Court File No. A-193-15

FEDERAL COURT OF APPEAL

BETWEEN:

BELL MOBILITY INC.

Appellant

- and -

BENJAMIN KLASS, THE CONSUMERS' ASSOCIATION OF CANADA, THE COUNCIL OF SENIOR CITIZENS' ORGANIZATIONS OF BRITISH COLUMBIA AND THE PUBLIC INTEREST ADVOCACY CENTRE, THE CANADIAN NETWORK OPERATORS CONSORTIUM INC., BRAGG COMMUNICATIONS INC. (CARRYING ON BUSINESS AS EASTLINK), FENWICK MCKELVEY, VAXINATION INFORMATIQUE, THE SAMUEL-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC, DAVID ELLIS, TERESA MURPHY and TELUS COMMUNICATIONS COMPANY

Respondents

- and –

ATTORNEY GENERAL OF CANADA

Intervener

MEMORANDUM OF FACT AND LAW OF THE APPELLANT, BELL MOBILITY INC.

McCarthy Tétrault LLP
Suite 5300, TD Bank Tower
66 Wellington Street West
Toronto ON M5K 1E6

Neil Finkelstein
Brandon Kain
Richard Lizius

Tel: 416-362-1812
Fax: 416-868-0673

Solicitors for the Appellant,
Bell Mobility Inc.

TABLE OF CONTENTS

PART I—STATEMENT OF FACTS

1. Overview

1. This is an appeal by Bell Mobility Inc. ("**Bell Mobility**") from the CRTC's Broadcasting and Telecom Decision 2015-26 ("**Decision 2015-26**", or the "**Decision**"),[1] dated January 29, 2015, under s. 31(2) of the *Broadcasting Act* and s. 64(2) of the *Telecommunications Act*.

2. Significantly, the CRTC majority found that Bell Mobility broadcasts as a broadcasting undertaking governed by the *Broadcasting Act* when operating its mobile television service ("**Bell Mobile TV**"). Bell Mobility itself acquires and aggregates the programming content which it retransmits to Bell Mobility's wireless customers. However, the majority went on to conclude that Bell Mobility is subject to the unjust discrimination regime in s. 27(2) of the *Telecommunications Act* because it also acts as a telecommunications common carrier when it retransmits its content to its wireless customers.

3. The CRTC's application of s. 27(2) of the *Telecommunications Act* was a "true jurisdiction[al]"[2] error because of the exclusionary provision in s. 4 of the *Telecommunications Act*, which states:

> Broadcasting excluded
>
> 4. This Act does not apply in respect of ***broadcasting by a broadcasting undertaking***. [*emphasis added*]

4. Having concluded that Bell Mobility was engaged in broadcasting as a broadcasting undertaking, the CRTC was precluded by s. 4 of the *Telecommunications Act* from applying s. 27(2) of that Act in this case.

5. ***First***, as to whether Bell Mobile TV is "broadcasting", that term is defined in s. 2(1) of the *Broadcasting Act* to mean "***any transmission of programs... by radio waves***

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[1] *Complaint against Bell Mobility Inc. and Quebecor Media Inc., Videotron Ltd. and Videotron G.P. alleging undue and unreasonable preference and disadvantage in relation to the billing practices for their mobile TV services Bell Mobile TV and illico.TV* – Broadcasting and Telecom Decision CRTC 2015-26, 29 January 2015, Appeal Book ("**AB**"), Tab 2.

[2] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, ¶59.

or other means of telecommunication". The *Telecommunications Act* incorporates that same definition.[3]

6. Therefore, Bell Mobility's retransmission of its Bell Mobile TV programs by telecommunications is part and parcel of "broadcasting". The entire activity from the acquisition and aggregation of programming to its retransmission by telecommunications to the public is thus excluded from the *Telecommunications Act* ***when done by a broadcasting undertaking*** such as Bell Mobility operating Bell Mobile TV.

7. ***Second***, as to whether Bell Mobile TV is operating as a "broadcasting undertaking", this follows necessarily from the CRTC's finding that Bell Mobile TV's services "constitute broadcasting ***as contemplated by the DMBU exemption order***".[4]

8. The CRTC's specific finding was as follows:

> ***The Commission considers that Bell Mobility*** and Videotron, ***in acquiring the mobile distribution rights*** for the content available on their mobile TV services, ***in aggregating the content*** to be broadcast, ***and in packaging and marketing*** those services, ***are involved in broadcasting***. In this regard, it notes that no party to this proceeding disputed that ***mobile TV services constitute broadcasting services as contemplated by the DMBU exemption order***.[5]

9. Under s. 2(1) of the *Broadcasting Act*, a "'broadcasting undertaking' ***includes*** a distribution undertaking, a programming undertaking and a network". The CRTC can, and has in the case of Bell Mobile TV, identified it as another category of broadcasting undertaking, and exempted it from Part II of the *Broadcasting Act* pursuant to s. 9(4):

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

10. The DMBU Exemption Order is such an order pursuant to s. 9(4), and as such, pursuant to s. 9(4), can only exempt ***"persons who carry on broadcasting***

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[3] Pursuant to s. 15(2)(b) of the *Interpretation Act*, "[w]here an enactment [such as the *Broadcasting Act*] contains an interpretation section or provision [such as s. 2(1)], it shall be read and construed... as being applicable to all other enactments relating to the same subject-matter [such as the *Telecommunications Act*] unless a contrary intention appears". There is no contrary intention in the *Telecommunications Act*. In fact, s. 2(1) of the *Telecommunications Act* states that "'broadcasting undertaking' has the same meaning as in subsection 2(1) of the *Broadcasting Act*".

[4] Decision 2015-26, ¶15, AB, Tab 2.

[5] Decision 2015-26, ¶15, AB, Tab 2, *emphasis added.*

undertakings". Therefore, in the passage quoted above, in finding that Bell Mobile TV offers broadcasting services "as contemplated by the DMBU exemption order", the CRTC necessarily concluded that Bell Mobility acted as a broadcasting undertaking in relation to its Bell Mobile TV service.

11. Accordingly, s. 4 of the *Telecommunications Act* is engaged to exclude Bell Mobile TV from the ambit of that Act.

12. The CRTC therefore misdirected itself here. It should have asked itself whether Bell Mobility was engaged in "broadcasting by a broadcasting undertaking". Once it so found, that should have been the end of the matter. Instead, the CRTC asked itself whether Bell Mobility was also engaged in "telecommunications". That is an irrelevancy where, as here, the "telecommunications" is part and parcel of broadcasting:

> ***The threshold issue*** in dispute in this proceeding ***is whether Bell Mobility*** and Videotron, in the transport of the mobile TV services to end users' mobile devices, ***are operating as Canadian carriers providing telecommunications services and are therefore subject to the Telecommunications Act*** and policies made pursuant to that Act.[6]

13. That is the crux of the CRTC's jurisdictional error. Given that Bell Mobile TV was broadcasting as a broadcasting undertaking, the *Telecommunications Act* immediately became inoperative and the CRTC had no jurisdiction to apply s. 27(2) of that Act.

14. Because the CRTC's error is a true jurisdictional error, engaging the wrong statutory regime, the standard of review is correctness.

15. In the alternative, the Decision is also unreasonable, both in its application of the provisions of the *Telecommunications Act* and *Broadcasting Act*, and in its failure to follow a consistent line of Supreme Court authority that broadcasting operations of broadcasting undertakings are indivisible.

16. Accordingly, the Decision should be set aside and the appeal allowed, regardless of whether the correctness or reasonableness standard of review applies.

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[6] Decision 2015-26, ¶10, AB, Tab 2, *emphasis added.*

2. The Facts

A. Bell Mobile TV

17. Bell Mobility is a wholly-owned subsidiary of BCE Inc., and provides wireless services throughout Canada.

18. Bell Mobility offers Bell Mobile TV among its menu of services. Bell Mobile TV allows customers to view "aggregated broadcasting content",[7] consisting of television programming services delivered via point-to-point technology to Bell Mobility subscribers who also subscribe to Bell Mobile TV via their wireless devices.[8]

19. It is helpful to conceive of Bell Mobile TV as a wireless version of a cable service. At the time of the Decision, Bell Mobile TV had approximately 1.6 million customers, and it offers a wide variety of independent Canadian programming services at a low cost in direct furtherance of several policy objectives in s. 3(1) of the *Broadcasting Act*.[9]

20. Bell Mobility's process for distributing its Bell Mobile TV service is significantly different from that by which it acts as a wireless Internet service provider ("**ISP**") to provide customers with wireless access to Internet-based content, such as streaming video applications like Netflix or YouTube.

21. With respect to the former, Bell Mobile TV, Bell Mobility ***itself*** acquires the mobile distribution rights for the programming content from the copyright owners and aggregates the content for broadcasting.[10]

22. With respect to the latter, Bell Mobility has ***no*** involvement in its ISP business with the content of third-party Internet programming services. Bell Mobility's ISP customers simply buy Internet connectivity access. In providing ISP service, Bell Mobility acts exclusively as a telecommunications common carrier, providing the connectivity enabling customers to access Internet programming services of their own choosing, such as Netflix or YouTube.

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[7] Decision 2015-26, ¶4, AB, Tab 2.

[8] Decision 2015-26, ¶6 and 21, AB, Tab 2

[9] Decision 2015-26, ¶57, AB, Tab 2; Abridged Answer of Bell Mobility Inc., 9 January 2014, ¶7-15, AB, Tab 3H.

[10] Decision 2015-26, ¶15, AB, Tab 2; Abridged Third Responses to Request of Bell Mobility, 14 October 2014, Bell Mobility(CRTC)30Sep14-3 Klass Part 1, AB, Tab 3ZZ.

23. Thus, when Bell Mobility operates Bell Mobile TV, as here, it acquires programming content rights, aggregates that programming content and retransmits it, as a broadcaster, to its wireless customers. When Bell Mobility acts as an ISP, it operates purely as a telecommunications common carrier with no role in relation to the specific content being accessed.

24. The *Broadcasting Act* applies exclusively in the former situation (i.e., the case here); and the *Telecommunications Act* applies exclusively in the latter.

B. The Klass Complaint to the CRTC

25. On November 20, 2013, Mr. Benjamin Klass filed a complaint against Bell Mobility under s. 27(2) of the *Telecommunications Act*, alleging that its practice of charging different data fees for Bell Mobile TV than when providing wireless access to Internet-based video services as an ISP confers an undue preference upon Bell Mobility, unjustly discriminates against Bell Mobility's wireless customers that consume mobile Internet-based video services, and discriminates against its competitors.[11]

26. Bell Mobility responded with arguments on the merits and, as well, with the jurisdictional argument that the *Telecommunications Act* is inapplicable to its Bell Mobile TV service.

C. CRTC Decision 2015-26

27. On January 20, 2015, the CRTC affirmed the Klass Complaint and found that Bell Mobility violated s. 27(2) of the *Telecommunications Act* when it exempted Bell Mobile TV from standard data charges.

28. The majority of the CRTC found that Bell Mobility is engaged in broadcasting as a broadcasting undertaking within the meaning of the *Exemption Order for Digital Media Broadcasting Undertakings* (the "**DMBU Exemption Order**")[12] when it acquires and markets the programming services, i.e. content, for Bell Mobile TV:

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[11] Decision 2015-26, ¶1-2, AB, Tab 2; Klass Application, 20 November 2013, AB, Tab 3A.

[12] *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)* – Broadcasting Order CRTC 2012-409, Appendix, 26 July 2012, Appendix B.

> ***The Commission considers that Bell Mobility*** and Videotron, ***in acquiring the mobile distribution rights*** for the content available on their mobile TV services, ***in aggregating the content*** to be broadcast, ***and in packaging and marketing*** those services, ***are involved in broadcasting***. In this regard, it notes that no party to this proceeding disputed that ***mobile TV services constitute broadcasting services as contemplated by the DMBU exemption order.***[13]

29. However, the majority then went on to hold that, because Bell Mobility retransmits Bell Mobile TV content to customers via the same wireless technology that Bell Mobility uses to provide them with telecommunications services like wireless Internet access, it becomes a telecommunications common carrier at some point during the distribution sequence over its wireless network:

> The Commission finds that ***in order to transport their mobile TV services from their servers to subscribers' mobile devices, Bell Mobility*** and Videotron ***use their respective wireless access networks. These are the very same networks they use to deliver their wireless voice and data telecommunications services***, which are clearly telecommunications services subject to the *Telecommunications Act*. Moreover, ***these services' traffic is currently treated the same as other traffic in Bell Mobility's*** and Videotron's ***wireless access networks.*** Based on both Bell Mobility's and Videotron's submissions, ***the data path is the same*** regardless of whether the Bell Mobile TV or illico.tv subscriber has a wireless voice plan, data plan or tablet plan.
>
> Further, given the network descriptions provided by Bell Mobility and Videotron, the Commission finds that ***the functions performed by Bell Mobility*** and Videotron ***to establish the data connectivity and provide transport over their wireless access networks would be the same whether the content being transported is their mobile TV services, other broadcasting services, or non-broadcasting services***. That is, the purpose of these functions is to establish data connectivity and transport the content - agnostic as to the content itself.
>
> ...
>
> In the facts of the present case, ***the data connectivity required to access the mobile TV services cannot be established unless the subscriber obtains a telecommunications service from Bell Mobility*** or Videotron. In the case of Bell Mobility, only an end user that subscribes to a Bell Mobility (or Bell Mobility affiliate) mobile wireless voice plan, data plan or tablet plan can subscribe to Bell Mobility's mobile TV service. ... ***As such, it is the subscriber's wireless voice plan, data plan or tablet plan that provides the basis upon which the end user is identified as a subscriber*** and upon which the subscriber is connected to the network. As noted above, this necessary data connection enables that end user to access the mobile TV services' content.[14]

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[13] Decision 2015-26, ¶15, AB, Tab 2, *emphasis added.*

[14] Decision 2015-26, ¶17-18 and 21, AB, Tab 2, *emphasis added.*

30. In effect, contrary to the statutory scheme of the *Broadcasting Act* and the *Telecommunications Act* (particularly s. 4 thereof), the majority divided Bell Mobile TV into two (2) separate entities, a broadcasting undertaking and a telecommunications common carrier in relation to Bell Mobile TV's broadcasting activities:

> In light of all of the foregoing, the Commission concludes that Bell Mobility and Videotron ***are providing telecommunications services, as defined in section 2 of the Telecommunications Act, and are operating as Canadian carriers, when they provide the data connectivity and transport necessary to deliver Bell Mobile TV*** and illico.tv, respectively, to their subscribers' mobile devices. In this regard, they ***are subject to the Telecommunications Act.*** This is the case ***whether or not concurrent broadcasting services are also being offered.***[15]

31. Having held that Bell Mobility ***also*** operates Bell Mobile TV as a telecommunications common carrier, the majority of the CRTC concluded from this that Bell Mobility is subject to the *Telecommunications Act*, contrary to the express terms of s. 4 thereof.

32. Then, despite s. 4 of the *Telecommunications Act*, the CRTC applied the undue preference provision in s. 27(2) of that Act to the Bell Mobile TV service. This was a jurisdictional error that should be reversed.

PART II—POINTS IN ISSUE

33. This appeal raises two issues:

(a) What is the appropriate standard of review in this case?

(b) Having found that Bell Mobile TV is broadcasting as a broadcasting undertaking within the DMBU Exemption Order, did the CRTC commit a reversible error in applying the *Telecommunications Act* in this case?

PART III—SUBMISSIONS

1. The Standard of Review

A. The Standard Is Correctness

34. The question here is a purely jurisdictional one; that is, whether the *Telecommunications Act* is excluded by s. 4 thereof when Bell Mobility acquires and

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[15] Decision 2015-26, ¶22, AB, Tab 2, *emphasis added.*

distributes programming content to its subscribers through its Bell Mobile TV service.[16]

35. It is submitted that the standard of review is therefore correctness. As Rothstein J. said when applying the correctness standard to a similar issue on judicial review from the Copyright Board:

> ... ***The Court is asked to determine whether a point-to-point transmission can ever constitute a communication "to the public" within the meaning of s. 3(1)(f) of the Copyright Act***... This is ***not a "questio[n] of mixed fact and law*** [that] involve[s] applying a legal standard to a set of facts"... it ***is an extricable question of law.***[17]

36. While it is true that a ***presumption*** of deference arises because the CRTC was interpreting its enabling legislation, that presumption is rebuttable where the issue is one which raises a true question of jurisdiction:

> It is now well established that deference will usually result ***where a decision maker is interpreting its own statute*** or statutes closely connected to its function, with which it will have particular familiarity... In such cases, ***there is a presumption of deferential review, unless the question at issue falls into one of the categories to which the correctness standard applies:*** constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside of the adjudicator's expertise, ***questions regarding the jurisdictional lines between two or more competing specialized tribunals, and the exceptional category of true questions of jurisdiction***...[18]

37. There are two (2) broad reasons why the presumption of deference is rebutted here.

i. The Decision Engages Two Competing Jurisdictional Lines

38. This case raises questions concerning the jurisdictional lines between ***competing statutory regimes***. It is true that the CRTC is the common ***administrative agency*** for both the *Broadcasting Act* and the *Telecommunications Act*. However, the remainder of the regulatory apparatus is different as between the two statutes:

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[16] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, ¶45 ("[T]he choice of the applicable standard depends primarily on the nature of the questions that have been raised").

[17] *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 283, ¶20, *underlining in original, bolding and italics added.*

[18] *Canadian National Railway Co. v. Canada (A.G.)*, [2014] 2 S.C.R. 135, ¶55, *emphasis added.* **See also** *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 283, ¶16 ("I must also respectfully disagree... that the 'exceptions to the presumption of home statute deference are... constitutional questions and questions of law of central importance to the legal system and outside the adjudicator's specialized expertise'... ***ATA and Dunsmuir allow for the exceptional other case to rebut the presumption of reasonableness review for questions involving the interpretation of the home statute.***")

a. Different Responsible Ministers

39. Different Ministers are responsible for these statutes; the Minister of Industry is responsible for the *Telecommunications Act*,[19] and the Minister of Canadian Heritage for the *Broadcasting Act*.[20]

40. These Ministers have numerous responsibilities under their respective Acts:

(a) Under the *Telecommunications Act*, the Minister of Industry: (i) carries forward proposed Cabinet and CRTC instruments (e.g., regulations, policy directions, exemptions) and lays them before Parliament; (ii) establishes and administers technical standards which must be observed by the CRTC; (iii) administers the regime for international submarine cable licences; (iv) approves the expropriation of land by carriers; (v) appoints persons to carry out inquiries and designates persons as inspectors; and (vii) may withhold consent to prosecutions for certain offences under the Act, and require the forfeiture of property by those convicted.[21]

(b) Under the *Broadcasting Act*, by contrast, the Minister of Canadian Heritage: (i) consults with the CRTC and interested persons regarding proposed Cabinet and CRTC instruments (e.g., policy directions, licence directions) and publishes them in the *Canada Gazette*; (ii) refers technical matters to the CRTC for review and consults with it regarding its recommendations; (iii) consults with the CRTC regarding CRTC hearings request by Cabinet; (v) recommends when Cabinet should issue directions respecting the CRTC and Art. 2006(3) of the *Canada-United States Free Trade Agreement Implementation Act*; and (vi) recommends when Cabinet should amend the schedule to the *Broadcasting Act*.[22]

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[19] *Telecommunications Act*, s. 2(1), *s.v.* "Minister"; *Department of Industry Act*, s. 4(1)(k).

[20] *Broadcasting Act*, s. 2(1), *s.v.* "Minister"; *Department of Canadian Heritage Act*, ss. 4(1), 4(2)(i) and 15; S.I./96-71, *Order Designating the Minister of Canadian Heritage as Minister for Purposes of the Broadcasting Act* (24 July 1996).

[21] *Telecommunications Act*, ss. 10(1), 10(2), 10(3), 10(7), 10(8), 12(4), 13, 15(1), 15(3), 19, 20, 21, 22(4), 41.6(1), 41.6(3), 46(3), 47(b), 69.3, 70(2), 71(2), 73(4) and 74.1.

[22] *Broadcasting Act*, ss. 7(6), 8(1)(a), 8(4), 14(2), 15(2), 26(4) and 27(1).

41. The two Ministers therefore have substantially different responsibilities and functions under the two statutes.

b. Different Cabinet Appeal Rights

42. There is a more restricted right of appeal to Cabinet under the *Broadcasting Act* than the *Telecommunications Act*.[23]

43. Under s. 12(1) of the *Telecommunications Act*, a party may appeal ***any CRTC decision to Cabinet without any express limitations***. There are thus no restrictions on the substance of the appeals to Cabinet, and a significant time period of 1 year for Cabinet intervention.

44. By contrast, under s. 28(1) of the *Broadcasting Act*, ***Cabinet may only set aside or refer back (but not vary) CRTC decisions within 90 days***, not 1 year, and this only in respect of ***licensing*** in certain circumstances.

45. Thus, if the CRTC is entitled to be wrong as to which statute applies, it could effectively select which of two Cabinet appeal provisions it prefers.

c. Different Judicial Appeal Rights

46. While both s. 31 of the *Broadcasting Act* and s. 64 of the *Telecommunications Act* permit appeals to this Court with leave on questions of law or jurisdiction, the two statutes contain important differences about the scope of the CRTC's participation in these appeals.

47. ***First***, under the *Telecommunications Act*, the CRTC must be given notice of any application for leave to appeal, and it is entitled to be heard on the leave application and at any stage of the appeal, with no liability for costs.[24] There are no similar rights in s. 31 of the *Broadcasting Act*.

48. ***Second***, under the *Telecommunications Act*, this Court cannot draw any inference that is inconsistent with a finding of fact made by the CRTC.[25] Again, there is no similar provision in the *Broadcasting Act*.

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[23] See *Canadian National Railway Co. v. Canada (A.G.)*, [2014] 2 S.C.R. 135, ¶42 (and ¶35-41).

[24] *Telecommunications Act*, ss. 64(2) and (6).

[25] *Telecommunications Act*, s. 64(5).

49. Thus, the CRTC's decision here that the *Telecommunications Act* applies gives it far greater participation rights in this appeal than it would have under the *Broadcasting Act*, which Bell Mobility says is the applicable statute.

d. Different CRTC Decision-Making Requirements

50. Under the *Broadcasting Act*, the CRTC determines matters in panels of not fewer than three,[26] and is *functus officio* once it reaches a decision not involving a mandatory order or referral back from the Governor in Council.[27]

51. By contrast, under the *Telecommunications Act*, the CRTC's quorum is two members in contested matters, and one member in uncontested matters,[28] and it is not *functus* after rendering its decisions but may rescind or vary them.[29]

52. Again, by its decision here, the CRTC has given itself much wider remedial jurisdiction than it would have under the *Broadcasting Act*.

e. Different Powers for the CRTC

53. The *Broadcasting Act* requires that the CRTC exercise its powers to implement the broadcasting policy in s. 3(1) of the *Broadcasting Act*,[30] whereas the *Telecommunications Act* requires that it implement the telecommunications policy in s. 7 of the *Telecommunications Act*.[31]

54. The CRTC's powers under each statute are significantly constrained by the respective policy provisions. As the Supreme Court of Canada held in *Cogeco*:

> ***Policy statements, such as the declaration of Canadian broadcasting policy found in s. 3(1) of the Broadcasting Act***... describe the objectives of Parliament in enacting the legislation and, thus, they ***circumscribe the discretion granted to a subordinate legislative body***...[32]

55. The policies of the *Broadcasting Act* and *Telecommunications Act* – and hence the powers granted to the CRTC under each statute – are radically different.

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[26] *Broadcasting Act*, s. 20(1).

[27] *Broadcasting Act*, ss. 12(3), 28(3) and 31(1).

[28] *Telecommunications Act*, s. 49.

[29] *Telecommunications Act*, s. 62.

[30] *Broadcasting Act*, s. 5(1).

[31] *Telecommunications Act*, s. 47(a).

[32] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶22 (and ¶32), *emphasis added.*

56. Whereas the *Broadcasting Act* has a "primarily cultural aim [that] "target[s] 'the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse'",[33] the purpose of the *Telecommunications Act* is "to encourage and regulate the development of an orderly, reliable, affordable and efficient telecommunications infrastructure for Canada".[34]

57. As demonstrated by the *Cogeco* case, the CRTC's jurisdiction to impose economic regulation is limited under the *Broadcasting Act*.[35] By the simple expedient of applying the *Telecommunications Act* instead, as it has done here, the CRTC expands its jurisdiction to permit the imposition of economic regulation.

f. Summary

58. In summary, given the differences between the *Broadcasting Act* and *Telecommunications Act* outlined above, the standard of review should be correctness.[36]

59. The issue here is which of two ***mutually exclusive*** statutes applies to the Bell Mobile TV service. If the CRTC is afforded deference on this point, it could incorrectly determine the applicable statutory regime ***in its entirety***. This would allow the CRTC to incorrectly decide:

(a) which Minister has jurisdiction;

(b) which Cabinet appeal rights apply to its own decision;

(c) which judicial appeal rights apply to its own decision;

(d) which remedial powers it has to rescind or vary its own orders as opposed to being *functus officio*; and

(e) whether the CRTC must act to advance the cultural goals of the *Broadcasting Act* or the economic goals of the *Telecommunications Act*.

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[33] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶19 and 29-31.

[34] *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, ¶38.

[35] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶22 (and ¶32), *emphasis added.*

[36] *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 283, ¶16; *Canadian National Railway Co. v. Canada (A.G.)*, [2014] 2 S.C.R. 135, ¶55.

ii. The Decision Raises a True Question of Jurisdiction

60. As a matter of law, whether the *Telecommunications Act* applies to the Bell Mobile TV service is a "true question of jurisdiction".[37] As LeBel and Cromwell JJ. explained in *Canadian Human Rights Commission*:

> ... The standard of correctness will also apply to ***true questions of jurisdiction*** or *vires*. In this respect, *Dunsmuir* expressly distanced itself from the extended definition of jurisdiction and restricted jurisdictional questions to those that ***require a tribunal to "explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter"***...[38]

61. In this case, the CRTC explicitly had to decide which of the *Broadcasting Act* or the *Telecommunications Act* applies because, if it was the former, the CRTC would have no jurisdiction to make an unjust discrimination finding under s. 27(2) of the *Telecommunications Act*:

> ***The threshold issue*** in dispute in this proceeding ***is whether Bell Mobility*** and Videotron, in the transport of the mobile TV services to end users' mobile devices, are operating as Canadian carriers providing telecommunications services and ***are therefore subject to the Telecommunications Act*** and policies made pursuant to that Act.[39]

62. Accordingly, the issue here is not simply one of statutory interpretation. Instead, it "raises a broad question of the tribunal's authority",[40] i.e., whether the *Telecommunications Act* ***as a whole***, and the CRTC's jurisdiction under s. 27(2) thereof, can be applied to a broadcasting undertaking which concurrently acts in other respects as a telecommunications common carrier.

63. It is noteworthy that Parliament has created appeal rights on a "question of law ***or of jurisdiction***" pursuant to s. 64(1) of the *Telecommunications Act* and s. 31(2) of the *Broadcasting Act*.[41] The case law holds that such jurisdictional decisions of the CRTC

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[37] *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, ¶42; *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, ¶25; *Canadian National Railway Co. v. Canada (A.G.)*, [2014] 2 S.C.R. 135, ¶55 and 61.

[38] *Canada (Canadian Human Rights Commission) v. Canada (A.G.)*, [2011] 3 SCR 471, ¶18, *emphasis added.* **See also** *Canadian National Railway Co. v. Canada (A.G.)*, [2014] 2 S.C.R. 135, ¶61.

[39] Decision 2015-26, ¶10, AB, Tab 2, *emphasis added.*

[40] *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678, ¶34 (and ¶33 and 35).

[41] **See also** *Federal Courts Act*, ss. 18.1(4)(a), 28(1)(c) and 28(2).

are reviewable for correctness.[42] As the Supreme Court of Canada said in *Barrie Public Utilities*:

> These points are illustrated by L'Heureux-Dubé J.'s discussion of the standard of review in *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739. There, ***L'Heureux-Dubé J. aptly described the CRTC as "a specialized administrative tribunal...*** which possesses considerable expertise over the subject matter of its jurisdiction" ***yet found that it was reviewable on a correctness standard "as regards jurisdictional questions*** and questions of law outside the CRTC's area of expertise" (paras. 30-31). ...[43]

B. Alternatively, the Decision Is Unreasonable

64. In the alternative, the CRTC Decision here is unreasonable, both in its result – which subjects Bell Mobile TV to the *Telecommunications Act* in clear violation of s. 4 – and in the reasoning process used to arrive at that result, which involved the following well-established types of error:

(a) As noted at paragraph 12 above, the CRTC ***asked itself the wrong question,***[44] i.e., whether Bell Mobility acts as a telecommunications common carrier in providing the Bell Mobile TV service, not whether it acts as a broadcasting undertaking.

(b) The CRTC then ***applied the wrong test*** to answer this question,[45] by holding that Bell Mobility is a telecommunications common carrier based on the technology that is used in distributing the Bell Mobile TV service, when the relevant issue is whether Bell Mobility has some control over Bell Mobile TV's content.

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[42] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, ¶33 (***"[T]his Court held in Northrop Grumman... that the question was jurisdictional and therefore subject to review on a correctness standard... based on an established pre-Dunsmuir jurisprudence applying a correctness standard to this type of decision"***).

[43] *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, ¶13 (and ¶17), *emphasis added.* **See also:** *Bell Canada v. Canada (C.R.T.C.)*, [1989] 1 S.C.R. 1722 at 1743-1747; *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739, ¶31; *Telecommunications Workers Union v. C.R.T.C.*, [2004] 2 F.C.R. 3 (C.A.), ¶24-25, 29 and 32-33; *Telus Communications Inc. v. Canada (C.R.T.C.)*, [2005] 2 F.C.R. 388 (C.A.), ¶37-38, leave to appeal refused, [2004] S.C.C.A. No. 573; *Edmonton (City) v. 360Networks Canada Ltd.*, [2007] 4 F.C.R. 747 (C.A.), ¶33-35, leave to appeal refused, [2007] S.C.C.A. No. 286. ***cf.***: *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, ¶33-38; *Wheatland County v. Shaw Cablesystems Ltd.*, 2009 FCA 291, ¶33-41.

[44] *C.U.P.E. v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 at 237.

[45] *Németh v. Canada (Justice)*, [2010] 3 S.C.R. 281, ¶10.

2. The CRTC Committed a Reversible Error when it Applied the *Telecommunications Act* to Bell Mobile TV

65. Based on the CRTC's findings of fact here, Bell Mobility is engaged in "broadcasting by a broadcasting undertaking" pursuant to the exclusionary provision in s. 4 of the *Telecommunications Act*.[46] The CRTC's error occurred when it held that Bell Mobility acts as a telecommunications common carrier ***during the broadcasting retransmission sequence.***[47]

66. The Decision should thus be set aside for the following interrelated reasons:

(a) The application of the *Broadcasting Act* exclusively depends on whether Bell Mobility is engaged in "***broadcasting by a broadcasting undertaking***" when it offers Bell Mobile TV. If so, that is the end of the inquiry. It is irrelevant that it concurrently acts as a telecommunications common carrier if it is a broadcaster.

(b) The test for whether Bell Mobility broadcasts as a broadcasting undertaking is whether it exerts ***control over the content*** of Bell Mobile TV, not the ***distribution technology*** it uses to retransmit that content.

(c) On the CRTC's ***own finding of fact***, the content control test is met and Bell Mobile TV is "broadcasting by a broadcasting undertaking".

67. Section 4 of the *Telecommunications Act* accordingly ousts the *Telecommunications Act* entirely regardless of which distribution technology Bell Mobility uses to broadcast its programming.

A. The Issue Is Whether Bell Mobility Is Broadcasting as a Broadcasting Undertaking

68. The starting point is s. 4 of the *Telecommunications Act*, which provides:

> 4. ***This Act does not apply in respect of broadcasting by a broadcasting undertaking.*** [*emphasis added*]

69. By its plain terms, s. 4 of the *Telecommunications Act* excludes ***all*** broadcasting by a broadcasting undertaking from the *Telecommunications Act*.

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[46] Decision 2015-26, ¶15, AB, Tab 2.

[47] Decision 2015-26, ¶22, AB, Tab 2, *emphasis added.*

70. That is so even if the broadcasting undertaking is ***carried on with "other" undertakings like a telecommunications common carrier.*** As stated in s. 4(3) of the *Broadcasting Act:*

> [4](3) For greater certainty, ***this Act applies in respect of broadcasting undertakings whether or not they are carried on for profit or as part of, or in connection with, any other undertaking or activity.***[48] [*emphasis added*]

71. In other words, there is no concept of "concurrency" between the two statutes, as the CRTC held below. An entity engaged in telecommunications is either (i) broadcasting as a broadcasting undertaking, in which case it is governed exclusively by the *Broadcasting Act* regardless of the fact that it retransmits via telecommunications technology, or (ii) governed exclusively by the *Telecommunications Act.*

72. There are thus two issues in the determination of whether s. 4 of the *Telecommunications Act* applies. The first is whether Bell Mobile TV is "broadcasting", and the second is whether it is doing so as a "broadcasting undertaking".

i. "Broadcasting"

73. The definition of "broadcasting" under the *Broadcasting Act* is very broad:

> 2. (1) In this Act,
>
> ***"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;
>
> ...
>
> (2) For the purposes of this Act, ***"other means of telecommunication" means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system.***

74. It is noteworthy that the definition of "telecommunications" in s. 2(1) of the *Telecommunications Act* is virtually identical:

> 2. (1) In this Act,
>
> ...
>
> ***"telecommunications" means the*** emission, ***transmission*** or reception ***of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system;*** [*emphasis added*]

---

[48] See also s. 4(4) of the *Broadcasting Act.*

75. Thus, "broadcasting" under the *Broadcasting Act* ***includes*** the telecommunications mode of distribution pursuant to ss. 2(1) and 2(2) of the *Broadcasting Act*.[49]

76. Given these definitions, the CRTC found as a fact that Bell Mobile TV is engaged in broadcasting:

> ***The Commission considers that Bell Mobility*** and Videotron, ***in acquiring the mobile distribution rights*** for the content available on their mobile TV services, ***in aggregating the content*** to be broadcast, ***and in packaging and marketing*** those services, ***are involved in broadcasting***. In this regard, it notes that no party to this proceeding disputed that ***mobile TV services constitute broadcasting services as contemplated by the DMBU exemption order.***[50]

ii. "Broadcasting Undertaking"

77. The CRTC also found in the quotation directly above that Bell Mobile TV broadcasts as a "broadcasting undertaking". This follows necessarily from the CRTC's finding that Bell Mobile TV's broadcasting services are "as contemplated by the DMBU Exemption Order".

78. Under s. 2(1) of the *Broadcasting Act*, "broadcasting undertakings" are defined to "include[e] a distribution undertaking, a programming undertaking and a network". The CRTC may thus exempt other categories of broadcasting undertakings from Part II of the *Broadcasting Act* pursuant to s. 9(4):

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

79. The DMBU Exemption Order is such an order made under s. 9(4).[51] As such, the DMBU Exemption Order may only apply to "persons who carry on broadcasting

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[49] That "broadcasting" is a form of "telecommunications" is also recognized in several other related statutes: see, e.g., the *Copyright Act*, ss. 29.23(3), 30.08(9) and 30.09(1)(b); the *Department of Industry Act*, s. 4(1)(k)(ii); and the *Radiocommunication Act*, s. 6(1)(n).

[50] Decision 2015-26, ¶15, AB, Tab 2, *emphasis added.*

[51] See *Amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197); Revocation of the Exemption order for mobile television broadcasting undertakings* – Broadcasting Order CRTC 2009-660, 22 October 2009, Appendix (which was renamed the DMBU Exemption Order in *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)* – Broadcasting Order CRTC 2012-409, Appendix, 26 July 2012, ¶3 and 6).

undertakings" pursuant to the express terms of s. 9(4) of the Broadcasting Act itself. Therefore, in finding that Bell Mobile TV offers broadcasting services "as contemplated by the DMBU exemption order", the CRTC necessarily concluded that it is also operated by Bell Mobility as a ***broadcasting undertaking***.

80. The CRTC has confirmed this point elsewhere. Pursuant to s. 2 of the DMBU Exemption Order, that Order applies to the following "undertakings":

> 2. ***The undertaking provides broadcasting services***, in accordance with the interpretation of "broadcasting" set out in *New Media*, Broadcasting Public Notice CRTC 1999-84/Telecom Public Notice CRTC 99-14, 17 May 1999, that are:
>
> a) delivered and accessed over the Internet; or
>
> b) ***delivered using point-to-point technology and received by way of mobile devices***. [*emphasis added*]

81. According to the CRTC, this definition in s. 2(b) includes "***mobile television broadcasting undertakings***"[52] like Bell Mobile TV, which the CRTC defined as follows:

> 2. ***The undertaking provides television broadcasting services that are received by way of mobile devices, including cellular telephones*** and personal digital assistants.
>
> 3. ***The undertaking uses point-to-point technology to deliver the service***; that is, the undertaking transmits a separate stream of broadcast video and audio to each end-user.[53]

82. Thus, in Broadcasting Notice 2014-190, the CRTC confirmed that mobile television services fall within the DMBU Exemption Order:

> ... ***Broadcasting services delivered*** over the Internet or ***on mobile devices are*** other examples of ***exempt services that form part of the television system.***[54]

83. Bell Mobility is therefore broadcasting as a "broadcasting undertaking" when it provides the Bell Mobile TV service.

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[52] *Amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197); Revocation of the Exemption order for mobile television broadcasting undertakings* – Broadcasting Order CRTC 2009-660, 22 October 2009, ¶5 and 10.

[53] *Exemption order for mobile television broadcasting undertakings* – Broadcasting Public Notice CRTC 2007-13, 7 February 2007, Appendix, *emphasis added.*

[54] *Let's Talk TV* – Broadcasting Notice of Consultation CRTC 2014-190, ¶15, *emphasis added.*

iii. Section 4 of the *Telecommunications Act* Exclusion

84. Given the above, it is submitted that s. 4 of the *Telecommunications Act* excludes the operation of that Act in this case. The legislative history clearly supports the reasons for this.

85. The various Parliamentary reports in support of these statutes referred frequently to the convergence between broadcasting and telecommunications.[55] They noted that some broadcasting undertakings, like cable companies, functioned ***simultaneously*** as telecommunications carriers.[56] Therefore, those reports recommended that Parliament regulate broadcasting undertakings under the *Broadcasting Act*. As the House of Commons Standing Committee on Communications and Culture stated:

> ...***[T]he Committee sought to define broadcasting broadly*** enough to include cable, satellite-to-cable, and direct-to-home satellite delivery of programming in the same way that over-the-air delivery of programming is captured today. ...
> ...
> The Committee endorses the Task Force recommendations:
>
> > (a) that ***the Act should cover all undertakings involved in broadcasting in the widest sense, this is, those that decide what programs to carry as well as those that are involved in program dissemination*** to the public, and thus in determining program accessibility to Canadians...[57]

86. The legislative history demonstrates that Parliament intended to exclude broadcasting, even via telecommunications, in s. 4 of the *Telecommunications Act* to prevent the concurrent regulation of broadcasting by broadcasting undertakings under it:

> ... ***Without this provision [s. 4] there would be concurrent regulation under the Broadcasting Act and the Telecommunications Act.***[58]

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[55] Government of Canada, Task Force on Broadcasting Policy, *Report of the Task Force on Broadcasting Policy* (Ottawa: Minister of Supply and Services Canada, 1986) at 72 ("***Broadcasting and other types of telecommunications have become more entwined***"); Department of Communications, *Canadian Voices, Canadian Choices: A New Broadcasting Policy for Canada* (Ottawa: Minister of Supply and Services Canada, 1988) at 52; House of Commons Standing Committee on Communications and Culture, *Minutes of Proceedings and Evidence of the Sub-Committee on Bill C-62* (Hull, Quebec: Queen's Printer for Canada, 1993) at 5:34, 11:11, 14:91 and 14:94-97.

[56] Government of Canada, Task Force on Broadcasting Policy, *Report of the Task Force on Broadcasting Policy* (Ottawa: Minister of Supply and Services Canada, 1986) at 574-575; House of Commons Standing Committee on Communications and Culture, *Sixth Report to the House: Recommendations for a New Broadcasting Act* (Hull, Quebec: Queen's Printer for Canada, 1987) at 60-71.

[57] House of Commons Standing Committee on Communications and Culture, *Fifteenth Report to the House: A Broadcasting Policy for Canada* (Hull, Quebec: Queen's Printer for Canada, 1988) at 6-7 (and 408), *emphasis added.*

[58] Department of Communications, *Telecommunications: New Legislation for Canada* (Ottawa: Communications Canada, 1992) at 15, *emphasis added.*

87. Thus, the Department of Communications testified in the Standing Committee on Communications and Culture about the purpose of s. 4:

> ***...[T]elecommunications includes broadcasting. Broadcasting is a subset of telecommunications.*** ...
>
> ***What this provision [s.4] does is as long as a broadcaster is operating as a broadcaster within the terms of the Broadcasting Act, then it is not subject to C-62 [the Telecommunications Act].*** As soon as it ceases to be operating as a broadcaster, then it would normally be subject to C-62, because broadcasting by definition is within the rubric of telecommunications.[59]

88. Parliament accordingly defined a broadcasting undertaking in s. 2 of the *Broadcasting Act* broadly enough to include program-controlling telecommunications common carriers, or "distribution undertakings" such as cable companies:

> 2. (1) In this Act,
>
> ...
>
> ***"broadcasting undertaking" includes a distribution undertaking***, a programming undertaking and a network;
>
> ...
>
> ***"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;[60] [*emphasis added*]

89. Parliament thus deliberately included the retransmission of broadcasting via telecommunications (i.e., the retransmission of programs) in the *Broadcasting Act*.[61]

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[59] House of Commons Standing Committee on Communications and Culture, *Minutes of Proceedings and Evidence of the Sub-Committee on Bill C-62* (Hull, Quebec: Queen's Printer for Canada, 1993) at 9:21-9:22 (and 3:63-64), (Mr. Shaw; Mr. Scott) *emphasis added.*

[60] When the *Telecommunications Act* was enacted two years after the *Broadcasting Act*, it defined "telecommunications common carrier" in s. 2(1) to mean "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". See also Order in Council P.C. 1994-1105, *Requesting CRTC to Report on Issues respecting the Information Highway* (***"Cable-TV systems are broadcasting undertakings subject to federal regulation under the Broadcasting Act, and when they deliver nonprogramming services on the same facilities they use to provide broadcasting, they also fall within the definition of a 'Canadian carrier' under the 1993 Telecommunications Act"***). See also *Regulation of broadcasting distribution undertakings that provide non-programming services*, Telecom Decision CRTC 96-1, 30 January 1996.

[61] At the same time, Parliament recognized that non-broadcasting telecommunications (i.e., the transmission of mere "intelligence" rather than "programs") do not contribute to the *Broadcasting Act*'s cultural goals, and so should be excluded from it for regulation under the general telecommunications legislation. It therefore enacted s. 4(4) of the *Broadcasting Act* to exclude undertakings that act ***"solely"*** as telecommunications common carriers, i.e., to carve non-broadcasting telecommunications out of the *Broadcasting Act*, but to retain broadcasting telecommunications within its scope: see Department of Communications, *Government Response to the Fifteenth Report of the Standing Committee on Communications and Culture: A Broadcasting Policy for Canada* (Ottawa: Department of Communications, 1988) at 87; and Industry Canada, *Convergence Policy – Backgrounder*, online: <https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf05267.html>.

90. As the Task Force on Broadcasting Policy stated:

> ***The definition of a broadcasting undertaking*** should of course tally with the definition of broadcasting. It ***should cover*** not only the transmission and reception of broadcast signals, but also ***any other form of program distribution by telecommunication***, whether or not there is a charge for the service, as well as networks. All undertakings involved in such activities would, within the meaning of the Act, be considered broadcasting undertakings. ***Only common carriers such as telephone companies should be exempted because their role is limited to relaying messages.***[62]

91. Thus, the Standing Committee on Communications and Culture recommended:

> ***The act should state that any person who transmits or distributes by means of telecommunications, other than solely as a telecommunications common carrier,*** any programming received by radiocommunication ***should be considered to be carrying on a broadcasting undertaking.***[63]

92. Therefore, in determining which statute applies to Bell Mobility in respect of Bell Mobile TV, the issue is not whether it acts as a telecommunications common carrier, but whether it broadcasts as a broadcasting undertaking. In this case, on the facts found by the CRTC, Bell Mobility does so. As such, the *Telecommunications Act* does not apply.

B. The Test Is Content Control, Not Technology

93. The test for whether an undertaking broadcasts as a broadcasting undertaking turns on whether it controls the ***content*** it distributes, not the ***technology*** by which it distributes that content. As the Supreme Court of Canada recognized in *Cogeco*, the *Broadcasting Act* focuses upon cultural effects, and thus on content, not the mode of carriage:

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

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[62] Government of Canada, Task Force on Broadcasting Policy, *Report of the Task Force on Broadcasting Policy* (Ottawa: Minister of Supply and Services Canada, 1986) at 149-150, *emphasis added.*

[63] House of Commons Standing Committee on Communications and Culture, *Fifteenth Report to the House: A Broadcasting Policy for Canada* (Hull, Quebec: Queen's Printer for Canada, 1988) at 409, *emphasis added.* See also Department of Communications, *Government Response to the Fifteenth Report of the Standing Committee on Communications and Culture: A Broadcasting Policy for Canada* (Ottawa: Department of Communications, 1988) at 69 (***"[C]lause 4(4) provides specific exclusion from the Act for telecommunication carriers acting solely in that capacity"***).

> 1985, c. R-2, ***are the main statutes governing carriage, and the Broadcasting Act deals with content***, which is "the object of 'carriage'"...
>
> ...[T]he *Broadcasting Act* regulates "program[s]" that are "broadcast" for reception by the Canadian public (see s. 2(1), definitions of "broadcasting" and of "program"), with a view to implementing the Canadian broadcasting policy described in s. 3(1) of the Act. Generally speaking, ***"[t]he Broadcasting Act is primarily concerned with the programmed content delivered by*** means of radio waves or other ***means of telecommunication*** to the public"...[64]

94. As a result, the *Broadcasting Act* was designed to be technologically neutral.[65] It applies, or not, regardless of the technological means of transmission, whether via radio waves or "other means of telecommunication".[66]

95. The CRTC itself recognized the importance of applying the *Broadcasting Act* regardless of the technological mode of distribution when it first proposed the DMBU Exemption Order, at that time known as the New Media Exemption Order:[67]

> 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".***
>
> ...[T]he Commission considers that the particular technology used for the delivery of signals over the Internet cannot be determinative. Based on a plain 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.***[68]

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[64] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶32 and 34-35, *emphasis added.* **See also** *Reference re Broadcasting Act*, [2012] 1 S.C.R. 142, ¶4 (***"[T]he policy objectives listed under s. 3(1) of the Act focus on content"***).

[65] See, by analogy, *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 283, ¶39 (***"[T]he Act should be interpreted to extend to technologies that were not or could not have been contemplated at the time of its drafting"***). **See also**: *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 231, ¶5 and 9-10; *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, [2012] 2 S.C.R. 326, ¶43. While these cases were decided in relation to the *Copyright Act*, the same principle clearly applies to the *Broadcasting Act* given the importance of technological neutrality to the latter statute as well. Indeed, the two statutes are closely related: *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶34.

[66] **See also** ss. 3(1)(d)(iv), 3(1)(t)(ii), 5(2)(c) and 5(2)(f) of the *Broadcasting Act*.

[67] *Exemption order for new media broadcasting undertakings* – Public Notice CRTC 1999-197, 17 December 1999, Appendix.

[68] *New Media* – Public Notice CRTC 1999-84, 17 May 1999, ¶38-39, *emphasis added.* **See also** *Review of broadcasting in new media* – Broadcasting Regulatory Policy CRTC 2009-329, 4 June 2009, ¶33.

96. Parliament's decision to adopt this technologically neutral approach was driven by the increasing convergence between telecommunications and broadcasting. As the Minister of Communications explained in a policy paper she released when first tabling Bill C-136 (later enacted, as Bill C-40, as the *Broadcasting Act*):

> ***Broadcasting and telecommunications, which a few decades ago seemed entirely different operations, are now converging.*** ...
>
> ***Today, television signals, telephone conversations and exchanges between computers are all routinely carried by cable***, fibre optics, microwave and satellite.
>
> ***Where does broadcasting end and telecommunications begin? What rules apply?***
>
> By concentrating on the concepts of programming and distribution, ***a technology-neutral broadcasting act can be concerned with the content of broadcasting*** in the context of its cultural significance to Canada.[69]

97. The Minister elaborated on this when introducing Bill C-136 for second reading:

> ***The approach of Bill C-136 is to be technology-neutral. Broadcasting is defined by content, not by the way it is received by the audience. The signal is not the key. What the signal carries is the important factor.***
>
> This technologically-neutral approach means that ***distribution systems can use the technology of their choice.*** It also ensures that Bill C-136 will ***keep its legal foundation in the face of future technological developments***, something which is ***very critical*** if the institutions that govern the broadcasting system are not to have their power eroded.[70]

98. When introducing Bill C-40 for third reading, the Minister added:

> ...[T]he *Broadcasting Act* must recognize that ***the same technologies used to transmit broadcasting programs are also used to deliver other kinds of services.*** Broadcasting legislation should not become an instrument for inhibiting the evolution of services which do not properly fall within its scope.
>
> ***Bill C-40 is about television and radio programming. These activities have traditionally been regulated because they are cultural in nature...***
>
> ***Information-based services such as*** shopping and real estate services, ***data base services***, home security services and the like ***are of a different nature.*** ...

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[69] Department of Communications, *Canadian Voices, Canadian Choices: A New Broadcasting Policy for Canada* (Ottawa: Minister of Supply and Services Canada, 1988) at 52, *emphasis added.*

[70] *House of Commons Debates*, 33rd Parl. 2nd Sess., Vol. 14 (19 July 1988) at 17745 (and 17748) (Hon. Flora MacDonald), *emphasis added.* **See also:** *House of Commons Debates*, 33rd Parl. 2nd Sess., Vol. 15 (27 September 1988) at 19672 (Hon. Pierre H. Cadieux); *House of Commons Debates*, 34th Parl. 2nd Sess., Vol. 4 (3 November 1989) at 5564-5565 (Hon. Jim Edwards); and *House of Commons Debates*, 34th Parl. 2nd Sess., Vol. 11 (30 October 1990) at 14946 (Hon. Jim Edwards).

> ***By dealing with the transmission of programs to the public, rather than on a particular technology, this bill gives the CRTC clear guidance about which activities are to be regulated, such as broadcasting.*** ...[71]

99. Accordingly, the prime determinant in whether an undertaking engages in broadcasting as a broadcasting undertaking is not the technology it uses, but whether it has some control over the content it distributes.

100. Under the *Broadcasting Act*, whose focus is content,[72] a broadcasting undertaking is "responsible for the programs they broadcast" pursuant to s. 3(1)(h). Under the *Telecommunications Act*, whose focus is carriage,[73] a telecommunications common carrier cannot control the content it transmits pursuant to s. 36.

101. The Supreme Court of Canada specifically held that content control is the test for broadcasting undertaking status in the *ISP Reference*. There, the Supreme Court held that ISPs are not broadcasting undertakings because, unlike broadcasting undertakings, they have no control over the content they provide access to:

> ...***[T]he terms "broadcasting" and "broadcasting undertaking",*** interpreted in the context of the language and purposes of the *Broadcasting Act*, ***are not meant to capture entities which merely provide the mode of transmission.***
>
> Section 2 of the *Broadcasting Act* defines "broadcasting" as "any transmission of programs ... by radio waves or other means of telecommunication for reception by the public". ***The Act makes it clear that "broadcasting undertakings" are assumed to have some measure of control over programming.*** ...
>
> An ISP does not engage with these policy objectives when it is merely providing the mode of transmission. ISPs provide Internet access to end-users. ***When providing access to the Internet, which is the only function of ISPs placed in issue by the reference question, they take no part in the selection, origination, or packaging of content.*** We agree with Noël J.A. that the term "broadcasting undertaking" does not contemplate an entity with no role to play in contributing to the *Broadcasting Act*'s policy objectives.
>
> ...
>
> ...***ISPs merely act as a conduit for information provided by others***...[74]

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[71] *House of Commons Debates*, 34th Parl. 2nd Sess., Vol. 12 (4 December 1990) at 16224 (Hon. Marcel Masse), *emphasis added.*

[72] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶34.

[73] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, ¶34.

[74] *Reference re Broadcasting Act*, [2012] 1 S.C.R. 142, ¶3-5, *emphasis added.*

102. Because the "***sole***" function of ISPs was to provide the mode of transmission, and they had ***no*** control over the transmitted content, they were excluded from the *Broadcasting Act* by s. 4(4). As this Federal Court of Appeal itself made clear in the *ISP Reference:*

> ... The answer turns on whether the definition of "broadcasting"... extends to the person whose ***sole involvement is to provide the mode of transmission.***
> ...
> ***...[S]ubsection 4(4) of the Broadcasting Act... excludes from the operation of the Act transmission intermediaries when working solely in that capacity.*** ...
> ...
> ...[T]he definition of "broadcasting" is... directed at the person who transmits a program and... ***a person whose sole involvement is to provide the mode of transmission is not transmitting the program and hence, is not "broadcasting".***
> ...
> Because ***ISPs' sole involvement is to provide the mode of transmission***, they have no control or input over the content made available to Internet users by content producers and as a result, they are unable to take any steps to promote the policy described in the *Broadcasting Act* or its supporting provisions. ...
> ...
> ***..[T]he Broadcasting Act specifically provides that it does not apply to a telecommunications common carrier when acting solely in that capacity.*** ...[75]

103. The Supreme Court of Canada, which specifically agreed with this Court's reasons,[76] made the same point when affirming its judgment:

> ISPs provide routers and other infrastructure that enable their subscribers to access content and services made available on the Internet. This includes access to audio and audiovisual programs developed by content providers. ... The ***ISPs, acting solely in that capacity***, do not select or originate programming or package programming services. Noël J.A. held that ***ISPs, acting solely in that capacity, do not carry on "broadcasting undertakings".***[77]

C. A Broadcasting Undertaking's Functions Cannot Be Severed

104. Unlike the ISPs in the *ISP Reference*, Bell Mobility does not act "solely" as a telecommunications common carrier. Instead, it retransmits its own acquired content.[78]

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[75] *Reference re Broadcasting Act*, [2012] 1 F.C.R. 219, ¶38, 46, 48, 50 and 53, aff'd, [2012] 1 S.C.R. 142, *underlining in original, bolding and italics added.*

[76] *Reference re Broadcasting Act*, [2012] 1 S.C.R. 142, ¶3.

[77] *Reference re Broadcasting Act*, [2012] 1 S.C.R. 142, ¶2, *emphasis added.*

[78] Decision 2015-26, ¶15, AB, Tab 2.

105. Nevertheless, despite the explicit statutory terms and its own finding that Bell Mobility is engaged in "broadcasting by a broadcasting undertaking" with respect to Bell Mobile TV, the CRTC severed Bell Mobility's sourcing of content and retransmission functions.

106. This undermines the different statutory schemes in the *Broadcasting Act* and the *Telecommunications Act*.[79]

107. Over 75 years ago, the Privy Council held in the *Radio* case that Parliament's jurisdiction over broadcasting undertakings cannot be divided between the transmission and the reception of Hertzian waves:

> ... ***Once it is conceded***, as it must be, keeping in view the duties under the convention, ***that the transmitting instrument must be so to speak under the control of the Dominion, it follows in their Lordships' opinion that the receiving instrument must share its fate. Broadcasting as a system cannot exist without both a transmitter and a receiver.*** The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. ***The system cannot be divided into two parts, each independent of the other.***
>
> ...
>
> Although the question had obviously to be decided on the terms of the statute, it is a matter of congratulation that the result arrived at seems consonant with common sense. ***A divided control between transmitter and receiver could only lead to confusion and inefficiency.***[80]

108. The Supreme Court of Canada applied the same principles in *Capital Cities*, where the issue was Parliament's constitutional jurisdiction over cable companies. It was conceded that Parliament had jurisdiction to regulate the reception of over-the-air television signals received by Ontario cable companies from the United States. However, it was argued that once the cable companies' antennae received those signals, their subsequent ***retransmission*** within Ontario by the ***different technology*** of cable fell outside Parliament's authority. In rejecting this argument, Laskin C.J.C. held:

> ***I am unable to accept the submission*** of the appellants and of the Attorneys-General supporting them ***that a demarcation can be made*** for legislative purposes at the point where the cable distribution systems receive the Hertzian

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[79] See, in addition to the cases cited below: *Public Utilities Commission v. Victoria Cablevision Ltd.*, 1965 CarswellBC 55 (C.A.), ¶8-13 and 26-30,; *C.F.R.B. Ltd. v. Canada (A.G.) (No. 2)*, 1973 CarswellOnt 875 (C.A.), ¶6-11 and 16-17,; and *R. v. Shellbird Cable Ltd.*, 1982 CarswellNfld 47 (C.A.), ¶12 and 18-21.

[80] *Reference re Regulation and Control of Radio Communication*, [1932] A.C. 304 (P.C.) at 314-315 and 317, *emphasis added.*

> waves. ...***[T]hey each constitute a single undertaking*** which deals with the very signals which come to each of them from across the border and transmit those signals, albeit through a conversion process, through its cable system to subscribers. The common sense of which the Privy Council spoke in the *Radio* case seems to me even more applicable here to ***prevent a situation of a divided jurisdiction in respect of the same signals or programmes according to whether they reach home television sets and the ultimate viewers through Hertzian waves or through coaxial cable.***
>
> ***The fallacy in the contention*** on behalf of the Attorney-General of Ontario and of the Attorneys-General of Quebec and of British Columbia, and, indeed, of the appellants, ***is in their reliance on the technology of transmission as a ground for shifting constitutional competence*** when the entire under-taking relates to and is dependent on extra-provincial signals which the cable system receives and sends on to subscribers. ...
>
> ... ***I do not see how legislative competence ceases in respect of those signals merely because the undertaking which receives them and sends them on to its local subscribers does so through a different technology.***
>
> ...
>
> ... ***The technology of cable television does not make the operation of a cable distribution system which draws on signals emanating from outside Canada any less an "undertaking"*** than the radio operations which were the subject of enquiry in the *Radio* case. ...
>
> ... ***Programme content regulation is inseparable from regulating the undertaking through which programmes are received and sent on as part of the total enterprise.***
>
> ...
>
> ***I cannot accept the submission*** made on behalf of the Attorney-General of Ontario ***that there are two undertakings involved*** in the operation of a cable distribution system, which receives and transmits television signals, ***simply because the transmission of the same signal to subscribers that it receives through Hertzian waves is done through a different technology.*** ...[81]

109. In this case, and despite the foregoing authorities, the CRTC severed Bell Mobile TV's functions as between sourcing the Bell Mobile TV content on the one hand, and retransmitting it to customers on the other. The CRTC did so because the Bell Mobile TV service uses the same wireless network to retransmit Bell Mobile TV as Bell Mobility does to provide Internet service access.

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[81] *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141 at 157 and 159-163, *emphasis added.*

110. It is submitted that this rationale is unsupportable under this statutory regime. As the Supreme Court of Canada emphasized in *Dionne*, "the inquiry must be as to the ***service that is provided*** and not simply as to the ***means*** through which it is carried on".[82]

111. Commissioner Shoan made the same point in the CRTC Decision below, in fundamental disagreement on this point with the majority:

> ... As ***technologically neutral legislation***, the applicability of the *Broadcasting Act* is not limited to a particular platform. It was drafted and designed as an evolving statute. As such, ***the manner in which programming is delivered to Canadians is immaterial***; the *Broadcasting Act* is intended to capture certain activity, namely, the provision of programming to Canadians by way of radio waves or other telecommunications. ...
>
> ...
>
> With respect to my colleagues, I have difficulty accepting their argument. ***It is the nature of the activity that defines a service, not the nature of its platform***
> ...[83]

112. The Supreme Court's ruling in the *ISP Reference* underscores the relevance of *Capital Cities* and *Dionne* here. The Supreme Court held that *Capital Cities* was inapplicable to the ISPs in the *ISP Reference*, since unlike the cable companies in *Capital Cities*, the ISPs in the *ISP Reference* had no "***control over content***" accessed through their ISP service:

> ... ***In Capital Cities***... the American stations attempted to sever the function of receiving television signals from the [cable television companies'] distribution or retransmission of those signals within a particular province. ***The Court rejected this severance of reception and distribution, stating that it was a "single system"*** coming under federal jurisdiction. ***The appellants argue before this Court that ISPs similarly form part of a single broadcasting system*** that is subject to regulation under the *Broadcasting Act*.
>
> Like Noël J.A., ***we are not convinced that Capital Cities assists the appellants.*** The case concerned Rogers Cable's ability to delete and substitute advertising from American television signals. ***There was no questioning in Capital Cities of the fact that the cable television companies had control over content. ISPs have no such ability to control the content of programming over the Internet.***[84]

113. As in *Capital Cities*, there is "no questioning" that Bell Mobility has control over the content of Bell Mobile TV. Therefore, the content sourcing and retransmission

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[82] *Public Service Board v. Dionne*, [1978] 2 S.C.R. 191 at 197 (and 198), *emphasis added.* **See also** *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, [2009] 3 S.C.R. 407, ¶60 and 65.

[83] Decision 2015-26, Concurring opinion of Commissioner Raj Shoan, p. 1, AB, Tab 2, *emphasis added.*

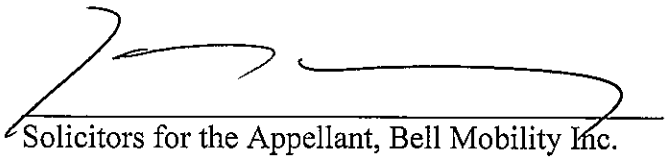
[84] *Reference re Broadcasting Act*, [2012] 1 S.C.R. 142, ¶8-9, *emphasis added.*

functions of the Bell Mobile TV broadcasting undertaking cannot be severed, and the *Broadcasting Act* rather than the *Telecommunications Act* applies.

PART IV—ORDER SOUGHT

114. Bell Mobility requests that the Decision be set aside.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of July, 2015.



Solicitors for the Appellant, Bell Mobility Inc.
Neil Finkelstein
Brandon Kain
Richard Lizius

SCHEDULE "A"
LIST OF AUTHORITIES

A. Statutes and Regulations

1. *Broadcasting Act*, S.C. 1991, c. 11, as am., Parts I and II

2. *Copyright Act*, R.S.C. 1985, c. C-42

3. *Department of Canadian Heritage Act, S.C. 1995, c. 11, as am., s. 4*

4. *Department of Industry Act*, S.C. 1995, c. 1, as am., s. 4

5. *Federal Courts Act*, R.S.C. 1985, c. F-7

6. *Interprétation Act, R.S.C. 1985, c. I-21*

7. *Radiocommunication Act*, R.S.C. 1985, c. R-2, as am., s. 6

8. *Telecommunications Act*, S.C. 1993, c. 38, as am., Parts I, III and IV

B. Case Law

CRTC Decisions

1. *Complaint against Bell Mobility Inc. and Quebecor Media Inc., Videotron Ltd. and Videotron G.P. alleging undue and unreasonable preference and disadvantage in relation to the billing practices for their mobile TV services Bell Mobile TV and illico.TV* – Broadcasting and Telecom Decision CRTC 2015-26, 29 January 2015

2. *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)* – Broadcasting Order CRTC 2012-409, Appendix, 26 July 2012

3. *Amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197); Revocation of the Exemption order for mobile television broadcasting undertakings* – Broadcasting Order CRTC 2009-660, 22 October 2009

4. *Amendments to the Exemption order for new media broadcasting undertakings (Appendix A to Public Notice CRTC 1999-197)*

5. *Revocation of the Exemption order for mobile television broadcasting undertakings* – Broadcasting Order CRTC 2009-660, 22 October 2009

6. *Amendments to the Exemption order for new media broadcasting undertakings (now known as the Exemption order for digital media broadcasting undertakings)* – Broadcasting Order CRTC 2012-409, Appendix, 26 July 2012

7. *Exemption order for mobile television broadcasting undertakings* – Broadcasting Public Notice CRTC 2007-13, 7 February 2007, Appendix

8. *Let's Talk TV* – Broadcasting Notice of Consultation CRTC 2014-190

9. *Regulation of broadcasting distribution undertakings that provide non-programming services*, Telecom Decision CRTC 96-1, 30 January 1996

10. *New Media* – Public Notice CRTC 1999-84, 17 May 1999, ¶38-39, *emphasis added*

11. *Reference re Regulation and Control of Radio Communication*, [1932] A.C. 304 (P.C.)

Judicial Decisions

1. *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654

2. *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476

3. *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764

4. *Bell Canada v. Canada (C.R.T.C.)*, [1989] 1 S.C.R. 1722

5. *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739

6. *C.F.R.B. Ltd. v. Canada (A.G.) (No. 2)*, 1973 CarswellOnt 875 (C.A.)

7. *C.U.P.E. v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227

8. *Canada (Canadian Human Rights Commission) v. Canada (A.G.)*, [2011] 3 S.C.R. 471

9. *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339

10. *Canadian National Railway Co. v. Canada (A.G.)*, [2014] 2 S.C.R. 135

11. *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141

12. *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, [2009] 3 S.C.R. 407

13. *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190

14. *Edmonton (City) v. 360Networks Canada Ltd.*, [2007] 4 F.C.R. 747 (C.A.), leave to appeal refused, [2007] S.C.C.A. No. 286

15. *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 231

16. *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895

17. *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16

18. *Németh v. Canada (Justice)*, [2010] 3 S.C.R. 281

19. *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678

20. *Public Service Board v. Dionne*, [1978] 2 S.C.R. 191

21. *Public Utilities Commission v. Victoria Cablevision Ltd.*, 1965 CarswellBC 55 (C.A.)

22. *R. v. Shellbird Cable Ltd.*, 1982 CarswellNfld 47 (C.A.)

23. *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489

24. *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 283

25. *Telecommunications Workers Union v. C.R.T.C.*, [2004] 2 F.C.R. 3 (C.A.)

26. *Telus Communications Inc. v. Canada (C.R.T.C.)*, [2005] 2 F.C.R. 388 (C.A.), leave to appeal refused, [2004] S.C.C.A. No. 573

27. *Wheatland County v. Shaw Cablesystems Ltd.*, 2009 FCA 291

C. Secondary Sources

1. *Report of the Task Force on Broadcasting Policy* (Ottawa: Minister of Supply and Services Canada, 1986)

2. *Sixth Report to the House: Recommendations for a New Broadcasting Act* (Hull, Quebec: Queen's Printer for Canada, 1987)

3. *Fifteenth Report to the House: A Broadcasting Policy for Canada* (Hull, Quebec: Queen's Printer for Canada, 1988)

4. *Government Response to the Fifteenth Report of the Standing Committee on Communications and Culture: A Broadcasting Policy for Canada* (Ottawa: Department of Communications, 1988)

5. *Canadian Voices, Canadian Choices: A New Broadcasting Policy for Canada* (Ottawa: Minister of Supply and Services Canada, 1988)

6. *Minutes of Proceedings and Evidence of the Sub-Committee on Bill C-62* (Hull, Quebec: Queen's Printer for Canada, 1993)

7. *House of Commons Debates*, 33rd Parl. 2nd Sess., Vol. 14 (19 July 1988)

Court File No. A-193-15

FEDERAL COURT OF APPEAL

BETWEEN

BELL MOBILITY INC.

Appellant

- and -

BENJAMIN KLASS, THE CONSUMERS' ASSOCIATION OF CANADA, THE COUNCIL OF SENIOR CITIZENS' ORGANIZATIONS OF BRITISH COLUMBIA AND THE PUBLIC INTEREST ADVOCACY CENTRE, THE CANADIAN NETWORK OPERATORS CONSORTIUM INC., BRAGG COMMUNICATIONS INC. (CARRYING ON BUSINESS AS EASTLINK), FENWICK MCKELVEY, VAXINATION INFORMATIQUE, THE SAMUEL-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC, DAVID ELLIS, TERESA MURPHY and TELUS COMMUNICATIONS COMPANY

Respondents

-and-

ATTORNEY GENERAL OF CANADA

Intervener

MEMORANDUM OF FACT AND LAW OF THE APPELLANT, BELL MOBILITY INC.

McCarthy Tétrault LLP
Suite 5300, TD Bank Tower
66 Wellington Street West
Toronto ON M5K 1E6

Neil Finkelstein
Brandon Kain
Richard Lizius

Tel: 416-362-1812
Fax: 416-868-0673

Solicitors for the Appellant,
Bell Mobility Inc.