Federal Court of Appeal  Cour d'appel fédérale

Date: 20160620

Docket: A-193-15

Citation: 2016 FCA 185

CORAM: **DAWSON J.A.**
WEBB J.A.
RENNIE J.A.

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

Heard at Toronto, Ontario, on January 19, 2016.

Judgment delivered at Ottawa, Ontario, on June 20, 2016.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRING REASONS BY: DAWSON J.A.
CONCURRED IN BY: RENNIE J.A..

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REASONS FOR JUDGMENT

WEBB J.A.

[1] Bell Mobility Inc. (Bell Mobility) has appealed the Broadcasting and Telecom Decision of the Canadian Radio-television and Telecommunications Commission (CRTC) dated January 29, 2015 (CRTC 2015-26). In this decision the CRTC determined that certain billing practices of Bell Mobility in relation to its mobile TV services violated subsection 27(2) of the *Telecommunications Act*, S.C. 1993, c. 38.

[2] For the reasons that follow I would dismiss this appeal.

I. Background

[3] Bell Mobility and Quebecor Media Inc., Videotron Ltd. and Videotron G.P. (collectively Videotron) offered live streaming of certain television stations and other related television programming services to their customers, including a video-on-demand service.

[4] Bell Mobility and Videotron only provided these mobile TV services to customers who also subscribed to a wireless voice plan, a data plan or a tablet plan. Neither Bell Mobility nor Videotron charged their customers for the amount of data that was used to transmit the mobile TV programs but rather they charged their customers for the amount of time that the customers spent accessing the programs. Bell Mobility charged its customers $5 per month for up to 10 hours of access time and $3 for each additional hour.

[5] Mr. Klass and certain organizations filed a complaint with the CRTC claiming that the practice by Bell Mobility and Videotron of exempting mobile TV services from data charges

"confers upon themselves an unfair advantage, gives their mobile TV services an undue preference, and unduly discriminates against their wireless customers that consume mobile online video services, and against Bell Mobility's and Videotron's competitors, in violation of subsection 27(2) … of the *Telecommunications Act*" (CRTC reasons, paragraph 2).

II. CRTC Decision

[6] In paragraph 9 of its decision, the CRTC, noted that, "[s]ection 4 of the *Telecommunications Act*, provides that the Telecommunications Act does not apply to broadcasting by a broadcasting undertaking, which is subject to the *Broadcasting Act* [S.C. 1991, c. 11]".

[7] The CRTC then noted that:

> 10. 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.

[8] In conducting its analysis, the CRTC found that Bell Mobility was "involved in broadcasting". In paragraph 15 of its reasons, the CRTC stated that:

> 15. 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.

[9] However, following its determination that Bell Mobility and Videotron were "involved in broadcasting" the CRTC found that they were operating as Canadian carriers when they were providing voice and data services and access to the Internet to their subscribers. The CRTC also found that Bell Mobility and Videotron were providing a telecommunications service to their customers when they provided the connectivity necessary to allow their customers to view the programs over the internet. However, the CRTC noted that this did not necessarily transform these services into those of a broadcasting undertaking, even though Bell Mobility and Videotron were involved in acquiring the rights to distribute the programs and in packaging and marketing the content.

[10] The CRTC further found that Bell Mobility and Videotron each used the same network to transmit the programs to their customers as they used to transmit voice and other non-programming data and the traffic was treated the same regardless of whether what was being transmitted was programming services, voice services or non-programming data. As noted by the CRTC, the transmission of voice and non-programming data would be subject to the *Telecommunications Act*.

[11] In paragraph 18 of its reasons, the CRTC found 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.

[12] The CRTC also found that data connectivity is required to transmit the programs and such connectivity can only be established if the customer acquires a telecommunications service from Bell Mobility or Videotron. From the customer's perspective, Bell Mobility's mobile TV services are accessed in the same way that such customers would access other applications.

[13] The CRTC concluded that:

> 22. 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.

[14] The CRTC then determined that Bell Mobility and Videotron were acting in violation of subsection 27(2) of the *Telecommunications Act* and directed Bell Mobility to "eliminate its unlawful practice with respect to data charges for its mobile TV service by no later than **29 April 2015**" (CRTC reasons, paragraph 62 – emphasis in original). Since Videotron had already announced that it would be withdrawing its illico.tv app (which would then remove any undue preference for its mobile TV service), the CRTC directed Videotron to confirm that it had done so.

[15] Although both Bell Mobility and Videotron participated at the hearing before the CRTC, only Bell Mobility has appealed the decision of the CRTC.

III. Issues

[16] The issues raised by Bell Mobility in this appeal are:

(a) whether the standard of review should be correctness; and

(b) whether the CRTC erred in its determination that the *Telecommunications Act* applied when Bell Mobility was transmitting its mobile TV services to its customers.

IV. Standard of Review

[17] Under subsection 64(1) of the *Telecommunications Act*, an appeal to this Court from a decision of the CRTC may, if leave is granted, only be brought in relation to a question of law or jurisdiction. Therefore the factual findings made by the CRTC (which are set out above and which, in any event, are within their area of expertise) are not subject to review in this appeal.

[18] Bell Mobility argued that the standard of review in this case should be correctness because in its view the issue is whether the CRTC applied the correct statute and, therefore, this was a question of jurisdiction. Bell Mobility also argued that whether its mobile TV services were subject to the *Telecommunications Act* was a "true question of jurisdiction". However the argument is framed, the issue is related to the CRTC's interpretation of the *Telecommunications Act* and the *Broadcasting Act*.

[19] In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 (*Mowat*), the Supreme Court of Canada stated at paragraph 18 that:

> 18 *Dunsmuir* recognized that the standard of correctness will continue to apply to constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, as well as to "[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals" (paras. 58, 60-61; see also *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 26, per Fish J.). 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" (para. 59; see also *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 5).
>
> (emphasis added)

[20] In *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, the Supreme Court of Canada noted that the correctness standard would apply if the issue was related to the jurisdictional lines to be drawn between different, competing specialized tribunals:

> 55 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 (*Dunsmuir*, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 30). 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 (*Dunsmuir*, at paras. 58-61, and *Alberta Teachers' Association*, at para. 30, citing *Canada (Canadian Human Rights Commission)*, at para. 18, and *Dunsmuir*, at paras. 58-61).
>
> (emphasis added)

[21] While there are different consequences that will arise depending on which statute is applicable, the CRTC is the decision-maker for matters that arise under the *Telecommunications Act* and the *Broadcasting Act.* There is no competition between specialized tribunals in relation to these two statutes. In my view, the issue in this case relates to the interpretation by a specialized tribunal of two of its home statutes – the *Telecommunications Act* and the *Broadcasting Act.* Deference should therefore be given to the interpretation of these statutes by the CRTC. As a result the standard of review that is applicable in this case is reasonableness.

V. Analysis

[22] Technology has evolved to the point where television programs are transmitted using the same network as voice and other data communications. As a result, the line between the *Telecommunications Act* and the *Broadcasting Act* is being blurred. Section 4 of the *Telecommunications Act* would, however, exempt certain activities (to which the *Broadcasting Act* would apply) from the application of the *Telecommunications Act* if the conditions of this section are satisfied.

[23] In this appeal, Bell Mobility focused its arguments on this section of the *Telecommunications Act*:

4. This Act does not apply in respect of broadcasting by a broadcasting undertaking.	**4.** La présente loi ne s'applique pas aux entreprises de radiodiffusion pour tout ce qui concerne leurs activités de radiodiffusion.

[24] If this section is applicable, then even if Bell Mobility was operating as a Canadian carrier providing telecommunication services when it was transporting its mobile TV services to

its customers, subsection 27(2) of the *Telecommunications Act* would not be applicable because the *Telecommunications Act* would not apply.

[25] The CRTC rejected the argument of Bell Mobility that section 4 of the *Telecommunications Act* was applicable. In paragraph 25 of its reasons, the CRTC stated that:

> 25. The Commission therefore rejects Bell Mobility's and Videotron's arguments that the relief claimed pursuant to the *Telecommunications Act* should be denied on the basis that they are not subject to that Act. Section 4 of the *Telecommunications Act* does not apply as a shield to the application of the *Telecommunications Act* in this case given that Bell Mobility and Videotron are acting as Canadian carriers in providing transport and data connectivity services required for the delivery of their mobile TV services, as discussed above.

[26] The main issue in this appeal is, therefore, whether the CRTC's determination that section 4 of the *Telecommunications Act* is not applicable, is reasonable.

[27] The interpretation of statutory provisions "must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at paragraph 10).

A. *Text*

[28] The text of this provision is clear that the exemption will only apply "in respect of broadcasting by a broadcasting undertaking". This section does not apply to all broadcasting but only to "broadcasting by a broadcasting undertaking".

[29] While "broadcasting undertaking" is defined in the *Telecommunications Act*, "broadcasting" is not. "Broadcasting" is defined in the *Broadcasting Act*. There is a significant interrelationship between the *Telecommunications Act* and the *Broadcasting Act*. Paragraph 15(2)(*b*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, provides that an interpretation section of one enactment shall be read "as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears". There is nothing to suggest that Parliament intended that the term "broadcasting", when it is used in the *Telecommunications Act*, should have a different meaning than the one assigned by the *Broadcasting Act* and none of the parties submitted that it should have a different meaning. Indeed, Parliament specifically provided that "broadcasting undertaking" would have the same meaning in both statutes and therefore, it is a fair inference that "broadcasting" would also have the same meaning in both statutes. As a result the meaning assigned to "broadcasting" by the *Broadcasting Act* is applicable to the *Telecommunications Act*.

[30] In the *Broadcasting Act*, "broadcasting" and "broadcasting undertaking" are defined as follows:

"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.

[31] "Distribution undertaking", "programming undertaking" and "network" are also defined in the *Broadcasting Act*. As a result of these definitions, a "broadcasting undertaking" is defined as including certain tasks or operations—it is not defined as a person. As well, subsection 2(2) of the *Broadcasting Act* provides that:

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.	Pour l'application de la présente loi, sont inclus dans les moyens de télécommunication les systèmes électromagnétiques — notamment les fils, les câbles et les systèmes radio ou optiques — , ainsi que les autres procédés techniques semblables.

[32] In the *Telecommunications Act*, "intelligence" and "telecommunications" are defined as follows:

intelligence means signs, signals, writing, images, sounds or intelligence of any nature;	information Signes, signaux, écrits, images, sons ou renseignements de toute nature.
…	[…]
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;	télécommunication La transmission, l'émission ou la réception d'information soit par système électromagnétique, notamment par fil, câble ou système radio ou optique, soit par tout autre procédé technique semblable.

[33] As a result of these definitions, both “telecommunications” and “broadcasting” involve the transmission of a form of intelligence, except that “broadcasting” is restricted to the transmission of programs while telecommunications would include the transmission of programs and other forms of intelligence. In *Regulation of Broadcasting Distribution Undertakings That Provide Non-programming Services* (30 January 1996), Telecom Decision CRTC 96 – 1, the CRTC confirmed that the definition of telecommunications would encompass “broadcasting”.

[34] Therefore, a finding that a person was a Canadian carrier providing telecommunication services would not preclude a finding that such person was also “broadcasting”, if that person was transmitting programs. However, whether that “broadcasting” was “broadcasting by a broadcasting undertaking” is another question.

[35] Bell Mobility submitted that once the CRTC concluded, as it did in paragraph 15 of its reasons, that Bell Mobility was “involved in broadcasting” and that “mobile TV services constitute broadcasting services as contemplated by the DMBU exemption order”, this should have been the end of the matter. According to Bell Mobility, the CRTC should then have determined that the *Broadcasting Act*, and not the *Telecommunications Act*, applied to the transmission of programs to its customers as part of its mobile TV services.

[36] I do not agree that these findings would end the matter. The finding that Bell Mobility was “involved in broadcasting” appears to be based on the functions identified by the CRTC in paragraph 15 of its reasons. These functions are acquiring rights, aggregating content, and packaging and marketing of services. None of these functions would be the “transmission of

programs". Therefore, the conclusion that Bell Mobility was "involved in broadcasting" in carrying on these functions would not necessarily lead to a conclusion that it was "broadcasting" as a "broadcasting undertaking" when it was delivering its mobile TV services to its customers.

[37] The Exemption Order for Digital Media Broadcasting Undertakings (DMBU exemption order), is set out in the appendix to Broadcasting Order 2012-409. There is nothing in this order that provides that an entity that is simultaneously broadcasting programs and other non-program data will be broadcasting its programs as a "broadcasting undertaking" and hence that the *Telecommunications Act* does not apply to the transmission of its programs.

[38] As a result, the question still remains whether, based on a contextual and purposive analysis, the determination by the CRTC, that Bell Mobility was not "broadcasting" as a "broadcasting undertaking" when it was transmitting its mobile TV programs, was reasonable.

B. *Context and Purpose*

[39] As noted above, there is a significant interrelationship between the *Telecommunications Act* and the *Broadcasting Act*. The Attorney General, in her Memorandum of fact and law, referred to paragraph 9(1)(*f*) of the *Broadcasting Act* and subsections 28(1) and (2) of the *Telecommunications Act* as support for her position that the different acts may apply "to different activities carried out in the same chain of program delivery".

[40] None of these provisions is engaged based on the facts of this case. However, provisions that are not directly engaged may still provide guidance with respect to whether the interpretation

of a particular provision of a statute is in harmony with that statute as a whole. As noted by Bastarache, J., writing on behalf of the dissenting Judges (although not in dissent on this point) in *Charlebois v. Saint John (City)*, 2005 SCC 74, [2005] 3 S.C.R. 563 at paragraph 42, "the legislative context is always a major consideration in the interpretation of a statute". The question in this case is whether these particular provisions provide any guidance with respect to the interpretation of section 4 of the *Telecommunications Act* when a person is simultaneously transmitting programs and voice or other non-program data.

[41] Since the first provisions to which the Attorney General referred were paragraph 9(1)(*f*) of the *Broadcasting Act* and subsection 28(2) of the *Telecommunications Act* and since these provisions can be reviewed together, these provisions will be addressed first. These provisions provide as follows:

Broadcasting Act

9 (1) Subject to this Part, the Commission may, in furtherance of its objects,	**9** (1) Sous réserve des autres dispositions de la présente partie, le Conseil peut, dans l'exécution de sa mission :
…	[…]
(*f*) require any licensee to obtain the approval of the Commission before entering into any contract with a telecommunications common carrier for the distribution of programming directly to the public using the facilities of that common carrier;	*f*) obliger les titulaires de licences à obtenir l'approbation préalable par le Conseil des contrats passés avec les exploitants de télécommunications pour la distribution — directement au public — de programmation au moyen de l'équipement de ceux-ci;

Telecommunications Act

28(2) Where a person who carries on a broadcasting undertaking does not agree with a Canadian carrier with respect to the allocation of satellite capacity for the transmission by the carrier of programs, as defined in subsection 2(1) of the Broadcasting Act, the Commission may allocate satellite capacity to particular broadcasting undertakings if it is satisfied that the allocation will further the implementation of the broadcasting policy for Canada set out in subsection 3(1) of that Act.	**28**(2) En cas de désaccord entre une entreprise de radiodiffusion et une entreprise canadienne sur l'attribution des canaux de satellite en vue de la transmission par celle-ci d'émissions — au sens du paragraphe 2(1) de la Loi sur la radiodiffusion — par satellite, le Conseil peut attribuer des canaux à certaines entreprises de radiodiffusion, s'il est convaincu que cela favorisera la mise en oeuvre de la politique canadienne de radiodiffusion.

[42] These provisions reflect the overlap between the transmission of programs and the transmission of voice and other non-program data. They contemplate that a person who wants to transmit programs to its customers may want to use the facilities of another person who is a telecommunications common carrier or a Canadian carrier and who is transmitting other content. However, both provisions apply before the telecommunications common carrier or the Canadian carrier are transmitting programs for the broadcaster. Paragraph 9(1)(*f*) of the *Telecommunications Act* provides that approval may be required before the contract is entered into and subsection 28(2) of the *Telecommunications Act* applies when a broadcaster is unable to reach an agreement with the Canadian carrier with respect to the allocation of satellite capacity.

[43] If the CRTC determines that its approval is required for the contract referred to in paragraph 9(1)(*f*) of the *Broadcasting Act* and such approval is granted, the telecommunications common carrier will then be transmitting programs. As noted above, "broadcasting" as defined in the *Broadcasting Act*, "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". Therefore, the telecommunications common carrier would then be "broadcasting" as defined in the *Broadcasting Act*. Paragraph 9(1)(*f*) of the *Broadcasting Act* does not, in and of itself, address the issue of whether the telecommunications common carrier would then be broadcasting as a broadcasting undertaking and hence whether section 4 of the *Telecommunications Act* would apply to the transmission of these programs. Paragraph 9(1)(*f*) of the *Broadcasting Act* only addresses the approval that may be required to enter into the contract which would result in the telecommunications common carrier transmitting programs.

[44] Likewise, subsection 28(2) of the *Telecommunications Act* does not, in and of itself, address the issue of whether the Canadian carrier, if it is required to allocate satellite capacity to the person carrying on a broadcasting undertaking, would then be broadcasting as a broadcasting undertaking when it is transmitting programs for reception by the public.

[45] In my view, the answer to the question of whether the particular carrier who is transmitting programs for a broadcaster will then be broadcasting as a broadcasting undertaking, can be found in *Reference re Broadcasting Act*, 2012 SCC 4, [2012] 1 S.C.R. 142 (*ISP*). In that case the Supreme Court of Canada determined that an internet service provider did not engage the *Broadcasting Act* when it was merely transmitting programs for another person:

> **3** We agree with Noël J.A., for the reasons he gave, that the 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.
>
> **4** Section 2(1) 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. Section 2(3) states that the *Act* "shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings". Further, the policy objectives listed under s. 3(1) of the *Act* focus on content, such as the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse.
>
> **5** 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.

[46] In the ISP case, the Supreme Court of Canada was interpreting “broadcasting undertaking” for the purposes of the *Broadcasting Act*. In this case, it is the use of this term in section 4 of the *Telecommunications Act* that is in issue. Since “broadcasting undertaking” has the same meaning in both statutes, in my view, the interpretation of “broadcasting undertaking”, as determined by the Supreme Court, is equally applicable here. Therefore, a person who has no control over the content of programs and is only transmitting programs for another person, would not be transmitting such programs as a broadcasting undertaking.

[47] The Attorney General also referred to subsection 28(1) of the *Telecommunications Act*:

28 (1) The Commission shall have regard to the broadcasting policy for Canada set out in subsection 3(1) of the *Broadcasting Act* in determining whether any discrimination is unjust or any preference or disadvantage is undue or unreasonable in relation to any transmission of programs, as defined in subsection 2(1) of that Act, that is primarily direct to the public	**28** (1) Le Conseil doit tenir compte de la politique canadienne de radiodiffusion exposée au paragraphe 3(1) de la *Loi sur la radiodiffusion* pour déterminer s’il y a eu discrimination, préférence ou désavantage injuste, indu ou déraisonnable, selon le cas, dans une transmission d’émissions — au sens du paragraphe 2(1) de cette loi —

and made (*a*) by satellite; or (*b*) through the terrestrial distribution facilities of a Canadian carrier, whether alone or in conjunction with facilities owned by a broadcasting undertaking.	principalement destinée à être captée directement par le public et réalisée soit par satellite, soit au moyen des installations de distribution terrestre de l'entreprise canadienne, en liaison ou non avec des installations de l'entreprise de radiodiffusion.

[48] This provision contemplates the application of the *Telecommunications Act* to a particular person who is transmitting programs. This does not, however, add anything to what can be gleaned from section 4 of the *Telecommunications Act* – that not all broadcasting will be exempt from the application of the *Telecommunications Act* – and still leaves open the question of when "broadcasting" would not be "broadcasting by a broadcasting undertaking" and hence not subject to the *Telecommunications Act*.

[49] Bell Mobility submits that the *ISP* case and the provisions referred to by the Attorney General can be distinguished because it was the only person involved in the chain of program delivery. It argues that the broadcasting function cannot be segregated into different parts and that it continued until the programs were received by its customers. Bell Mobility referred to a decision of the Privy Council – *Reference re Regulation and Control of Radio Communication*, [1932] A.C. 304, [1932] 2 D.L.R. 81 (P.C.) and to a decision of the Supreme Court of Canada – *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, [1977] 81 D.L.R. (3d) 609. However, neither case is helpful as they both address the issue of the jurisdiction of Parliament. In this case there is no dispute that Parliament has the jurisdiction over both the *Broadcasting Act* and the *Telecommunications Act*.

[50] The relevant question is whether the CRTC's determination that, even though Bell Mobility was involved in broadcasting in carrying out certain activities, it was not broadcasting as a broadcasting undertaking in transmitting its programs, is reasonable. It is important to note that section 4 of the *Telecommunications Act* exempts an *activity* (broadcasting by a broadcasting undertaking), not a person or an entire undertaking.

[51] The activity that is in issue is the transmission of programs. Bell Mobility transmitted its mobile TV programs simultaneously with its voice and other data communications using the same network. The transmission of voice and non-program data to its customers is not "broadcasting" as they are not programs and therefore section 4 of the *Telecommunications Act* is not applicable to the transmission of that content. If the transmission of programs by Bell Mobility were to be treated as "broadcasting by a broadcasting undertaking", then some of the transmissions made using the same network would be subject to the *Broadcasting Act* and other transmissions would be subject to the *Telecommunications Act*. In my view, it is a reasonable result that all transmissions by Bell Mobility would be subject to the same Act.

[52] In my view, this result is also reasonable based on the purposes of the two statutes. As noted by the Supreme Court of Canada in the *ISP* case, "the policy objectives listed under s. 3(1) of the [*Broadcasting*] *Act* focus on content, such as the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse". The policy objectives of the *Telecommunications Act*, as set out in section 7 of that *Act*, focus on the telecommunications system and the telecommunications service. Therefore, the focus of the policy objectives under the

Telecommunications Act is on the *delivery* of the "intelligence" and not the *content* of the "intelligence".

[53] In my view it was reasonable for the CRTC to determine that Bell Mobility, when it was transmitting programs as part of a network that simultaneously transmits voice and other data content, was merely providing the mode of transmission thereof – regardless of the type of content – and, in carrying on this function, was not engaging the policy objectives of the *Broadcasting Act*. The activity in question in this case related to the delivery of the programs – not the content of the programs – and therefore, the policy objectives of the *Telecommunications Act* related to the delivery of the "intelligence" were engaged.

[54] In this case, the CRTC is responsible for administering both the *Broadcasting Act* and the *Telecommunications Act*. The CRTC is entitled to deference in determining which of these statutes will be applicable. In my view, it is a reasonable interpretation of "broadcasting undertaking", based on the purposes of the two *Acts*, that Bell Mobility was not acting as a "broadcasting undertaking" in transmitting its mobile TV services as part of its entire bundle of voice, data and programs that it was transmitting. Since section 4 of the *Telecommunications Act* only applies in relation to "broadcasting by a broadcasting undertaking", it would not apply to the transmission of its mobile TV service as it was not transmitting this content as a "broadcasting undertaking".

VI. Subsection 4(4) of the *Broadcasting Act*

[55] Bell Mobility also referred to subsection 4(4) of the *Broadcasting Act*:

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.	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.

[56] However, since the CRTC found that the *Telecommunications Act* applies and, in my view, this is a reasonable finding, it is not necessary to address the argument of Bell Mobility related to subsection 4(4) of the *Broadcasting Act*.

VII. Conclusion

[57] Based on a textual, contextual and purposive analysis, it is within the range of reasonable possible outcomes for the CRTC to conclude that Bell Mobility was not acting as a "broadcasting undertaking" when it provided the data connectivity and delivered its mobile TV services to its customers and, therefore, that the *Telecommunications Act* applied to such services.

[58] As a result, I would dismiss the appeal, with one set of costs payable by Bell Mobility to the Canadian Network Operators Consortium Inc. and one set of costs payable by Bell Mobility to the respondents Klass, Ellis and McKelvey, collectively.

"Wyman W. Webb"

J.A.

DAWSON J.A. (Concurring reasons)

[59] I agree with both my colleague's reasons and the disposition of the appeal proposed by him. I would only add that, in my view, the contextual and purposive interpretation of the *Broadcasting Act* and *Telecommunications Act* can be further supported by the following analysis.

[60] The nub of Bell Mobility's argument is that there is no concept of "concurrency" between the *Broadcasting Act* and the *Telecommunications Act*. It follows, in Bell Mobility's view, that an entity engaged in telecommunications is either:

i. Broadcasting as a broadcasting undertaking governed exclusively by the *Broadcasting Act* (notwithstanding that it retransmits through telecommunications technology); or,

ii. Governed exclusively by the *Telecommunications Act*.

[61] I reject this submission.

[62] In my view, paragraph 9(1)(*f*) of the *Broadcasting Act* and section 28 of the *Telecommunications Act* demonstrate that the two Acts may apply to different activities carried on in the same chain of program delivery.

[63] Paragraph 9(1)(*f*) of the *Broadcasting Act* allows the CRTC to require any licensee to obtain its permission before entering into any contract with a "telecommunications common carrier" for the "distribution of programming".

[64] Thus, as submitted by the Attorney General, paragraph 9(1)(*f*) contemplates a telecommunications common carrier being involved in the "distribution of programming" along with a broadcast undertaking. It demonstrates that the delivery of programming may involve different activities – some governed by the *Broadcasting Act*, others governed by the *Telecommunications Act*.

[65] Similarly, subsection 28(2) of the *Telecommunications Act* allows the CRTC to "allocate satellite capacity to particular broadcasting undertakings" where a broadcasting undertaking does not agree with a Canadian carrier about the allocation of satellite capacity.

[66] Subsection 28(2) therefore recognizes that transmitting a program by satellite for a broadcasting undertaking remains a telecommunications service governed by the *Telecommunications Act*.

[67] Subsection 28(1) of the *Telecommunications Act* requires the CRTC to have regard to the broadcasting policy for Canada set out in subsection 3(1) of the *Broadcasting Act* when assessing whether any discrimination is unjust or any preference or disadvantage is undue or unreasonable "in relation to any transmission of programs" by satellite or through the terrestrial distribution facilities of a Canadian telecommunications common carrier.

[68] Again, this subsection is premised on the transmission of programs through a telecommunications common carrier's infrastructure. As the Attorney General submits, this transmission does not mean that the telecommunications common carrier becomes a broadcasting undertaking and therefore exempt from the application of the *Telecommunications Act* as argued by Bell Mobility.

[69] In light of these provisions, in my view the CRTC reasonably concluded on the evidence before it that customers accessed Bell Mobile TV through data conductivity and transport services governed by the *Telecommunications Act*. At the same time, the acquisition, aggregation, packaging and marketing of Bell Mobile TV involved a separate broadcasting function governed by the *Broadcasting Act*.

[70] Further, I accept the submission of the CRTC that a company cannot avoid regulation under the *Telecommunications Act* by choosing a particular corporate structure. Bell Mobility chose to offer its mobile TV service through the same corporation that provides its wireless telecommunications services. This cannot determine the CRTC's jurisdiction over Bell Mobility's telecommunications and broadcasting activities.

[71] It follows that I would dismiss the appeal, with one set of costs payable by Bell Mobility to the Canadian Network Operators Consortium Inc. and one set of costs payable by Bell Mobility to the respondents Klass, Ellis and McKelvey, collectively.

"Eleanor R. Dawson"
J.A.

"I agree.
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

(AN APPEAL FROM A DECISION OF THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION DATED JANUARY 29, 2015, DECISION NUMBER 2015-26)

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PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 19, 2016
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CONCURRING REASONS BY:	DAWSON J.A.
CONCURRED IN BY:	RENNIE J.A.
DATED:	JUNE 20, 2016

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