Federal Court of Appeal  Cour d'appel fédérale

Date: 20170915

Docket: A-258-16

Citation: 2017 FCA 186

CORAM: **WEBB J.A.**
NEAR J.A.
GLEASON J.A.

BETWEEN:

2251723 ONTARIO INC. (c.o.b. as VMEDIA)

Appellant

and

ROGERS MEDIA INC.

Respondent

Heard at Toronto, Ontario, on June 7, 2017.

Judgment delivered at Ottawa, Ontario, on September 15, 2017.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: WEBB J.A.
DISSENTING REASONS BY: GLEASON J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

I. Introduction

[1] The appellant, VMedia Inc., appeals from the April 4, 2016 decision of the Canadian Radio-television and Telecommunications Commission (the Commission) denying the appellant's application to add QVC to the *List of non-Canadian programming services and stations authorized for distribution* (the List) (Broadcasting Decision CRTC 2016-122).

II. Background

[2] Pursuant to paragraph 20(1)(f) of the *Broadcasting Distribution Regulations*, SOR/97-555 (the Regulations), a person licenced to carry on a distribution undertaking may distribute "any authorized non-Canadian programming service". The Commission authorizes the distribution of a non-Canadian programming service in Canada by adding the service to the List. A Canadian broadcasting distribution undertaking (BDU), acting as a sponsor for the service, must apply to the Commission to add the service to the List.

[3] The appellant is a Canadian BDU licensed by the Commission under the *Broadcasting Act*, S.C. 1991, c. 11 (the Act) to distribute programming services in Canada. QVC Inc. is a United States (US) company that operates a television shopping channel, QVC, which is distributed by cable and satellite services in the US.

[4] The appellant, acting as a sponsor, applied to the Commission to add QVC to the List.

[5] The respondent, Rogers Media Inc. intervened to oppose the appellant's application. The respondent submitted that adding QVC to the List would result in QVC Inc. carrying on a broadcasting undertaking in Canada without a licence or without being subject to a valid exemption, contrary to the Act. Further, the respondent argued that adding QVC to the List would circumvent the *Exemption Order Respecting Teleshopping Programming Service Undertakings* (the Teleshopping Exemption Order), which allows only Canadian teleshopping services to operate in Canada. The respondent also submitted that approving the appellant's application would violate the Commission's long-standing policy of prohibiting non-Canadian

programming services that compete with Canadian ones. The respondent alleged that authorizing the distribution of QVC would prejudice The Shopping Channel (TSC), a teleshopping service operated in Canada by the respondent pursuant to the Teleshopping Exemption Order.

[6] In reply, the appellant submitted that neither the retransmission of QVC in Canada by a BDU nor QVC Inc.'s intended retail business with Canadians would amount to QVC Inc. carrying on a broadcasting undertaking in Canada. Further, the appellant argued that the List is the appropriate means to authorize the distribution of QVC in Canada and the Teleshopping Exemption Order does not prevent the Commission from adding QVC to the List. The appellant also submitted that TSC is not entitled to the same protection as it is an exempt service and, in any event, QVC is not directly competitive with the respondent's teleshopping service.

III. Decision of the Commission

[7] The Commission began its analysis of the appellant's application by indicating that its "general policy" is to authorize the distribution of those non-Canadian services in Canada that do not compete in whole or in part with Canadian services (reasons at para. 16).

[8] Nonetheless the Commission pointed to sections 4 and 32 of the Act which together provide that broadcasting undertakings, carried on in whole or in part within Canada, must operate pursuant to a licence or a valid exemption order (reasons at para. 17).

[9] The Commission then determined that an undertaking is in whole or in part being carried on in Canada where there is a "nexus (i.e. a real and substantial connection) between Canada and

the undertaking in question" (reasons at para. 18). The Commission outlined various factors to consider when assessing the existence and extent of any nexus:

- the location of the profit-producing elements of the operation in Canada;
- the intention of a company to do business in Canada;
- a fixed place of business in Canada;
- the operation of a Canadian bank account;
- employees and agents within Canada;
- continuous business activity in Canada (vs. isolated transaction);
- the solicitation of advertising in Canada; and
- the targeting of programming to Canadians or the tailoring of an international feed to fit the Canadian market

(reasons at para. 18).

[10] The Commission found such a nexus between Canada and QVC Inc. because QVC Inc. intended to do business with Canadians in Canada on a continuous basis. The Commission considered QVC Inc.'s sale of products to be an "integral component" of its teleshopping service that could not be separated from the programming (reasons at paras. 19-20). The Commission acknowledged that other programming services on the List sell products to Canadians but distinguished QVC because it was "dedicated to teleshopping services funded primarily by retail sales to viewers" (reasons at para. 20).

[11] As QVC Inc. would be carrying on a broadcasting undertaking in Canada if added to the List, the Commission determined that QVC Inc. had to obtain a licence or be otherwise

authorized pursuant to a valid exemption order before QVC could be distributed in Canada by the appellant or a different BDU (reasons at paras. 20-21).

[12] Pursuant to the *Direction to the CRTC (Ineligibility of Non-Canadians)*, the Commission found that it could not issue a broadcasting license to QVC Inc. as it is non-Canadian (reasons at para. 22). The Commission also found that QVC Inc. was ineligible to operate pursuant to the Teleshopping Exemption Order because a condition of eligibility is that the Commission not be prohibited from licensing the undertaking by virtue of the *Direction to the CRTC (Ineligibility of Non-Canadians)* (reasons at paras. 23-24). The Commission noted that it had previously denied QVC Inc.'s request to remove the condition that a teleshopping service be Canadian from the Teleshopping Exemption Order because there was insufficient evidence to demonstrate the benefit to Canada and its consumers (reasons at para. 24).

[13] The Commission denied the appellant's application to add QVC to the List.

[14] On June 10, 2016, this Court granted leave to appeal the Commission's decision (Docket: 16-A-19).

IV. Issues

[15] Pursuant to subsection 31(2) of the Act, an appeal from a decision of the Commission only lies for errors of law or jurisdiction. I would characterize the issue on appeal as follows:

1. Is the Commission's interpretation of 'programming undertaking' and 'broadcasting undertaking' as defined by the Act, reasonable?

V. Analysis

A. *Standard of Review*

[16] The issues on the present appeal relate to the Commission's interpretation and application of the Act, one of its home statutes. As such, the applicable standard of review is reasonableness (*Bell Mobility Inc. v. Klass*, 2016 FCA 185 at para. 21; 401 D.L.R. (4th) 353 [*Klass*]; *Bell Canada v. Canada (Attorney General)*, 2016 FCA 217 at para. 42, 402 D.L.R. (4th) 551 [*Bell Canada*]).

B. *The Reasonableness of the Commission's Interpretation of 'programming undertaking' and 'broadcasting undertaking'*

[17] Section 32 of the Act makes it an offence for any person to carry on a broadcasting undertaking without a licence or pursuant to a valid exemption order. Subsection 4(2) provides that the Act "applies in respect of broadcasting undertakings carried on in whole or in part within Canada".

[18] A 'broadcasting undertaking' is defined in section 2 of the Act:

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.

[19] The existence of the List implies that a non-Canadian programming service may be distributed in Canada without the non-Canadian (whose programming service is being transmitted in Canada (the non-Canadian broadcaster)) being considered to be carrying on a broadcasting undertaking within Canada. If a service is added to the List, the non-Canadian broadcaster is not required to be licensed or to operate pursuant to an exemption. Rather, a

Canadian BDU, which is required to be licensed under the Act, distributes the authorized service (Regulations, ss. 1, 20(1)(*f*)). This perhaps explains why previously the principal determination to be made on an application to add a new service to the List has not been whether that non-Canadian broadcaster would be carrying on a broadcasting undertaking within Canada. Rather, the Commission recently articulated that, when authorizing non-Canadian programming services, it would "retain a competitiveness test, based primarily on overlap between non-Canadian and Canadian pay and specialty services". The Commission stated that this approach reflected the objectives of the Act by prioritizing the distribution of Canadian services while still adding diversity with non-Canadian services (Broadcasting Public Notice CRTC 2008-100 (30 October 2008) – *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* at para. 243).

[20] In the decision under appeal, the Commission stated that its "general policy" has been to authorize the distribution of those non-Canadian services in Canada that "do not compete in whole or in part with Canadian pay or specialty services" (reasons at para. 16). Despite reiterating that competition is the principal determination, the Commission indicated, without any explanation, that the appellant's application to add QVC to the List engaged sections 4 and 32 of the Act (reasons at para. 17).

[21] This Court has previously held that "an indication of the reasonableness of an administrative interpretation is that it is consistent with earlier decisions" made by the administrative decision-maker (*Re: Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 at para. 104, [2015] 2 F.C.R. 170). In the case at bar, this Court was not directed to any past

applications to add new services to the List where the Commission made a determination as to whether the non-Canadian broadcaster would be carrying on a broadcasting undertaking within Canada. It appears that, for the first time, the Commission is requiring a sponsoring Canadian BDU to demonstrate that a non-Canadian broadcaster would not be carrying on a broadcasting undertaking within Canada and would not be competitive with any Canadian service if its programming service is added to the List. Yet, the most recent statement of the information requirements for sponsors does not suggest that an application to add a new service to the List would trigger sections 4 and 32 rather than just paragraph 20(1)(*f*) of the Regulations and the competition test (Broadcasting Circular CRTC 2008-9 (17 December 2008 – *Information requirements for sponsors of non-Canadian services for addition to the lists of eligible satellite services for distribution on a digital basis*).

[22] In my view, the Commission's failure to explain why this additional inquiry was engaged or, how this seemingly new basis for authorizing non-Canadian services is consistent with the Act, undermines the justification, transparency, and intelligibility of the decision (see *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190). I recognize, pursuant to section 6 of the Act, that guidelines or statements issued by the Commission are not binding on the Commission. The Commission may very well have the authority to take a different legal approach to authorizing the transmission of non-Canadian programming services. However, the reasonableness of this approach, in light of the broadcasting regulatory scheme, cannot be reviewed by this Court as the Commission provided no reasoning for its choice. While I respect that this Court must avoid being "unduly formalistic" when reviewing the reasons of an administrative decision-maker (*Newfoundland and Labrador Nurses' Union v. Newfoundland*

and Labrador (Treasury Board), 2011 SCC 62 at para. 18, [2011] 3 S.C.R. 708 [*Newfoundland Nurses*]), this does not protect a decision that "cannot be discerned without engaging in speculation or rationalization" (*Lloyd v. Canada (Attorney General)*, 2016 FCA 115 at para. 24, 2016 D.T.C. 5051 [*Lloyd*]).

[23] The Commission characterized the question to be determined as whether QVC Inc. was "carrying on business in whole or in part in Canada" (reasons at para. 18 (emphasis added)). As a result, the Commission's analysis focused solely on whether QVC Inc.'s business, its intended retail activities, would create a real and substantial nexus with Canada (reasons at paras. 19-20). What is absent from the Commission's analysis, in my view, is a consideration of why, if QVC Inc. were to be carrying on business in Canada, this would necessarily lead to the conclusion that QVC Inc. would be carrying on a 'broadcasting undertaking' within Canada. This determination is necessary because it is broadcasting undertakings that must be carried on pursuant to a license or exemption (Act, s. 32(1)).

[24] The respondent suggests that it is implicit that QVC Inc. is carrying on a broadcasting undertaking which is why the Commission did not engage in this analysis. The respondent submits that QVC Inc. would be carrying on a 'programming undertaking', which is included within the definition of broadcasting undertaking (Act, s. 2(1)). A programming undertaking is defined as:

2 (1) In this act,	2 (1) Les définitions qui suivent s'appliquent à la présente loi.
[…]	[…]
programming undertaking	***entreprise de programmation***

an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus;	Entreprise de transmission d'émissions soit directement à l'aide d'ondes radio-électriques ou d'un autre moyen de telecommunication, soit par l'intermédiare d'une entreprise de distribution, en vue de leur reception par le public à l'aide d'un récepteur.

The definition of 'programming undertaking' is, however, restricted to the "transmission of programs". There is no reference to "carrying on a business" in this definition.

[25] In my view, the respondent's interpretation of the Commission's reasoning is not supported by the decision itself or the Commission's past practice. The Commission does conclude that QVC Inc. would be carrying on a broadcasting undertaking in its reasons. The Commission does not, however, assess whether the appellant's retransmission of the unaltered US feed of QVC in Canada constitutes the transmission of programs by QVC Inc. This Court was not directed to any past decisions or statements of the Commission that determined that the transmission of the programming services on the List would result in the non-Canadian broadcaster carrying on a broadcasting undertaking within Canada. I came across one decision where the Commission merely referred to services on the List as "programming undertakings" (Broadcasting Decision CRTC 2015-187 (13 May 2015) – *Removal of KSTP-TV Minneapolis from the List of non-Canadian programming services authorized for distribution*). This past decision cannot be used as a substitute for assessing whether the distribution of a particular non-Canadian service would fall within a defined term under the Act and trigger corresponding rights and obligations. The Commission may have assumed that non-Canadian programming services are undertakings for the transmission of programs carried on within Canada. However, without

any analysis as to whether QVC, in particular, meets this definition, I fail to see how section 4 and 32 of the Act are engaged. If the transmission of a particular non-Canadian programming service that is on the List would be a programming undertaking, why would the non-Canadian broadcaster of that programming service not have to obtain a licence or an exemption order (as the Commission concluded that QVC Inc. would have to do)?

[26] The Supreme Court of Canada in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at paras. 36-38, [2016] 2 S.C.R. 293 [*City of Edmonton*] has recently posited that a tribunal's failure to provide any reasons does not in itself breach procedural fairness and a reviewing court may consider the reasons which could be offered in support of the decision being reasonable. However, in my view the comments of Justice Rennie, first in *Komolafe v. Canada (Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267 at paragraph 11 [*Komolafe*] and then repeated by him and affirmed by this Court in *Lloyd* at paragraph 24, are particularly apt here:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. […] *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

In addition, the SCC in *Edmonton* at paragraph 38 states that "In appropriate circumstances, this Court has for example, drawn upon the reasons given by the same tribunal in other decisions (*Alberta Teachers',* at para. 56) …". As noted earlier in these reasons, in this case the prior reasons given by the Commission are of no assistance in explaining the Commission's conclusion that QVC Inc. would be carrying on a broadcasting undertaking or why the

appellant's retransmission of the unaltered US feed of QVC in Canada constitutes transmission of programs by QVC Inc.

[27] The respondent submits that the Commission's authority over broadcasting undertakings goes beyond the transmission of programs. The respondent relies on division of powers jurisprudence to argue that the term 'undertaking' includes profit-making activities. In my view, while the term undertaking may be interpreted broadly, the act of broadcasting, defined as the transmission of programs under the Act, cannot be divorced from the definition of 'broadcasting undertaking'. Although the Commission did not interpret 'broadcasting undertaking', the jurisprudence indicates that the term is grounded in whether the entity is transmitting programs (see *Klass* at para. 36; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC* 2010-168, 2012 SCC 68 at para. 35, [2012] 3 S.C.R. 489 [*Reference re Broadcasting Regulatory Policy*]; *Regulation of Broadcasting Distribution Undertakings that Provide Non-Programming Services*, Telecom Decision CRTC 96-1 (30 January 1996)).

[28] While QVC Inc. may have a different presence in Canada as compared to the other non-Canadian broadcasters whose programming services are on the List, given the extent of the former's retail activities, I fail to see how this single factor would result in QVC Inc. carrying on a programming undertaking within Canada since "programming undertaking", as defined in the Act, is restricted to the transmission of programs. There is no reference to carrying on a retail business in the definition of "programming undertaking". In my view, the Commission's analysis fails to explain why, based on the meanings of the terms 'broadcasting undertaking' and 'programming undertaking' as set out in sections 4 and 32 of the Act, QVC Inc. would be

carrying on a programming undertaking (and hence a broadcasting undertaking) while the other non-Canadian broadcasters whose programming services are on the List, would not be carrying on a broadcasting undertaking.

[29] I recognize that the Commission is a specialized expert body with a broad mandate to regulate the complex field of broadcasting and, as such, it is owed deference (see *Bell Canada* at para. 31; *Reference re Broadcasting Regulatory Policy* at paras. 99-108). Even though the decision to authorize a non-Canadian programming service for distribution is discretionary and engages the Commission's past treatment of foreign teleshopping services, the Commission must reasonably interpret and apply the Act. In my view, the Commission failed to meet this standard in the decision under appeal.

VI. Conclusion

[30] For the foregoing reasons, I would allow the appeal, with costs, and refer the matter back to the Commission for reconsideration.

"David G. Near"
J.A.

"I agree.
Wyman W. Webb J.A."

GLEASON J.A. (Dissenting Reasons)

[31] I have had the opportunity of reading the majority reasons, penned by my colleague, Near, J.A., and respectfully disagree with both the analysis and proposed disposition of this appeal. The majority reasons hold that the CRTC's decision in the instant case is unreasonable as the CRTC failed to adequately explain why it concluded that QVC was carrying on a broadcasting undertaking in Canada. I disagree with this conclusion and analysis for four reasons.

[32] First, in light of the decision of the Supreme Court of Canada in *City of Edmonton*, I do not think that the failure to provide reasons or the failure to provide adequate reasons can be said to be a sufficient basis to set aside a tribunal decision as being unreasonable. In the *City of Edmonton* case, the majority of the Supreme Court assessed the reasonableness of the administrative decision in issue based solely on the reasons that *could* have been offered for the decision as no reasons at all were given by the administrative decision-maker for the decision in question. In so doing, Justice Karakatsanis, who wrote for the majority, specifically endorsed the statements made by Professor Dyzenhaus in his article, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286, to the effect that reasonableness review requires the reviewing court to consider the reasons that *could* be offered in support of a decision. Justice Karakatsanis wrote as follows at paragraph 36 in *City of Edmonton* :

> […] when a tribunal's failure to provide any reasons does not breach procedural fairness, the reviewing court may consider the reasons "which could be offered" in support of the decision (*Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286). In appropriate

> circumstances, this Court has, for example, drawn upon the reasons given by the same tribunal in other decisions (*Alberta Teachers*, at para. 56) and the submissions of the tribunal in this Court (*McLean*, at para. 72).

[33] Given this direction from the Supreme Court of Canada, I believe that the principles set out in *Komolafe* are no longer an accurate reflection of the law. Rather, the current state of the law on reasonableness review and the adequacy of reasons is set out in this Court's recent decision in *Canada (Minister of Transport) v. Canadian Union of Public Employees and Sunwing Airlines Inc.* 2017 FCA 164 at paragraph 32:

> In assessing whether a decision meets the tripartite requirements of transparency, intelligibility and justification, a reviewing court must have regard to both the reasons given by the decision-maker (where it gives reasons) and the record before the decision-maker. Where necessary, the reviewing court may use the record to supplement the reasons if it finds in the record support for the decision under review: *City of Edmonton*, at paras. 36-38; *Dunsmuir* at para. 48; *Alberta (Information & Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 56, [2011] 3 S.C.R. 654 [*Alberta Teachers*]. Indeed, for a decision to be upheld as being reasonable, it may not even be necessary for the decision-maker to have provided any reasons at all if the record allows the reviewing court to discern how and why the decision was reached and the decision-maker's conclusion is defensible in light of the facts and applicable law: *City of Edmonton* at paras. 36-38; *Alberta Teachers* at para. 55.

[34] Second, I disagree with my colleagues as to the adequacy of the CTRC's reasons. While the reasons are not as fulsome as one might wish, I believe the CRTC addressed the issue of why it determined that QVC was carrying on, in part, a broadcasting undertaking in Canada.

[35] It commenced its decision by setting out Rogers' argument on the issue, with which it ultimately agreed. The CRTC wrote in this regard at paragraph 4 of its reasons:

> 4. Rogers submitted that the addition of QVC to the list and its subsequent distribution in Canada would result in QVC carrying on a broadcasting undertaking in whole or in part in Canada without a licence and without authority pursuant to an exemption order, contrary to the *Broadcasting Act* (the Act). It argued that if QVC were added to the list, it would solicit and obtain revenues directly from Canadian consumers and would actively target Canadian audiences through its programming. As a result, QVC would have a substantial level of operation in Canada.

[36] The CRTC continued by noting VMedia's response to this argument, writing as follows at paragraph 10 of the Reasons:

> VMedia replied that QVC would not be carrying on a broadcasting undertaking in Canada and that conducting retail business with Canadian residents does not amount to carrying on a broadcasting undertaking in Canada. It listed authorized non-Canadian services that do business with Canadians, including WWE Network, Baby TV, BabyFirstTV, Big Ten Network and Bloomberg Television, the first three of which Rogers was the sponsor. It also indicated that an operator of a non-Canadian programming service on the list has never been considered by the Commission or the industry to be engaged in broadcasting in Canada because of its signal is transmitted in Canada by a broadcasting distribution undertaking (BDU). According to the applicant, a distribution agreement between a non-Canadian service and a Canadian BDU has never been considered to be an indication that the service is carrying on a broadcasting undertaking in Canada.

[37] The CRTC then turned in its analysis section of the Reasons to address these arguments. After noting the requirements of section 32 of the Act, which prohibit the carrying out of a broadcasting undertaking in Canada without a license or authority under an exemption order, and the provisions of subsection 4(2) of the Act, which stipulate that the Act applies in respect of broadcasting undertakings carried on in whole or in part in Canada, the CRTC set out its interpretation of these statutory requirements. It wrote at paragraph 17 that "for an undertaking to be captured by the Act, it is sufficient that only part of the undertaking's activities take place in Canada". In the subsequent paragraph, the CRTC analyzed what those activities might be

through the lens of when a broadcasting undertaking may be said to be carrying on business in whole or in part in Canada. It provided several indicia of whether the relevant nexus to Canada may be said to exit, namely:

- the location of the profit-producing elements of the operation in Canada;
- the intention of a company to do business in Canada;
- a fixed place of business in Canada;
- the operation of a Canadian bank account;
- employees and agents within Canada;
- continuous business activity in Canada (vs. isolated transaction);
- the solicitation of advertising in Canada; and
- the targeting of programming to Canadians or the tailoring of an international feed to fit the Canadian market.

[38] The CRTC then moved to consider whether any of these elements were present in the case of QVC and held that its "sale of products is an integral part of QVC's teleshopping service and cannot be separated from the programming" (Reasons, at paragraph 20). One cannot quarrel with this observation as the *sina qua non* of a shopping channel is the sale of the merchandise shown in its programming. As the sales occurred in Canada and they were integral part of QVC's operation, the CRTC found it to be carrying on the business of a broadcasting undertaking in part in Canada. Thus, as I read the CRTC's reasons, it held that the sale of products is a vital part of a broadcasting undertaking, such sales occurred in Canada and QVC was therefore carrying on the undertaking at least in part in Canada. The CRTC accordingly dismissed VMedia's application as QVC had no license, was barred from obtaining a license as it was foreign-owned and

likewise did not fall under any relevant exemption order. Thus, I think that the CRTC was far from silent on the issue that is germane to this appeal.

[39] Third, unlike my colleagues, I do not see that anything turns on the CRTC's failure to be more explicit about why the List was inapplicable as QVC is fundamentally different from all the other foreign services that have been approved for addition to the List. None of these other services exists solely to sell merchandise and their finances do not flow solely from product sales. Thus, shopping channels are fundamentally different from other channels that might incidentally sell products. I accordingly see nothing unreasonable in affording a foreign-based shopping channel different treatment under the Act.

[40] Finally, and perhaps most importantly, I see nothing unreasonable in the interpretation that the CRTC offered of the relevant provisions in the Act. For the Act to apply, I do not believe it necessary that an entity be engaged in the act of broadcasting or the act of transmitting in Canada to be found to be carrying on a broadcasting undertaking, in part, in Canada, if the undertaking nonetheless carries on activities in Canada that are an integral part of its broadcasting undertaking. As noted in *Klass* at paragraph 36, the carrying on of a broadcasting undertaking is different from the act of broadcasting. Indeed, that the two are not one and the same is implicit in the statutory definitions of the two concepts in the Act. Likewise, a programming undertaking cannot be conflated with the act of transmitting; rather the definition in section 2 of the Act provides that a programming undertaking is one that exists "for the transmission of programs" via the means listed in the definition. Such an undertaking will engage in many activities in addition to transmission.

[41] I thus disagree with paragraphs 27 and 28 of my colleagues' reasons that equate a programming undertaking with the act of transmitting and a broadcasting undertaking with the act of broadcasting. Moreover, I do not believe that the decided cases indicate that a broadcasting undertaking "is grounded in whether the entity is transmitting programs" as the majority reasons state at paragraph 28.

[42] In any event, the issue before the CRTC was not so much whether QVC is a broadcasting or programming undertaking, but rather whether part of such undertaking was proposed to be carried on in Canada. Given the fact that QVC is a television channel, it seems to me that it cannot be contested that it is a programming and therefore a broadcasting undertaking as those terms are defined in the Act. That was not what the CRTC was called upon to decide. Rather, it was asked whether such undertaking was to be carried on in part in Canada. For the reasons given, I believe that the CRTC's answer to this question was reasonable.

[43] I would accordingly have dismissed this appeal with costs.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

AN APPEAL FROM THE DECISION OF THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION DATED APRIL 4, 2016, DOCKET NUMBER: CRTC 2016-122

DOCKET:	A-258-16
STYLE OF CAUSE:	2251723 ONTARIO INC.(C.O.B. AS VMEDIA) v. ROGERS MEDIA INC.
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CONCURRED IN BY:	WEBB J.A.
DISSENTING REASONS BY:	GLEASON J.A.
DATED:	SEPTEMBER 15, 2017

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