. 12-18] [emphasis added]; *infra* note 64.

[60] 1991 Act [**ABA** t. 5], at para. 3(1)(t); *Regulations* [**ABA** t.6], s. 29 and 44.

[61] Broadcasting Regulatory Policy CRTC 2009-329, **AR** Vol. III t.27 p. 72 [para. 41].

would review the appropriate regulatory treatment of broadcasting over the Internet in light of the Internet's evolving significance in the Canadian broadcasting system.[62]

F. Activities of ISPs

59. The Internet is a worldwide network that allows for the transmission of many types of data to and from many types of devices. Persons wishing to disseminate content through the Internet arrange for it to be encoded and stored on host servers. End-users wishing to access this content do so through ISPs. It is only through ISPs that end-users are connected to the Internet and receive content from a host server. To provide Internet service, ISPs must, among other things: deploy an infrastructure of network hardware; execute network control mechanisms and management strategies; and enter into business arrangements such as interconnection agreements with "content distribution networks", also known as "caching" system providers, and with other networks.[63] ISPs acquire blocks of universal Internet Protocol (IP) addresses for their system and in turn assign an IP address to each of their subscribers.[64]

60. When an end-user issues a request for content from an Internet-connected device, the request is sent to the ISP to which he or she subscribes. The ISP translates the request so as to direct it to the most appropriate "cache" or other host server that has a copy of the content, according to the policy and arrangements of the ISP. When the host server fulfills the request, it sends the content in the form of data packets to another device known as a router. It examines the packets' header information, and uses their instructions to calculate the appropriate

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[62] Broadcasting Regulatory Policy CRTC 2009-329 , **AR** Vol. III t.27 p.70,72 [paras. 26 and 40-41].

[63] Affidavit of Mark Coates for the Cultural Groups ("Coates"), **AR** Vol. III t.28 p. 99-100, 104 [paras. 21, 23 and 33] (on arrangements between ISPs and caching system providers); Affidavit of Kenneth Engelhart for the ISP Coalition ("Engelhart"), **AR** Vol. III t.30 p. 133, paras. 46-48 (on the operations of content distribution networks). See also David D. Clark, *Design and Operation of the Internet* (Report to Gowling, Strathy and Henderson, 1997), **AR** Vol. II t.19 p.146 ("Clark"), (regarding "TV caches").

[64] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427 [**ABA** t.26] at para. 8 (*SOCAN v. CAIP*); Broadcasting Order CRTC 2009-452, **AR** Vol. I t.4 at para. 16; Clark, **AR** Vol. II t.19 p.128-132, 138, 146-147, 149-152 [ss. 3-3.2 and 3.11, 5.2, 7]; Coates , **AR** Vol. III t.28 p. 95, 99 [paras. 8, 20]. The facts in this and subsequent paras. are taken from the 2009 Order of the CRTC, the affidavits filed in this application, this Court's conclusions in *SOCAN v. CAIP*, and the other materials referred to in this factum.

transmission route for the packets to be sent to back to the end-user.[65]

61. The packets are thus read and copied multiple times by a succession of routers, causing them to be transmitted from router to router, until they reach the end-user's ISP for final transmission to the device operated by the end-user. Each router accomplishes its transmissions through interconnection with equipment attached to physical network links either leased from a telecommunications common carrier, or owned by the company operating the router.[66]

62. The core business activity of an ISP is forwarding packets. That business activity is accomplished by the ISP installing and operating routers, and by the routers receiving and transmitting packets. That process is an active one.[67]

63. An increasing proportion of content accessed over the Internet is audio content (such as music) and audiovisual content (such as movies or live hockey games). This trend is continuing. Canada has the highest consumption rate of on-line video content in the world.[68] On-demand video is forecast to make up a large proportion, if not the majority, of traffic transmitted by ISPs to end-users. One provider of television shows and movies over the Internet, Netflix, now accounts for almost 30% of all U.S. Internet traffic flowing to end-users. Netflix has "fundamentally alter[ed] the Internet landscape" and reportedly accounts for more Internet traffic in North America than the World Wide Web.[69]

64. These increases have driven demand for network resources and caused congestion.[70]

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[65] Broadcasting Order CRTC 2009-452, **AR** Vol. I t.4 p.58 [paras. 13-14]; *SOCAN v. CAIP* [**ABA** t.26], at para. 20; Engelhart, **AR** Vol. III t.30 p.127-129 [paras. 27 and 33], and Coates , **AR** Vol. III t.28 p. 101 [para. 25].

[66] Broadcasting Order CRTC 2009-452, **AR** Vol. I t.4 at para. 12; *SOCAN v. CAIP* [**ABA** t.26], at paras. 8-9, 20; Coates, **AR** Vol. III t.28 p.100-102 [paras. 23-28]; Clark, **AR** Vol. II t.19 p.128-132 [s. 3.2].

[67] Clark, **AR** Vol. II t.19 p.128-132,138 [ss. 3.1, 3.2, 3.11]; Coates, **AR** Vol. III t.28 p.99-102 [paras. 21-28].

[68] Affidavit of David L. Wodelet for Shaw Communications Inc. ("Wodelet"), **AR** Vol III t.32 p.162 [para. 15]; Remarks of Ken Stein in House of Commons, Standing Committee on Industry, Science and Technology, Evidence, 40th Parl., 3rd Sess., No. 056 (10 February 2011) [**ABA** t.38].

[69] Sandvine, *Global Internet Phenomena Spotlight 2011* [**ABA** t.40] at 8 and 10, referring only to "streaming".

[70] Cisco Systems Inc., "Global IP Traffic Forecast and Methodology, 2006-2011", **AR**, Vol. II t.20 p.174,180-182 ("Peer-to-peer traffic still dominates Internet traffic and growth is not slowing…. driven by the … increasing use of peer-to-peer for standard-definition video file exchange, and the advent of high-definition video file exchange and

ISPs have introduced practices for "network and system design, implementation and enhancement" to cope with this congestion and demand. [71] One such practice is "usage-based billing", which aligns the way that Internet access is charged with the consumption of network resources: audiovisual content consumes a relatively high degree of network resources.[72]

65. Another such practice is called "Deep Packet Inspection" ("DPI"). DPI allows ISPs to analyze the content of data packets and use this information to improve "types of on-line experience" that result from the use of applications that "make broadcast programs available on the Internet". These applications include "Internet radio", "streaming video from YouTube, etc.", and "'client-server' download services like … iTunes".[73] DPI permits the ISP to undertake the classification of network traffic, permitting traffic created by different applications to be treated or processed differently. DPI has been used to identify and inhibit "peer-to-peer" file exchange, of which audiovisual content is a significant part. DPI also enables activities such as exercising parental control, providing personalized advertising, and addressing security threats.[74]

66. The CRTC reviews these practices and their appropriateness, fairness, and compliance with the *Telecommunications Act.* These practices affect the quantity and quality with which programming is made available to and consumed by Canadians. However, the CRTC has not reviewed these practices with regard to the goals of the *Broadcasting Act*.[75]

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television content via peer-to-peer…. Internet video and streaming and downloads are beginning to take a larger share of bandwidth, and will grow from 9 percent of all consumer Internet traffic in 2006 to 30 percent in 2011. P2P … [will] make up 43 percent of consumer Internet traffic in 2011").

[71] Wodelet, **AR** Vol III t.32 p162 [para. 15].

[72] *Review of billing practices for wholesale residential high-speed access services,* Telecom Notice of Consultation CRTC 2011-77, 8 February 2011 [**ABA** t.34] at paras. 5-7; Telecom Regulatory Policy CRTC 2009-657 [**ABA** t.35], at para. 40; Coates, **AR** Vol. III t.28 p.96-97 [para. 11].

[73] Engelhart, **AR** Vol. III t.30 p.130 [para. 35]; Bell Canada, "Bell: Network Management," **AR** Vol. III t.23.

[74] *Review of the Internet traffic management practices of Internet service providers*, Telecom Public Notice CRTC 2008-19-1, 11 February 2009, attaching Graham Finnie, "Traffic Management Technologies: The State of the Art" prepared on behalf of the CRTC (January 2009), **AR** Vol. III t.21 at 3.

[75] *Review of the Internet traffic management practices of Internet service providers*, Telecom Public Notice CRTC 2008-19, 20 November 2008, **AR** Vol. II t.18, decided in Telecom Regulatory Policy CRTC 2009-657; *Review of billing practices for wholesale residential high-speed access services*, Telecom Notice of Consultation CRTC 2011-77, 8 February 2011 [**ABA** t.34]; *Requests to modify the scope and terms of the proceeding*, CRTC Letter, 11 March 2011 [**ABA** t.33].

G. Decision of the Federal Court of Appeal

67. The Federal Court of Appeal answered "No" to the question posed by the CRTC. It did so notwithstanding its acknowledgement that it was required to accept the assumptions on which the question was framed, and that the question assumed that programs are transmitted on the Internet. The Court further acknowledged that, read on its own, the definition of "broadcasting" in the Act includes what that Court called "providing the mode of transmission", since no distinction is made between the active or passive nature of the involvement.[76]

68. However, the Federal Court of Appeal arrived at a contrary conclusion by applying what it stated to be the policy focus of the *Broadcasting Act,* namely, the cultural enrichment of Canada. The Federal Court of Appeal held that it is only those persons who are "making the transmission" that can contribute to that cultural enrichment and, therefore, "transmit" programs within the meaning of that word in the *Broadcasting Act.*

69. The Court did not state what it meant by those words. However, it apparently meant that it is only the person who either initiates the first transmission in a series of transmissions, or else influences its content, who "transmits" or "makes the transmission". Accordingly, the Federal Court of Appeal concluded that ISPs' activities do not amount to "transmission" and, therefore, ISPs do not act as broadcasting undertakings.[77]

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[76] *Reference re Broadcasting Act (Can.) applicability to Internet Service Providers*, 2010 FCA 178, 322 D.L.R. (4th) 337 ("FCA Decision"), **AR** Vol. I t.3, paras. 32-33, 38 and 39.

[77] *Ibid.*, paras. 39-40, 46-49, 59.

PART II – QUESTIONS IN ISSUE

70. The question referred by the CRTC to the Federal Court of Appeal was:

> Do retail ISPs carry on, in whole or in part, "broadcasting undertakings" subject to the Act when, in their role as ISPs, they provide access through the Internet to "broadcasting" requested by end-users?[78]

71. The Federal Court of Appeal's response to the Reference requires that the Reference question be divided into two questions on this appeal:

> (i) Did the Federal Court of Appeal err in law in its interpretation of the word "transmission" in section 2 of the *Broadcasting Act*?
>
> (ii) Did the Federal Court of Appeal err in holding that retail ISPs do not carry on "broadcasting undertakings" by reason of policy or considerations other than the wording of section 2 of the Act?

PART III – LAW AND ARGUMENT

A. Standard of Review

72. Subsection 18.3(1) of the *Federal Courts Act* provides for a reference on any question or issue of law or jurisdiction.[79] The Federal Court of Appeal's decision involves a determination of the jurisdiction of the CRTC over ISPs' activities, and pure questions of law about the interpretation of the *Broadcasting Act*. Accordingly, that decision is to be reviewed on the basis of correctness.[80]

B. ISPs Are Engaged in "Transmission"

73. The definitions in the *Broadcasting Act* are to be interpreted in the entire context of that Act, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the

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[78] Notice of Application of the CRTC, 28 July 2009, **AR** Vol. I t.5 at 2; Broadcasting Order CRTC 2009-452, **AR** Vol. I t.4 at para. 19.

[79] R.S.C. 1985, c. F-7.

[80] *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190 [**ABA** t.17] at paras. 51, 55; *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, [2009] 3 S.C.R. 309 [**ABA** t.21] at para. 10.

object of the Act and the intention of Parliament.[81]

74. As stated in paragraph 67, the Federal Court of Appeal acknowledged that, read on its own, the word "broadcasting" in section 2 of the Act includes a person whose sole involvement is to retransmit without input or control into the content, since the Act makes no distinction between the active or passive nature of the involvement. Accordingly, based upon the ordinary meaning of the word "transmission", ISPs are involved in "transmission" and are acting as "broadcasting undertakings" when they deliver audiovisual materials to their subscribers.

75. It is submitted that, for numerous reasons, the Federal Court of Appeal erred in holding that ISPs are not engaged in "transmission".

(a) Findings of the CRTC

76. The decision of the Federal Court of Appeal is inconsistent with the findings contained in the decisions of the CRTC. As noted in paragraphs 56 and 57 above, the CRTC expressly found that "transmission" of broadcasting to end-users is occurring on the Internet and that the business of ISPs is to provide for the transmission of content requested by end-users.

77. The findings of the CRTC can be read in no other way than involving the transmission of data packets by ISPs to their end-users. Indeed, the Federal Court of Appeal itself stated that the "referred question assumes that programs are transmitted on the Internet", and that "the issue is whether, when providing access to the 'transmission of programs', ISPs are broadcasting".

78. Moreover, the Federal Court of Appeal's finding that ISPs are in "utter ignorance" of content goes much further than the CRTC's description.[82] As set forth, ISPs affect how and how much Canadians obtain programs through the Internet in fundamental ways.[83]

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[81] *Bell ExpressVu v. Rex*, [2002] 2 S.C.R. 559 [**ABA** t.14] at paras. 26-27, 62; Ruth Sullivan, *Sullivan on the Construction of Statutes,* 5th ed. (Toronto, Butterworths, 2009) [**ABA** t.39] at p. 1, 5-7, 23-27, 42-43.

[82] Broadcasting Order CRTC 2009-452, **AR** Vol. 1 t.4 p.57 [para. 16] ("In their role as providers of access to broadcasting, ISPs do not select or originate programming or package or aggregate programming services.").

[83] *Supra,* paras. 64-66.

(b) Affidavit Evidence before the Federal Court of Appeal

79. The decision of the Federal Court of Appeal is also inconsistent with the evidence before that Court, referred to in paragraphs 59 to 65 above. That evidence was consistent with the findings of the CRTC, which in turn were based upon the findings of this Court in *SOCAN v. CAIP*. In *SOCAN v. CAIP*, this Court held that:

> the various packets are forwarded from router to router and may follow different transmission routes along the way until they reach the Internet service provider at the receiving end which, under contract to the end-user, **transmits** the packets to the computer operated by the end-user.[84]

80. The affidavit and documentary evidence before the Federal Court of Appeal established that there is transmission of the data packets by means of the ISP's undertaking, from the receipt of those packets at the ISP's system boundary, through the ISP's system and on to the end-user. Once those packets are received by the ISP, they do not travel onward by magic. They travel because, and only because, they are propelled onward by the routers in the ISP's undertaking, and directed to the correct end-user by the routers and other systems of the ISP. Like the findings of the CRTC, the evidence before the court establishes that the process is an active one. Whether that process is described as "active" or "passive", the data packets will not reach their destination without the ISP's undertaking and its equipment transmitting them to the end-user.

(c) Structure of the *Broadcasting Act*

81. The whole structure of the *Broadcasting Act* demonstrates that Parliament intended to include within the definition of "broadcasting" those undertakings that retransmit programs to the public without exercising input or control over those programs' content. The Federal Court of Appeal referred to this type of transmission as "providing the mode of transmission". The Act does not contain those words. The Act's structure demonstrates that Parliament did not intend to limit the definition of "broadcasting" to undertakings that exercise such control or input.

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[84] *SOCAN v. CAIP* [**ABA** t.26] at paras. 20, 42 [emphasis added].

82. The Act separately identifies and includes both programming undertakings (which disseminate programs) and distribution undertakings (which receive and retransmit programs). The definition expressly includes an undertaking which retransmits the program to an end-user or another undertaking. The definition contains no suggestion that the retransmitter need have input or control over the content of the program.[85]

83. The plain effect of the generic definition of "broadcasting undertaking" in s. 2 is to include all such disseminating and receiving/retransmitting undertakings. As the Federal Court of Appeal acknowledged, there is nothing in the Act that requires that those undertakings be involved in the content or the message contained in the broadcasting.[86]

(d) History of the *Broadcasting Act*

84. The history of the Act further confirms that Parliament intended the Act's scope to include undertakings which have no control over or involvement in the programming. The 1932 version of the Act defined "broadcasting" to include dissemination "either directly or indirectly through the medium of relay stations".[87] The later Acts substantially widened the regulatory net over the receiving end of the system. The 1968 Act did so by defining a broadcasting undertaking to include a "broadcasting receiving undertaking".[88] The DOT policy required these undertakings not to alter the signals they received and retransmitted.[89]

85. The 1991 Act widened the definition of these "broadcasting receiving undertakings", renaming them "distribution undertakings" and specifying that they included undertakings for the reception of broadcasting and the retransmission thereof to other such undertakings.[90] This definition demonstrates that "transmission" could not mean only the first in a series of

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[85] 1991 Act [**ABA** t. 5] s. 2(1) ("distribution undertaking").

[86] FCA Decision, **AR** Vol. I t.3 at para. 39.

[87] *Canadian Radio Broadcasting Act* [**ABA** t.8] at para. 2(a).

[88] 1968 Act [**ABA** t.3] at s. 2.

[89] *Capital Cities* [**ABA** t.16] at 149-150.

[90] 1991 Act [**ABA** t. 5] at subs. 2(1).

transmissions. It expressly includes the subsequent transmissions that are part of a series. None of these definitions suggests that the distribution undertaking need have any control or involvement in the content of the programming.[91]

(e) Gap in the Single System

86. The Federal Court of Appeal's interpretation of the word "transmission" creates a gap in the broadcasting system. The last and most important link in the system, namely the ISP through which the broadcast reaches the subscriber, is removed from the Act by that interpretation. Such an interpretation contradicts the "single system" principle which was enunciated in the *Radio Reference*, was a fundamental component of the 1968 and 1991 Acts, and was applied and endorsed by this Court in *Capital Cities*. In the *Capital Cities* case, the appellants asserted that the receiving undertaking was "no more than a conduit for signals from the telecast", did nothing more than act as the antenna for the television viewer, and was therefore not covered by the 1968 *Broadcasting Act*. That argument is similar to the argument now raised by the respondents in the present appeal with respect to new technology.

87. In *Capital Cities,* this Court held that the broadcasting system was a "single undertaking" which included receiving undertakings, all of which was subject to the 1968 Act.[92] The extension of that principle to *all* technologies which transmit audiovisual content to the public, in order to ensure that the Act adapt to new technologies without risking erosion of its jurisdiction, is fundamental to the *Broadcasting Act.*

88. Parliament must have been aware of the *Radio Reference* case when it enacted the 1968 *Broadcasting Act*, and of the *Radio Reference* and *Capital Cities* cases when it enacted the 1991 Act. It must have been aware that, in both cases, the argument had been advanced, and rejected,

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[91] Note also the express decision to include, as "broadcasting", on-demand programming, selected and requested by the end-user: *supra* note 54 and accompanying text. Compare also Bill C-136 [**ABA** t. 1] at subs. 2(1) ("broadcasting"), which excluded on-demand transmission from the definition of "broadcasting", to Bill C-40 [**ABA** t.2] at subs. 2(1) ("broadcasting"), which eliminated that exclusion.

[92] *Capital Cities* [**ABA** t.16] at 157-159, 163-168.

that distinct undertakings to operate an aerial in a radio (in the *Radio Reference*) and a cable system in television (in *Capital Cities*) were outside the broadcasting system. Had Parliament intended to remove the authority of the *Broadcasting Act* over passive receiving and transmitting systems, it would have said so.[93] Instead, Parliament expressly incorporated the single system principle into those enactments, thereby affirming that the *Broadcasting Act* applies to all elements of the system from dissemination to reception.

89. The Federal Court of Appeal erred by distinguishing the *Capital Cities* decision on the basis that the decision dealt with constitutional matters. In fact, the constitutional question was one of five which the Court considered.[94] The appellants in *Capital Cities* argued that, in addition to Parliament not having constitutional jurisdiction over receiving undertakings, the 1968 *Broadcasting Act* did not apply to those undertakings because they were no more than an aerial for the viewer. This Court rejected that argument and held that those undertakings fell within that Act.[95]

90. The Federal Court of Appeal also erred in distinguishing the *Capital Cities* decision on the basis that, at the time of that decision, the default federal statute was the *Broadcasting Act,* as the regulatory scheme did not include the *Telecommunications Act.* In fact, at that time the CRTC supervised telecommunications pursuant to the *Railway Act.*[96] This Court's finding that content-neutral audiovisual retransmissions to the public fell under the *Broadcasting Act* did not result from a dearth of statutory regimes to which to resort. It resulted from this Court's finding that the 1968 *Broadcasting Act* was the applicable statute.[97]

(f) Parliamentary Proceedings, 1985-1991

91. The parliamentary proceedings leading to the 1991 *Broadcasting Act* show that

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[93] *Sullivan* [**ABA** t.39] at 632.

[94] *Capital Cities* [**ABA** t.16] at 150-151.

[95] *Capital Cities* [**ABA** t.16] at 163-168.

[96] *Supra,* para. 48; FCA Decision, **AR** Vol. I t.3 p.31 [para. 57].

[97] *Capital Cities* [**ABA** t.16] at 168.

Parliament intended that the Act be applied in a "technology neutral" fashion, particularly with respect to the distribution of broadcasting.[98] In effect, the decision of the Federal Court of Appeal allows the intent of Parliament to be thwarted by the nature of the technology, simply by characterizing the technology used by ISPs as "passive" technology, and exempting such technology from the ambit of the Act.

92. The nature of technology cannot change the scope and application of the Act, nor can it shield an undertaking from the application of the Act. Yet, the Federal Court of Appeal's interpretation of the word "transmission" has effectively allowed that to happen, by making the application of the Act depend on the nature of the technology used by the service provider.

(g) Restriction Written into the Act

93. The Federal Court of Appeal's decision effectively reads a restriction into the *Broadcasting Act* that is not there. The Federal Court of Appeal has held that an undertaking must have control or input into content before it is "broadcasting". That holding injects into the definition of "broadcasting" words like "which originate" or "which impact or control content". Those words or concepts are simply not found in the definition of "broadcasting" in the Act. Nor are they found in the surrounding definitions, nor in the scheme of the Act. By adding words to the definition of "broadcasting", the decision of the Federal Court of Appeal is contrary to basic principles of statutory interpretation.[99]

94. Parliament's ability to create an exception, if it had wanted one so far as "broadcasting" is concerned, is reflected in the "intermediary" exception in para. 2.4(1)(b) of the *Copyright Act*. That definition excludes copyright liability for a person "whose only act in respect of a communication of a work or other subject matter to the public consists of providing a means for

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[98] Parliament made it clear that "[t]he definition of broadcasting is a broad one" and that it "encompass[es] all technologies that are now or may in the future be used" and includes "all aspects of broadcasting in the face of future technological developments. *Supra* note 19 and accompanying text.

[99] *Thompson v. Goold & Co.,* [1910] A.C. 409 [**ABA** t.27] at 420, Lord Mersey ("It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do."); *National Bank v. Soucisse,* [1981] 2 S.C.R. 339 [**ABA** t.20] at 348; *Sullivan* [**ABA** t.39] at 62.

telecommunication necessary for another person to so communicate the work".[100] If Parliament had wished to similarly exclude so-called "passive" retransmitters from the definitions in the *Broadcasting Act*, it could have done so. It did not. Again, the fact that Parliament did not do so is a clear sign that it intended such intermediaries to be included within the definition.[101]

95. In any event, the statutory scheme with which the *Broadcasting Act* is integrated is not the *Copyright Act,* but the *Telecommunications Act.* The *Broadcasting* and *Telecommunications* Acts each establish a regulatory scheme, unlike the *Copyright Act'*s civil liability scheme. The *Broadcasting* and *Telecommunications* Acts are administered by the same regulatory agency, pursuant to common rules of procedure. They refer to one another in several provisions. They share multiple definitions and concepts.

96. "Transmission" in the *Broadcasting Act* must mean the same as it means in the *Telecommunications Act.*[102] What the Federal Court of Appeal has done is to write a restriction into, or read down, what "transmission" means in the *Broadcasting Act.* In so doing it has created a meaning which is different from the meaning of that word in the *Telecommunications Act,* where transmission must encompass "passive" transmission.[103] It has ostensibly done that to harmonize the *Broadcasting Act* with the *Copyright Act,* a statute with a completely different regime and a specific intermediary exception in para. 2.4(1)(b).

97. The only provision of the *Broadcasting Act* to which the Federal Court of Appeal referred

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[100] *SOCAN v. CAIP* [**ABA** t.26] at para. 92; *supra* note 48 and accompanying text.

[101] *Sullivan* [**ABA** t.39] at 215 ("the legislature is presumed to avoid stylistic variation…. Given this practice, it makes sense to infer that where a different form of expression is used, a different meaning is intended").

[102] The definitions of "telecommunication" at subs. 2(1) of the *Telecommunications Act*, and "other means of telecommunication" at subs. 2(1) of the *Broadcasting Act*, are virtually identical. Subs. 4(4) of the 1991 Act [**ABA** t. 5] explicitly requires that "telecommunications common carrier" be read "as defined in the *Telecommunications Act*", which includes that Act's definition of "transmission apparatus": *Interpretation Act,* R.S.C. 1985, c. I-21 [**ABA** t.11], subs. 15(1).

[103] *Telecommunications Act* [**ABA** t.12] s. 36. As the Federal Court of Appeal pointed out, a Canadian carrier is not permitted to control the content or influence the meaning or purpose of the telecommunication it carries unless the Commission approves otherwise.

was subs. 4(4), addressed below.[104] That subsection does not change the meaning of the word "transmission". Rather, the subsection simply allocates regulatory authority according to whether the transmission of a program to the public is occurring or not.

(h) Conclusion Regarding "Transmission"

98. In short, there is nothing in the *Broadcasting Act* that leads to the exclusion of ISPs from being engaged in the "transmission" of broadcasting programs. The parliamentary history, the scheme of the Act, the judicial history and the evidence before the court all support an interpretation of that word that includes the very undertaking with which the end-user interacts and connects, and from which the viewer or listener receives programs.

C. ISPs Carry On Broadcasting Undertakings

99. The Federal Court of Appeal relied on its interpretation of the word "transmission" to hold that ISPs do not fall within the definition of "broadcasting undertakings". If, as submitted above, that interpretation is incorrect, then it follows that ISPs engaging in the "transmission" of programs to the public thereby act as "broadcasting undertakings" under the *Broadcasting Act*.

100. The Federal Court of Appeal also referred to three other considerations in holding that ISPs do not fall within the definition "broadcasting undertakings". The Appellants submit that none of those considerations alters the plain meaning of "broadcasting" and "broadcasting undertakings" and the clear application of those definitions to ISPs.

(a) Policy Objectives

101. The Federal Court of Appeal did not apply the ordinary meaning of the word "transmission" in the *Broadcasting Act* because, in its view, ISPs are "passive" transmitters that provide the "mode" of transmission. As such, according to the Federal Court of Appeal, ISPs do not contribute to the cultural enrichment of Canada which is the "focus" of the Act's policy

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[104] *Infra,* paras. 113-117.

objectives and, accordingly, ISPs fall outside the Act. It is respectfully submitted that this conclusion is incorrect for a number of reasons.[105]

(i) No Basis to Amend Section 2 by Reference to Policy

102. The Federal Court of Appeal erred in re-writing the definitions in the *Broadcasting Act* on the basis of policy considerations. Absent ambiguity or conflict with the structure of the Act, resort to policy is not a proper basis to re-write and restrict a statutory power. At no point in its decision did the Federal Court of Appeal state that the definitions in section 2 are ambiguous or require amendment to give effect to the Act's structure. Indeed it acknowledges that *prima facie* they had the meaning attributed to them by the Appellants.[106]

103. In *Capital Cities,* this Court rejected exactly the same policy argument which has been adopted by the Federal Court of Appeal in the present case. In *Capital Cities,* this Court held that the policy provisions in the 1968 *Broadcasting Act* could not override the application of that Act to broadcasting receiving undertakings so as to exclude the Act's jurisdiction over cable systems.[107]

(ii) Policy Determinations Should be Made by the CRTC

104. Most importantly, under subsection 5(1) of the Act, it is the CRTC which is given the responsibility to implement the broadcasting policy set out in subsection 3(1). Under subsection 9(4) of the Act, Parliament requires the CRTC to exempt all classes of broadcasting undertaking if regulation would not, in the CRTC's sole determination, contribute materially to implementing the Broadcasting Policy for Canada. In light of those subsections, there was no basis for that Court to itself apply the policies in subsection 3(1) to rewrite the definitions in the Act.

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[105] FCA Decision, **AR** Vol. I t.3 at paras. 48-54.

[106] *Bishop v. Stevens,* [1990] 2 SCR 467 at 484; *R. v. Multiform Manufacturing Co.*, [1990] 2 SCR 624 at 630-631; *65302 B.C. Ltd. v. Canada*, [1999] 3 SCR 804 at 65-66; *Sullivan* [**ABA** t.39] at 23-27, 42-44 and 62.

[107] *Capital Cities* [**ABA** t.16] at 167-168.

(iii) Content-Neutral Transmission Falls Within the Single System

105. Since at least 1968 the *Broadcasting Act* has been plainly concerned with the content-neutral transmission of programs. The 1968 Act defined "broadcasting undertakings" to include "broadcasting receiving undertakings". The 1991 Act expanded that category by calling them "distribution undertakings", which expressly includes reception and retransmission to other such undertakings. These enactments were made without any statement that those undertakings must or will have any input or control over content.[108]

106. The inclusion of undertakings that merely retransmit programs is pursuant to the most basic principle underlying broadcasting policy, namely, that the regulator must have authority over the system from its beginning to its end. That basic principle is contained in the statutory declaration in subsection 3(2) that the Canadian broadcasting system is a single system.[109] It is under that principle that the Privy Council, in the *Radio Reference*, rejected the proposition that receiving antennae fell outside the regulatory regime applicable to broadcasting. It is under the same principle that this Court found in its *Dionne* decision that cable TV systems, whose "operations are merely a link in a chain which extends to subscribers who receive the programmes through their private receiving sets", were governed by the 1968 *Broadcasting Act*, and held in *Capital Cities* that a cable system, which is the "undertaking through which programs are received and sent on as part of the total enterprise", falls under the *Broadcasting Act.*[110] It is respectfully submitted that there was no policy basis for the Federal Court of Appeal to over-ride the express declaration of this principle in the Act.

107. The Federal Court of Appeal held that *Capital Cities* was inapplicable because it was concerned with cable television.[111] With respect, that conclusion raises a distinction without a

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[108] *Supra,* paras. 29 and 36.

[109] 1991 Act [**ABA** t. 5], *supra* note 1, subs. 3(2); *Radio Reference* [**ABA** t.25]*; Capital Cities* [**ABA** t.16].

[110] *Public Service Board v. Dionne,* [1978] 2 S.C.R. 191 [**ABA** t.22] at 198; *Capital Cities* [**ABA** t.16] at 159: "[Cable systems] transmit those signals, albeit through a conversion process, through its cable system to subscribers; *supra* paras. 86-90.

[111] FCA Decision, **AR** Vol. I t.3 at paras. 55-57.

difference in principle. The *Radio Reference*, *Capital Cities* and *Dionne* decisions all establish the principle that an undertaking that is no more than a mode or link to transmit programs to the public, and has no input or control over programs, is nevertheless part of the system to which the *Broadcasting Act* applies.

(iv) Policy Considerations Apply to ISPs

108. To the extent that the Federal Court of Appeal interpreted the definitions in section 2 of the Act in light of the policy objectives contained in the Act, it incorrectly focused on one policy objective to the exclusion of more than 30 others set forth in subsections 3(1) and 5(2). Many of those other objectives are particularly applicable to the transmission of audiovisual content, such as extending a range of broadcasting services to all Canadians as resources become available.[112]

109. Indeed, the Federal Court of Appeal disregarded two policy initiatives which the CRTC acknowledged could apply to ISPs under the *Broadcasting Act*. The first is the levying of contribution requirements on ISPs' revenues in respect of the transmission of broadcast content in order to fund the creation of such content, as the CRTC does with respect to most distribution undertakings.[113] In its June 2009 Decision, the CRTC considered that the evidence presented did not support the establishment of such a levy "**at this time**". The CRTC also decided that, by 2014, it would again consider the appropriate regulatory treatment of broadcasting over the Internet in light of the Internet's evolving significance in the Canadian broadcasting system.[114]

110. The Federal Court of Appeal's decision eliminates the CRTC's ability to review its decision in respect of ISPs at a subsequent time. ISPs may become the primary vehicle through which end-users access audiovisual content. If ISPs are not subject to the Act, then the CRTC will be unable to find that they should make the cultural contribution that the Federal Court of Appeal said was essential for the Act to apply. It is precisely because ISPs oppose a contribution

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[112] 1991 Act [**ABA** t. 5] at para. 3(1)(k).

[113] *Supra,* para. 58; 1991 Act [**ABA** t. 5] at para. 3(1)(t); *Regulations* [**ABA** t.6], ss. 29 and 44.

[114] Broadcasting Regulatory Policy CRTC 2009-329, **AR** Vol. III t.27 at paras. 26 and 40-41.

by them to the funding of Canadian programming that they argue the Act does not apply to them.

111. The other regulatory initiative that the CRTC acknowledged could apply to ISPs under the *Broadcasting Act* is a prohibition against broadcasting undertakings granting themselves an undue preference or subjecting others to an undue disadvantage. The CRTC referred to this objective in its June 2009 Decision and July 2009 Order. Using powers under the *Broadcasting Act,* the CRTC decided to prohibit "new media broadcasting undertakings" from granting such preference or disadvantage. The CRTC stated that legal certainty would allow it to know whether these undue preference provisions apply to ISPs.[115] A finding that ISPs' transmission of audiovisual content to the public is subject to the *Broadcasting Act* would provide the clarification requested by the CRTC. It would also enable the CRTC to directly apply this rule to the relevant activities of ISPs which are not carried on as part of telecommunications common carriers, and which are therefore not directly regulated under the *Telecommunications Act*.

112. If, as projected, ISPs continue to transmit an increasing proportion of audiovisual content to Canadians, the CRTC may well find that additional regulatory initiatives would contribute to implementation of broadcasting policy. First, the CRTC may find it necessary to ensure that the pricing arrangements of all ISPs, including ISPs not carried on as part of carriers, provide for the Internet to extend a broad range of programming to all Canadians in a manner consistent with broadcasting policy.[116] Second, in the case of cable and satellite undertakings, the CRTC found it would advance broadcasting policy to prescribe exceptions to the strict content neutrality policy. As ISP business models develop, the CRTC may make similar findings for ISPs' delivery of programming over the Internet.[117]

(b) Subsection 4(4) Does Not Exempt ISPs from the Act

113. The Federal Court of Appeal held that subsection 4(4) of the *Broadcasting Act* mirrors

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[115] Broadcasting Order CRTC 2009-452, **AR** Vol. 1 t.4 at para. 4; Broadcasting Regulatory Policy CRTC 2009-329, **AR** Vol. III t.27 at paras. 59-65 and 67.

[116] 1991 Act [**ABA** t. 5] at para. 3(1)(t).

[117] *Supra,* para. 44.

paragraph 2.4(1)(b) of the *Copyright Act* by excluding the activity of ISPs in transmitting programs in a content-neutral manner.[118] With respect, subsection 4(4) has no such effect.

114. The application of subsection 4(4) simply means that the *Broadcasting Act* does not apply to ISPs when they act *solely* in the capacity of a "telecommunications common carrier, as defined in the *Telecommunications Act*."[119] The prior subsection 4(3) makes it clear that, for greater certainty, the *Broadcasting Act* does apply when telecommunications common carrier is acting as a broadcasting undertaking. The two subsections make eminent sense and provide a clear roadmap to Parliament's intent. The transmission of broadcasting to the public by a telecommunications common carrier is subject to the *Broadcasting Act.* The transmission of non-broadcast intelligence by such a carrier is subject to the *Telecommunications Act*.

115. The concept that a company's activities or undertakings may be regulated from different aspects and under different statutory regimes, depending upon the activity conducted, is well-known to Canadian law. Just as cable companies are subject to the *Telecommunications Act* when they transmit telephone calls but to the *Broadcasting Act* when they transmit programs through the same wire, so the operations of ISPs are subject to the *Telecommunications Act* when they transmit something other than programs and are subject to the *Broadcasting Act* when they transmit programs. In both situations, ISPs are subject to the supervision of the same regulator which has the responsibility to fairly apply each regulatory regime.[120]

116. In any case, acting as an ISP cannot constitute acting "solely" in the "capacity" of a "telecommunications common carrier", which is defined in subsection 2(1) of the *Telecommunications Act* as a person who owns or "operates" a "transmission facility" used to

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[118] FCA Decision, **AR** Vol. I t.3, at paras. 43-46.

[119] *Supra,* paras. 51-55.

[120] Telecom Decision CRTC 96-1, **AR** Vol. II t.15; *Regulation under the Telecommunications Act of certain telecom services offered by "broadcast carriers",* Telecom Decision CRTC 98-9, 9 July 1998, **AR** Vol. II t.16 p.93-94 [para. 6]; Broadcasting Regulatory Policy CRTC 2009-329, **AR** Vol. III t.27 p.76-77 at para. 67.

provide telecommunications services for compensation.[121] The definition of a "transmission facility" explicitly *excludes* "exempt transmission apparatus" such as switching and routing apparatus.[122] The operation of routers, which is the very essence of an ISP's activity, is thus expressly exempted from causing a person to act as a "telecommunications common carrier" under the *Telecommunications Act*.[123] As a result, routing audiovisual content to end-users, which is the sole focus of the Reference before the Federal Court of Appeal, cannot constitute the activity of a "telecommunications common carrier … when **acting solely** in that capacity", as routing Internet traffic does not engage the definition of a telecommunications common carrier.[124]

117. Indeed, many persons who undertake the functions of ISPs in Canada do not own or operate the underlying transmission facilities over which they undertake these functions. Instead, they lease such facilities. These persons are not telecommunications common carriers.[125] Indeed, they are not held to the Canadian ownership and control requirement that is a prerequisite to acting as a telecommunications common carrier.[126] The activities of a telecommunications common carrier and an ISP may or may not be carried on as part of the same activity, but they are simply separate matters or aspects.[127]

(c) *Electric Despatch* and *SOCAN v. CAIP*

118. Part of the Federal Court of Appeal's reasoning for excluding ISPs from the definition of

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[121] The meaning of "operating" a transmission facility does not include transmitting through the underlying transmission facility: *supra* note 46.

[122] *Supra,* paras. 52.

[123] Broadcasting Order CRTC 2009-452, **AR** Vol. I t.4 p.58 [para. 15]; *Telecommunications Act* [**ABA** t.12] s. 2 ("transmission facility"; "exempt transmission apparatus"); Michael Ryan, *Canadian Telecom. Law & Regulation* (Toronto: Carswell, 2001/2010) [**ABA** t.37] at §110, p. 1-18, note 62.9 ("Ryan").

[124] 1991 Act [**ABA** t. 5] at subs. 4(4) [emphasis added].

[125] *Supra* para. 52; Broadcasting Order CRTC 2009-452, **AR** Vol. I t.4 p.57-59 [paras. 8, 13-19].

[126] *Telecommunications Act* [**ABA** t. 12] at s. 16.

[127] 1991 Act [**ABA** t. 5] at subs. 4(3).

"broadcasting undertaking" was based on the *Electric Despatch*[128] and *SOCAN v. CAIP*[129] decisions of this Court. However, neither decision related to the *Broadcasting Act* or supports a departure from the ordinary meaning of words in that Act.

119. The *Electric Despatch* decision concerned a non-compete covenant in which Bell, having sold its courier operations to the plaintiff, had agreed not to "transmit or give" orders to any courier company except the plaintiff's. This Court found that, in that context and being a non-compete clause, the covenant must refer to courier orders Bell placed itself, not to orders placed by others using Bell's telephone system. The decision simply affirmed the principle that words must be read in their context. It provides no assistance for interpreting the *Broadcasting Act*.

120. In *SOCAN v. CAIP*, this Court held that intermediaries are not liable for copyright in respect of communications transmitted by them over the Internet. That decision was based upon paragraph 2.4(1)(b) of the *Copyright Act,* which specifically excludes content-neutral intermediaries in that situation. The *SOCAN v. CAIP* decision only underlines that, in the absence of an equivalent provision in the *Broadcasting Act*, the activities of intermediaries in relation to broadcasting fall within the latter Act.

121. The *Copyright Act* and the *Broadcasting Act* are concerned with different matters. The former is concerned with the *communication* of intellectual property, and imposes civil liability: it exempts intermediaries from such liability. The latter is concerned with *transmission, receipt and retransmission* of programs, and establishes a regulatory regime: it falls to the CRTC to decide the role of intermediaries. When, in *SOCAN v. CAIP,* this Court referred to the *Electric Despatch* decision, it did so to demonstrate that in the context of civil liability, Parliament's intent to protect an intermediary from infringement could be well understood. Indeed, as noted above, this Court specifically found that ISPs transmit packets to their customers.[130]

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[128] FCA Decision, **AR** Vol. I t.3 p.24-26, 27-27 [paras. 40 and 46-47]; *Electric Despatch Co. of Toronto v. Bell Telephone Co. of Canada,* [1891] 20 S.C.R. 83 [**ABA** t.18].

[129] FCA Decision, **AR** Vol. I t.3 p.25-28 [paras. 41-48]; *SOCAN v. CAIP* [**ABA** t.26].

[130] *Supra,* paras. 57 and 79; *SOCAN v. CAIP* [**ABA** t.26] at paras. 96, 20, 42.

122. The definitions in the *Broadcasting Act* cannot be amended by the provisions of the *Copyright Act*.[131] Indeed, the definition of a "broadcasting undertaking" in the *Broadcasting Act* is significantly broader than the narrow definition of "broadcaster" in the *Copyright Act*. The *Copyright Act* definition of "broadcaster" expressly excludes retransmission: in the *Broadcasting Act,* "broadcasting undertaking" expressly includes it.[132] By excluding undertakings which retransmit programs, the Federal Court of Appeal has effectively substituted the *Copyright Act*'s definition of a "broadcaster" for the *Broadcasting Act*'s clear and different definition of a "broadcasting undertaking".

PART IV – SUBMISSIONS ON COSTS

123. The Appellants submit that there should no costs to any party on this appeal, as it arises out of a reference directed by the CRTC.

PART V – ORDER REQUESTED

124. The Appellants submit that this appeal should be granted and that this Court should answer "Yes" to the question posed in this Reference by the CRTC.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Thomas G. Heintzman **Bram Abramson**

Counsel for the Appellants

[131] *Miln-Bingham Printing Co. v. The King* (1930), 2 D.L.R. 263 [**ABA** t.19] at 263-264; *Sullivan* [**ABA** t.39] at 416.

[132] R.S.C. 1985, c. C-42 [**ABA** t.9], s. 2 ("broadcaster"); 1991 Act [**ABA** t. 5], at subs. 2(1) ("distribution undertaking").

PART VI – AUTHORITIES

A. Statutory Authorities

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Bill C-40, *An Act respecting broadcasting and to amend certain acts in relation thereto and in relation to radiocommunication*, 2nd Sess., 34th Parl., 1989-1991	85
Broadcasting Act, R.S.C. 1985, c. 9 (formerly S.C. 1968, c. 25)	84
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Broadcasting Distribution Regulations, SOR/97-555	109
Canadian Radio Broadcasting Act, S.C. 1932, c. 51	84
Copyright Act, R.S.C. 1985, c. C-42	96, 122
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B. Jurisprudence

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C. Secondary Sources

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Ruth Sullivan, *Sullivan on the Construction of Statutes,* 5th ed. (Toronto: Butterworths, 2009)	73, 88, 93, 94, 102, 102

PART VII – PROVISIONS AT ISSUE

***Broadcasting Act*, S.C. 1991, c. 11**

2. (1)

"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;	**« radiodiffusion »** Transmission, à l'aide d'ondes radioélectriques ou de tout autre moyen de télécommunication, d'émissions encodées ou non et destinées à être reçues par le public à l'aide d'un récepteur, à l'exception de celle qui est destinée à la présentation dans un lieu public seulement.
"**broadcasting undertaking**" includes a distribution undertaking, a programming undertaking and a network;	« **entreprise de radiodiffusion** » S'entend notamment d'une entreprise de distribution ou de programmation, ou d'un réseau.
"**distribution undertaking**" means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking;	« **entreprise de distribution** » Entreprise de réception de radiodiffusion pour retransmission, à l'aide d'ondes radioélectriques ou d'un autre moyen de télécommunication, en vue de sa réception dans plusieurs résidences permanentes ou temporaires ou locaux d'habitation, ou en vue de sa réception par une autre entreprise semblable.
"**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;	« **entreprise de programmation** » Entreprise de transmission d'émissions soit directement à l'aide d'ondes radioélectriques ou d'un autre moyen de télécommunication, soit par l'intermédiaire d'une entreprise de distribution, en vue de leur réception par le public à l'aide d'un récepteur.

3.

(2) It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public	(2) Il est déclaré en outre que le système canadien de radiodiffusion constitue un système unique et que la meilleure façon d'atteindre les objectifs de la politique canadienne de radiodiffusion consiste à confier la réglementation et la surveillance du système canadien de radiodiffusion à un seul organisme

authority.

public autonome.

4.

(4) For greater certainty, this Act does not apply to any telecommunications common carrier, as defined in the Telecommunications Act, when acting solely in that capacity.

(4) Il demeure entendu que la présente loi ne s'applique pas aux entreprises de télécommunication — au sens de la Loi sur les télécommunications — n'agissant qu'à ce titre.

5.

(1) Subject to this Act and the Radiocommunication Act and to any directions to the Commission issued by the Governor in Council under this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2).

(1) Sous réserve des autres dispositions de la présente loi, ainsi que de la Loi sur la radiocommunication et des instructions qui lui sont données par le gouverneur en conseil sous le régime de la présente loi, le Conseil réglemente et surveille tous les aspects du système canadien de radiodiffusion en vue de mettre en oeuvre la politique canadienne de radiodiffusion.

(2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that […]

(2) La réglementation et la surveillance du système devraient être souples et à la fois:[…]

(c) is readily adaptable to scientific and technological change; […and]

c) pouvoir aisément s'adapter aux progrès scientifiques et techniques; […]

(f) does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians […].

f) permettre la mise au point de techniques d'information et leur application ainsi que la fourniture aux Canadiens des services qui en découlent […].

9.

(4) The Commission shall, by order, on such terms and conditions as it deems appropriate, exempt persons who carry on broadcasting undertakings of any class specified in the order from any or all of the requirements of this Part or of a regulation made under this Part where the Commission is satisfied that compliance with those requirements will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1).

(4) Le Conseil soustrait, par ordonnance et aux conditions qu'il juge indiquées, les exploitants d'entreprise de radiodiffusion de la catégorie qu'il précise à toute obligation découlant soit de la présente partie, soit de ses règlements d'application, dont il estime l'exécution sans conséquence majeure sur la mise en oeuvre de la politique canadienne de radiodiffusion.

***Telecommunications Act*, S.C. 1993, c. 38**

2. (1)

"**exempt transmission apparatus**" means any apparatus whose functions are limited to one or more of the following:	« **appareil de transmission exclu** » Appareil effectuant une ou plusieurs des opérations suivantes:
(a) the switching of telecommunications,	a) commutation des télécommunications;
(b) the input, capture, storage, organization, modification, retrieval, output or other processing of intelligence, or	b) saisie, réception, mise en mémoire, classement, modification, récupération, sortie ou tout autre traitement de l'information;
(c) control of the speed, code, protocol, content, format, routing or similar aspects of the transmission of intelligence;	c) commande de la vitesse, du code, du protocole, du contenu, de la forme, de l'acheminement ou d'autres aspects semblables de la transmission de l'information.
"**telecommunications common carrier**" means a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation;	« **entreprise de télécommunication** » Propriétaire ou exploitant d'une installation de transmission grâce à laquelle sont fournis par lui-même ou une autre personne des services de télécommunication au public moyennant contrepartie.
"**telecommunications service**" means a service provided by means of telecommunications facilities and includes the provision in whole or in part of telecommunications facilities and any related equipment, whether by sale, lease or otherwise;	« **service de télécommunication** » Service fourni au moyen d'installations de télécommunication, y compris la fourniture — notamment par vente ou location — , même partielle, de celles-ci ou de matériel connexe.
"**transmission facility**" means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system, for the transmission of intelligence between network termination points, but does not include any exempt transmission apparatus.	« **installation de transmission** » Tout système électromagnétique — notamment fil, câble ou système radio ou optique — ou tout autre procédé technique pour la transmission d'information entre des points d'arrivée du réseau, à l'exception des appareils de transmission exclus.

4.

This Act does not apply in respect of broadcasting by a broadcasting undertaking.	La présente loi ne s'applique pas aux entreprises de radiodiffusion pour tout ce qui concerne leurs activités de radiodiffusion.

16.

(1) A Canadian carrier is eligible to operate as a telecommunications common carrier if it is a Canadian-owned and controlled corporation incorporated or continued under the laws of Canada or a province. […]

(1) Est admise à opérer comme entreprise de télécommunication l'entreprise canadienne qui est une personne morale constituée ou prorogée sous le régime des lois fédérales ou provinciales et est la propriété de Canadiens et sous contrôle canadien. […]

(4) No Canadian carrier shall operate as a telecommunications common carrier unless it is eligible under this section to operate as such.

(4) Il est interdit à l'entreprise canadienne d'opérer comme entreprise de télécommunication si elle n'y est pas admise aux termes du présent article.

Court File No. 33884

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

B E T W E E N:

ALLIANCE OF CANADIAN CINEMA, TELEVISION & RADIO ARTISTS (ACTRA), CANADIAN MEDIA PRODUCTION ASSOCIATION (CMPA), DIRECTORS GUILD OF CANADA (DGC) AND WRITERS GUILD OF CANADA (WGC)
(THE "CULTURAL GROUPS")

Appellants

- and -

BELL ALIANT REGIONAL COMMUNICATIONS, LP, BELL CANADA, COGECO CABLE INC., MTS ALLSTREAM INC., ROGERS COMMUNICATIONS INC., TELUS COMMUNICATIONS COMPANY AND VIDEOTRON LTD.
(THE "ISP COALITION"), AND SHAW COMMUNICATIONS INC.

Respondents

- and -

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION (CRTC)

Intervener

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