Federal Court of Appeal  Cour d'appel fédérale

Date: 20171218

Dockets: A-472-16
A-471-16

Citation: 2017 FCA 249

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

Docket: A-472-16

BETWEEN:

BELL CANADA and BELL MEDIA INC.

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

and

ASSOCIATION OF CANADIAN ADVERTISERS and ALLIANCE OF CANADIAN CINEMA. TELEVISION AND RADIO ARTISTS

Interveners

Docket: A-471-16

AND BETWEEN:

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC and NFL PRODUCTIONS LLC

Appellants

and

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ASSOCIATION OF CANADIAN ADVERTISERS and ALLIANCE OF CANADIAN CINEMA. TELEVISION AND RADIO ARTISTS

Interveners

Heard at Toronto, Ontario, on October 17, 2017.

Judgment delivered at Ottawa, Ontario, on December 18, 2017.

REASONS FOR JUDGMENT BY: NEAR J.A.

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

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REASONS FOR JUDGMENT

NEAR J.A.

I. Overview

[1] This is a consolidation of two statutory appeals under subsection 31(2) of the *Broadcasting Act*, S.C. 1991, c. 11. The appellants, Bell Canada and Bell Media Inc. (Bell) and the National Football League, NFL International LLC, and NFL Productions LLC (NFL), appeal an order of the Canadian Radio-television and Telecommunications Commission (CRTC) by

which the CRTC excluded the Super Bowl from the simultaneous substitution regime (Broadcasting Regulatory Policy CRTC 2016-334 (Final Decision) and Broadcasting Order CRTC 2016-335 (Final Order)).

[2] The appeals A-472-16 and A-471-16 were consolidated in an order dated January 12, 2017 with A-472-16 designated as the lead appeal. Accordingly, the following reasons will be filed in the lead file and a copy will be filed as Reasons for Judgment in file number A-471-16.

II. Background

[3] The appellant, the NFL, is the copyright holder for the television production of the Super Bowl, the annual championship game of the NFL. The NFL has an agreement with the other appellant, Bell, granting Bell the exclusive rights to broadcast the Super Bowl in Canada. The Super Bowl was the most watched single event on television in Canada in 2015.

[4] For more than 40 years, the Super Bowl has been broadcast subject to Canada's simultaneous substitution regime. Regulations promulgated under the *Broadcasting Act* provide that Canadian broadcasters shall not delete or alter signals when retransmitting programming services originating outside of Canada unless granted permission under the simultaneous substitution regime (*Broadcasting Distribution Regulations*, S.O.R./97-555, s. 7(a)). Under the simultaneous substitution regime, unless the CRTC determines otherwise, the operator of a Canadian television station may require a Canadian broadcasting distribution undertaking to substitute the Canadian feed for a non-Canadian programming service, which results in Canadian commercials being substituted for those of an American broadcaster so that Canadian viewers watching an American channel will see Canadian commercials. The Canadian broadcaster of the

Super Bowl made such simultaneous substitution requests for many years and so, up until the Order that is the subject of this judicial review, the Super Bowl was broadcast in Canada with Canadian commercials on both Canadian and American channels.

[5] On October 24, 2013, the CRTC launched a public consultation called "Let's Talk TV: A conversation with Canadians about the future of television" (Broadcasting Notice of Invitation CRTC 2013-563). This was followed by a series of consultations throughout which some Canadians complained about not being able to watch the American commercials during the Super Bowl (Final Decision at para. 5). These consultations culminated in the Final Decision and the Final Order under appeal.

III. Decision of the CRTC

[6] On August 19, 2016, the CRTC issued the Final Order "through which simultaneous substitution will no longer be authorized for the Super Bowl, effective 1 January 2017" (Final Decision at para. 69). It explained that it made this decision because simultaneous substitution for the Super Bowl is not in the public interest (Final Decision at para. 46). Effectively, as of January 1, 2017, Canadians are now able to watch the Super Bowl on Canadian stations with Canadian advertisements or on American stations with American advertisements.

[7] In its reasons, the CRTC considered five legal issues raised by the parties: (1) the CRTC's jurisdiction to issue the Final order; (2) whether administrative law discrimination (the principle that an administrative tribunal is not permitted to make its rules applicable to different persons based on a distinction not explicitly authorized by its legislation) has been applied; (3) the targeting of a specific program; (4) the retrospective application of a regulatory regime, and

vested rights; and (5) copyright and international trade (Final Decision at para. 44). I will discuss the CRTC's determination on each of the issues under appeal in my analysis.

IV. Issues

[8] I would characterize the issues on appeal as follows:

1. Was it reasonable for the CRTC to determine that its Final Order—made pursuant to paragraph 9(1)(h) of the Broadcasting Act—was within its jurisdiction?
2. Was it reasonable for the CRTC to determine that its Final Order is not retrospective and does not interfere with vested rights?
3. Was it correct for the CRTC to determine that its Final Order does not conflict with the *Copyright Act*, R.S.C., 1985, c. C-42 and/or international trade law?

V. Analysis

A. *Jurisdiction of the CRTC*

(1) Standard of Review

[9] The standard of review is reasonableness where an administrative decision-maker interprets its home statutes or statutes closely related to its functions and this "extends to the delineation of its own jurisdiction in applying its home statutes" (*Bell Canada v. Canada (Attorney General)*, 2016 FCA 217 at para. 42, 402 D.L.R. (4th) 551 (*Bell Canada*); *Bell Canada v. Amtelecom Limited Partnership*, 2015 FCA 126 at paras. 37–39, [2016] 1 F.C.R. 29 (*Amtelecom*); *2251723 Ontario Inc. (VMedia) v. Rogers Media Inc.*, 2017 FCA 186 at para. 29, 414 D.L.R. (4th) 750 (*VMedia*)). In my view, the standard of review for this issue is

reasonableness. The appellants strenuously argue for a limited margin of appreciation and a narrow view as to what would be reasonable which, in my view, is an analysis of limited assistance. The determination to be made is whether the decision is reasonable under the circumstances; nothing more and nothing less (*Zulkoskey v. Canada (Employment and Social Development)*, 2016 FCA 268 at para. 15, 2017 C.L.L.C. 230-010 citing *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 at paras. 18, 73, [2016] 1 S.C.R. 770). Thus, the principles in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190 apply. As long as the CRTC's decision demonstrates "justification, transparency and intelligibility within the decision making process" and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", the Court will treat it with deference.

(2) Was it reasonable for the CRTC to determine that its Final Order—made pursuant to paragraph 9(1)(*h*) of the *Broadcasting Act*—was within its jurisdiction?

[10] It is important to understand the interplay between the *Broadcasting Act* and its regulations with respect to simultaneous substitution for the purposes of this appeal. The CRTC issued its Final Order pursuant to paragraph 9(1)(*h*) of the *Broadcasting Act*. Paragraph 9(1)(*h*) reads:

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 :
…	[…]
(*h*) require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission.	*h*) obliger ces titulaires à offrir certains services de programmation selon les modalités qu'il précise.

[11] Further, subsection 4(1) of the *Simultaneous Programming Service Deletion and Substitution Regulations*, S.O.R./2015-240 (Sim Sub Regulations) outlines the circumstances in which simultaneous substitution is required:

4 (1) Except as otherwise provided under these Regulations or in a condition of its licence, a licensee that receives a request referred to in section 3 must carry out the requested deletion and substitution if the following conditions are met:	4 (1) Sous réserve du présent règlement ou des conditions de sa licence, le titulaire qui reçoit la demande visée à l'article 3 doit retirer le service de programmation en cause et effectuer la substitution demandée si les conditions suivantes sont réunies :
(*a*) the request is in writing and is received by the licensee at least four days before the day on which the programming service to be substituted is to be broadcast;	*a*) la demande est présentée par écrit et doit être reçue par le titulaire au moins quatre jours avant la date prévue pour la diffusion du service de programmation à substituer;
(*b*) the programming service to be deleted and the programming service to be substituted are comparable and are to be broadcast simultaneously;	*b*) le service de programmation à retirer et le service de programmation à substituer sont comparables et doivent être diffusés simultanément;
(*c*) the programming service to be substituted has the same format as, or a higher format than, the programming service to be deleted; and	*c*) le service de programmation à substituer est d'un format égal ou supérieur au service de programmation à retirer;
(*d*) if the licensee carries on a terrestrial distribution undertaking, the programming service to be substituted has a higher priority under section 17 of the *Broadcasting Distribution Regulations* than the programming service to be deleted.	*d*) dans le cas où le titulaire exploite une entreprise de distribution terrestre, le service de programmation à substituer a priorité, en vertu de l'article 17 du *Règlement sur la distribution de radiodiffusion*, sur le service de programmation à retirer.

[12] Then, subsection 4(3) of the Sim Sub Regulations outlines an exception to the simultaneous substitution requirement in subsection 4(1):

4 (3) A licensee must not delete a programming service and substitute another programming service for it if	(3) Le titulaire ne peut retirer un service de programmation et y substituer un autre service de

the Commission decides under subsection 18(3) of the *Broadcasting Act* that the deletion and substitution are not in the public interest.	programmation si le Conseil rend une décision, en vertu du paragraphe 18(3) de la *Loi sur la radiodiffusion*, portant que le retrait et la substitution ne sont pas dans l'intérêt public.
[emphasis added]	[nos soulignements]

[13] Finally, subsection 18(3) of the *Broadcasting Act* reads:

18(3) The Commission may hold a public hearing, make a report, issue any decision and give any approval in connection with any complaint or representation made to the Commission or in connection with any other matter within its jurisdiction under this Act if it is satisfied that it would be in the public interest to do so.	18(3) Les plaintes et les observations présentées au Conseil, de même que toute autre question relevant de sa compétence au titre de la présente loi, font l'objet de telles audiences, d'un rapport et d'une décision — notamment une approbation — si le Conseil l'estime dans l'intérêt public.
[emphasis added]	[nos soulignements]

[14] The CRTC explained that its Final Order pursuant to paragraph 9(1)(*h*) was within its jurisdiction at paragraphs 45–48 of its Final Decision:

> 45. Section 4(1) of the Simultaneous Deletion and Substitution Regulations sets out circumstances in which a licensee is required to delete and substitute programming, with the explicit provision that this obligation applies "except as otherwise provided under these Regulations or in a condition of its licence." Section 4(3) goes on to create such an exception, by stating that a licensee "must not delete a programming service and substitute another programming service for it if the Commission decides under subsection 18(3) of the *Broadcasting Act* that the deletion and substitution are not in the public interest."
>
> 46. In light of the Commission's finding above, further to a proceeding initiated by Broadcasting Notice of Consultation 2016-37, that deleting and performing simultaneous substitution for the Super Bowl are not in the public interest, the Commission finds that its decision in this regard falls within section 4(3) of the Simultaneous Deletion and Substitution Regulations. Having made this finding, pursuant to section 4(3), the Commission can use its power under section 9(1)(h) of the Act to implement this decision without conflict with the Simultaneous Deletion and Substitution Regulations. Accordingly, the Commission is of the view that issuing the proposed distribution order is within its jurisdiction.

> 47. In any event, the Act provides for several overlapping powers of the Commission to impose legally binding requirements, which include regulations, conditions of licence, 9(1)(h) orders and exemption orders. The legislative history indicates that these different powers can be used by the Commission in a complementary manner. The Commission has considered this issue in the past.
>
> 48. To interpret the Act as permitting the issuance of a 9(1)(h) order only where a regulation does not already exist could render the effect of 9(1)(h) orders virtually meaningless. Moreover, if in making a regulation the Commission was prohibiting itself from issuing a 9(1)(h) order in the future, such a regulation could be viewed as fettering the Commission's discretion to exercise a complementary power. Consequently, the Commission considers that BCE's argument is not convincing in the present case.
>
> [emphasis added, citations omitted]

[15] The appellants argue that because paragraph 9(1)(*h*) refers to "programming services", the CRTC only has jurisdiction to make orders and regulations regarding programming services and does not have jurisdiction to single out an individual "program". The appellants equate the term "program" with a single show. Subsection 2(1) of the *Broadcasting Act* defines "program" as follows:

> ***program*** means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text; (*émission*)
>
> ***émission*** Les sons ou les images — ou leur combinaison — destinés à informer ou divertir, à l'exception des images, muettes ou non, consistant essentiellement en des lettres ou des chiffres. (*program*)

Although the *Broadcasting Act* does not define programming service, the appellants argue that the Act uses the term to refer to an entire television channel and not individual shows (as it does in paragraphs 3(1)(*r*) and 3(1)(*t*)). Thus, the appellants argue, the Super Bowl is a program—which is different from a programming service—and so the CRTC did not have jurisdiction to make its Final Order under paragraph 9(1)(*h*).

[16] In support of their argument, the appellants cite Broadcasting Decision CRTC 2005-195 (*Star Choice*), however, as the respondent notes, the appellants cite only part of this authority. In that decision, the CRTC explained that the meaning of the term "programming service" depends on the context in which it is used:

> 28. …the Commission notes that section 33(2) of the *Interpretation Act* states that, in any statute or regulation, "Words in the singular include the plural, and words in the plural include the singular." Accordingly, the Commission considers that "programming service," depending upon the context in which it is used, may be taken to include all programs, i.e., the entire output transmitted by the operator of a programming undertaking for reception by the public.
>
> [emphasis added]

[17] In my view, the CRTC's explanation that "the Commission considers the 'programming service', depending upon the context in which it is used, may be taken to include all programs" necessarily means that, in other circumstances, the same term may be taken to include a single program. It is also instructive and informs the context that the definition of "programming services" in subsection 1(2) of the Sim Sub Regulations (which adopts the definition in section 1 of the *Broadcasting Distribution Regulations*) defines "programming service" to include a program. Section 1 of the *Broadcasting Distribution Regulations* defines "programming service" as follows:

programming service means a program that is provided by a programming undertaking. (*service de programmation*)	***service de programmation*** Émission fournie par une entreprise de programmation.(*programming service*)
[emphasis added]	[nos soulignements]

[18] The appellants also argue that the legislative history of paragraph 9(1)(*h*) of the *Broadcasting Act* and previous decisions of this Court indicate that the term "programming

service" does not include programs. In my view, the use of the term "programming service" to refer to channels in some circumstances does not preclude the term from also including a program. Although the legislative history demonstrates that the term "programming service" was used to refer to channels in parliamentary debates, the appellants do not demonstrate that the legislator intended to exclude programs from its meaning. Further, legislative history, on its own, is not determinative. Similarly, the fact that this Court has used the term "programming service" to refer to channels does not mean that the term cannot also be used to refer to programs. The appellants do not demonstrate that either the legislator or this Court has excluded programs from the meaning of "programming service".

[19] It seems reasonable to determine that, in some contexts, the term "programming services" in paragraph 9(1)(*h*) includes a program given that the Sim Sub Regulations (by adopting the definition of "programming service" in the *Broadcasting Distribution Regulations*) provide for such an interpretation where substitution is to be prohibited. In my view, it is reasonable to conclude that a program would be included where terms and conditions are being added preventing the substitution of ads. Further, the CRTC's interpretation of "programming services" and "program" in *Star Choice* seems to me to be a reasonable interpretation of the jurisdiction granted to the CRTC in paragraph 9(1)(*h*) of the *Broadcasting Act* and, in my view, there is no inconsistency between its finding in *Star Choice* and this matter.

[20] Having established that it is a reasonable interpretation that "programming services", for the purposes of paragraph 9(1)(*h*), can include one or more programs, it is necessary to consider the other parts of the paragraph that grant the CRTC broad powers to make orders outlining such

"terms and conditions as the Commission deems appropriate" so long as they are "in furtherance of its objects".

[21] The appellants argue that the Final Order is inconsistent with the policy objectives of the *Broadcasting Act* because it does not privilege Canadian content. I disagree.

[22] The appellants argue that Canadian broadcasting policy must privilege Canadian content, citing *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at para. 32, [2012] 3 S.C.R. 489 (*Cogeco*). Although the Supreme Court of Canada has found that the *Broadcasting Act* "has a primarily cultural aim" (*Cogeco* at para. 32), this does not mean that promoting Canadian content is its sole objective. Indeed, the objectives of the *Broadcasting Act* are extensive and varied. Although the objectives set out in section 3 of the *Broadcasting Act* (and mandated to the CRTC in subsection 5(1)) include supporting Canadian content, (see *e.g.* paras. 3(*d*)(*i*), (*e*), and (*t*)(*i*)), the *Broadcasting Act* also states that one of the Act's objectives is that "the programming provided by the Canadian broadcasting system should be drawn from local, regional, national and international sources" (subpara. 3(1)(*i*)(ii)).

[23] In its Final Decision (paras. 21–24), the CRTC explained that, although it generally promotes Canadian content in its policies, in this circumstance, it does not believe that the simultaneous substitution regime is in the public interest:

> 21. … While many of the policy objectives of the Act focus on ensuring Canadian cultural enrichment and the promotion of Canadian programming, they also include other objectives, such as ensuring that Canadians have access to local, national and international programming. …

…

> 24. As noted in the Act, the Commission's duty is to regulate and supervise the broadcasting system as a whole (which includes programming services, distribution services, and Canadian viewers) to ensure the fulfilment of the policy objectives of the Act. The Commission remains of the view that changes to the simultaneous substitution regime are needed to ensure that the broadcasting system is balanced as a whole in a way that fulfils the policy objectives of the Act. In addition to the making of the Simultaneous Deletion and Substitution Regulations, this includes no longer authorizing simultaneous substitution for the Super Bowl.

[24] The appellants argue, and I agree, that there is a certain irony that legislation that has the protection of the Canadian broadcasting industry and its employees as one of its important objectives is being used to allow for the broadcasting of American ads during the Super Bowl to the apparent detriment of the Canadian industry and its employees. But there are numerous disparate objectives set out in the *Broadcasting Act* and Parliament intended that the CRTC decide how best to balance competing policy objectives related to broadcasting in Canada. It is not for the Court to engage in weighing these competing policy objectives and substituting its own view in deciding which policy objectives should be pursued.

[25] Having established that the CRTC's determination that it had jurisdiction to make the Final Order under paragraph 9(1)(*h*) was reasonable, it follows that it had jurisdiction to make this order pursuant to subsection 18(3) of the *Broadcasting Act* and subsection 4(3) of the Sim Sub Regulations. Once the CRTC found that simultaneous substitution of the Super Bowl is not in the public interest under subsection 18(3) of the *Broadcasting Act*, it was entitled to exempt the Super Bowl from the simultaneous substitution regime under subsection 4(3) of the Sim Sub Regulations. Neither of the appellants argued that subsection 4(3) of the Sim Sub Regulations is *ultra vires*.

[26] The appellants further submit that the Final Order conflicts with the applicable regulations and was therefore beyond the jurisdiction of the CRTC. More specifically, they assert that the substantive decision to exclude the Super Bowl from the simultaneous substitution regime was not made in the Final Order but rather in the earlier Broadcasting Regulatory Policy, CRTC-2015-25, issued by the CRTC on January 29, 2015. In January of 2015, the Sim Sub Regulations had not yet been promulgated by the CRTC. The appellants say that the Sim Sub Regulations do not have retrospective effect and that, under the regulations in place in January of 2015, the CRTC lacked the jurisdiction to make the Final Order as it conflicted with the regulatory provisions that then governed simultaneous substitution.

[27] I disagree. The substantive decision of the CRTC regarding the exclusion of the Super Bowl from the simultaneous substitution regime was made in the Final Decision and Final Order and not in the January 2015 policy. Indeed this was determined by this Court in *Bell Canada* where this Court held that the CRTC's January 2015 policy was not a reviewable decision and that the appellants' judicial review application in respect of it and related policies was therefore premature. Thus, the decision to exclude the Super Bowl from the simultaneous substitution regime was made in the Final Decision and Final Order and, as of the date they were rendered, the Sim Sub Regulations were in force. As already noted, subsection 4(3) of the Sim Sub Regulations provides for an exception to the simultaneous substitution regime where the CRTC decides that the deletion and substitution is not in the public interest under subsection 18(3) of the *Broadcasting Act*. Thus, the Final Order does not conflict with the applicable regulations.

[28] The CRTC is a specialized administrative tribunal with expertise in the area of broadcasting. As such, it is owed deference by this Court. This deference extends to interpretation of the *Broadcasting Act* as one of its home statutes (*Bell Canada* at para. 42; *Amtelecom* at paras. 37–39; *VMedia* at para. 29). The CRTC's interpretation that "programming service" in paragraph 9(1)(*h*) of the *Broadcasting Act* can include programs is reasonable in that it is consistent with its previous decision in *Star Choice*, the Sim Sub Regulations which adopt the definition in the *Broadcasting Distribution Regulations*, and the policy objectives set out in subsection 3(1) of the *Broadcasting Act*. Given the deference owed to the CRTC in its interpretation of its home statutes and the broad discretion conferred on the CRTC by paragraph 9(1)(*h*), the CRTC's explanation of its jurisdiction to make the Final Order is justifiable, transparent, and intelligible and falls within the range of reasonable outcomes defensible in respect of the facts and the law.

B. *Retrospective Application*

(1) Standard of Review

[29] The appellant Bell, the respondent, and the interveners all agree that the standard of review on the question of retrospectivity is reasonableness as the CRTC interpreted a question within its specialized expertise. I agree. As this Court explained in *Amtelecom* at paragraphs 37 and 38 with regards to the CRTC and retrospectivity:

> 37 Even if one assumes that the presumption against retrospective legislation is a law of general application, that question calls for review on the correctness standard only if the question is outside the tribunal's specialized expertise. …
>
> 38 The notion of a tribunal's specialized expertise has evolved to include the exercise of "interpretive discretion" so that the CRTC is presumed to have the required expertise to resolve the question of whether section 24 authorizes it to promulgate a Code with retrospective effect.

(2) Was it reasonable for the CRTC to determine that its Final Order is not retrospective and does not interfere with vested rights?

[30] The appellant, Bell, argues that the Final Order operates retrospectively and interferes with vested rights. It explains that the Final Order has made it very difficult for Bell to sell Canadian advertising and that this "will cause Bell Media to lose the vast majority of the benefit of broadcasting the Super Bowl".

[31] The CRTC explained its position that its Final Order does not interfere with vested rights at paragraph 56 of its Final Decision:

> 56. The Commission is of the view that it cannot be prevented from changing its regulatory regime, including its rules on simultaneous substitution, simply because of an existing contractual situation relating to broadcast rights. In the present case, although BCE may have negotiated its agreement with the NFL based on assumptions about the amount of revenue if can expect to receive from the subject broadcast rights, the contract itself relates to the transaction between BCE and the NFL, not between BCE and its advertisers. Although the Commission's actions may affect the parties' assumptions underlying the contract, such actions do not affect – either directly or retrospectively – a vested contractual right, given that no one has a vested right in the continuance of a regulatory regime as it exists at a given moment.
>
> [emphasis added]

[32] There are no guarantees that the law will not change. Indeed, legislators often make legislation and regulations that interfere with expectations. The CRTC's powers to make orders and regulations cannot be limited by a contract made between private parties. As the Supreme Court of Canada explained in *Gustavson Drilling (1964) v. Minister of National Revenue*, [1977] 1 S.C.R. 271 at 282–83, 66 D.L.R. (3d) 449:

> … No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and

> governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.
>
> The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued.
>
> [emphasis added, citations omitted]

[33] In this case, Bell's argument that the CRTC interfered with its vested right to be the exclusive broadcaster of the Super Bowl in Canada fails. Bell argued that the NFL granted it the right to be the exclusive Canadian broadcaster of the Super Bowl. Although it is the NFL's right, as a copyright holder, to licence its program to Bell, it is not the NFL's right that the program will be simultaneously substituted—this is a benefit conferred by Canada's broadcasting regulatory regime. Consequently, this could not have been a term of the licence granted to Bell.

[34] Canada's broadcasting regime does not confer rights but benefits. Bell only ever had the privilege to request simultaneous substitution, a privilege which flows from the *Broadcasting Act* and regulations. Even if Bell wanted to, it could never have guaranteed that it would engage in simultaneous substitution. As the respondent argues: "[t]o the extent any company is contractually obligated to perform simultaneous substitution, the company undertook to do so at its own risk." Bell only ever had the possibility to sell advertising space at a later date and so lost only a speculative opportunity for profit that is not sufficiently concrete to be considered vested.

[35] This case is distinguishable from *Amtelecom*. In that case, this Court found that a CRTC order limiting wireless services providers' contracts to two years—including existing contracts—interfered with the wireless service providers' vested rights in the payment of early cancellation

fees. The Court explained that this interfered with an existing obligation: "[t]o the extent that the early cancellation charge is the accelerated payment of a portion of that revenue stream, it … is simply a different mode of payment of an existing obligation" (*Amtelecom* at para. 21). In this case, however, there is no existing obligation as there is no vested right because, unlike the cellular providers in *Amtelecom*, Bell has no legal entitlement to a specific sum of revenue from selling advertisements under its contract with the NFL. Its rights to revenue are contingent on entering into subsequent contracts with advertisers and are not vested by virtue of its contract with the NFL.

[36] This private agreement under which no right to simultaneously substitute commercials has vested cannot prevent the CRTC from issuing an order. Further, the interpretation of contractual rights is a question of mixed fact and law and is owed deference. I see no reviewable error in the CRTC's interpretation of one of its home statutes, the *Broadcasting Act*, on the issue of retrospectivity.

C. *Copyright and International Trade*

(1) Standard of Review

[37] The appellant, the NFL, argues that the standard of review for the copyright issue is correctness. They argue that the CRTC's functions are those given to it in the *Broadcasting Act* and the *Telecommunications Act*, S.C. 1993, c. 38 and that Parliament never delegated powers relating to the *Copyright Act* to the CRTC.

[38] I agree with the NFL that the applicable standard of review is correctness. The *Copyright Act* is not a 'home statute' of the CRTC and, in any case, it shares concurrent jurisdiction with the Copyright Board and the courts at first instance (*Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para. 15, [2012] 2 S.C.R. 283).

> (2) Was it correct for the CRTC to determine that its Final Order does not conflict with the *Copyright Act* and/or international trade law?

[39] The NFL argues that the Final Order conflicts with the *Copyright Act* in both purpose and in operation.

[40] The NFL's argument is premised on several provisions of the *Copyright Act* and the *Canada-United States Free Trade Agreement*, 2 January 1988, Can. T.S. 1989 No. 3 (CUSFTA) that relate to retransmission rights. First, paragraph 3(1)(*f*) of the *Copyright Act* grants a copyright holder the exclusive right to produce or reproduce copyrighted works, including retransmission rights:

3 (1) For the purposes of this Act, ***copyright***, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right	3 (1) Le droit d'auteur sur l'oeuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'oeuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'oeuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :
…	[…]
(*f*) in the case of any literary, dramatic,	*f*) de communiquer au public, par

musical or artistic work, to communicate the work to the public by telecommunication,	télécommunication, une oeuvre littéraire, dramatique, musicale ou artistique;

[41] Subsection 31(2) of the *Coypright Act*, however, creates an exception to this exclusive right when a work is retransmitted in accordance with the enumerated conditions. As long as a broadcaster meets each of the enumerated conditions, it does not infringe copyright:

31 (2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if	31 (2) Ne constitue pas une violation du droit d'auteur le fait, pour le retransmetteur, de communiquer une oeuvre au public par télécommunication si, à la fois :
(*a*) the communication is a retransmission of a local or distant signal;	*a*) la communication consiste en la retransmission d'un signal local ou éloigné, selon le cas;
(*b*) the retransmission is lawful under the *Broadcasting Act*;	*b*) la retransmission est licite en vertu de la Loi sur la radiodiffusion;
(*c*) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;	*c*) le signal est retransmis, sauf obligation ou permission légale ou réglementaire, simultanément et sans modification;
(*d*) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act; and	*d*) dans le cas de la retransmission d'un signal éloigné, le retransmetteur a acquitté les redevances et respecté les modalités fixées sous le régime de la présente loi;
(*e*) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(*b*).	*e*) le retransmetteur respecte les conditions applicables, le cas échéant, visées à l'alinéa (3) *b*).

[42] Finally, the NFL cites article 2006(1) of the CUSFTA which relates to the requirement for remuneration for retransmission of a copyright holder's program:

2006(1) Each Party's copyright law shall provide a copyright holder of the	2006(1) La législation sur le droit d'auteur de chaque Partie disposera

other Party with a right of equitable and non-discriminatory remuneration for any retransmission to the public of the copyright holder's program where the original transmission of the program is carried in distant signals intended for free, over-the-air reception by the general public. Each party may determine the conditions under which the right shall be exercised...	que le titulaire d'un droit d'auteur de l'autre Partie a droit à une rémunération juste et non discriminatoire pour toute retransmission au public d'un programme du titulaire lorsque la transmission originale du programme, faite au moyen de signaux éloignés, peut être captée directement et gratuitement par le grand public. Chaque Partie peut déterminer dans quelles conditions ce droit sera exercé...

(a) *Conflict of Purpose*

[43] First, the NFL argues that the Final Order is contrary to the purpose of the *Copyright Act*. It argues that the Final Order is discriminatory contrary to the retransmission provisions, specifically paragraph 31(2)(*c*) of the *Copyright Act* and article 2006(1) of the CUSFTA. The NFL argues that "Parliament could not have intended that the condition set forth in s. 31(2)(*c*) be applied or altered by the CRTC in a discriminatory fashion against a single program, to the detriment of a single local licensee and single foreign copyright holder" because this would conflict with article 2006(1) of the CUSFTA.

[44] Article 2006(1) of the CUSFTA, however, is concerned with the copyright holder's ability to be remunerated for its copyright where its program is retransmitted and not with simultaneous substitution of commercials. As the respondent notes, Article 2006(1) of the CUSFTA provides a "right of equitable and non-discriminatory remuneration for any retransmission … of the copyright holder's program" and this right is protected by sections 71 to 74 of the *Copyright Act* which provide for tariffs. In support of its argument, the NFL relies

extensively on *Cogeco*. That decision, however, supports the conclusion that non-discrimination in retransmission is concerned only with compensation:

> [60] The CRTC's proposed value for signal regime would enable broadcasters to negotiate compensation for the retransmission by BDUs of their signals or programming services, regardless of whether or not they carry copyright protected "work[s]", and regardless of the fact that any such works are carried in local signals for which the *Copyright Act* provides no compensation.
>
> [emphasis added]

Thus, although *Cogeco* found that an order of the CRTC conflicted with the *Copyright Act*, it found so, in part, because the proposed value for signal regime interfered with the right to remuneration. This is not the case here as remuneration for copyright holders whose works are retransmitted is provided for in section 71 to 74 of the *Copyright Act*.

[45] It is well established that the purpose of the *Copyright Act* is to balance authors' and users' rights (*Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336 (*Théberge*)). This purpose was affirmed in *Cogeco* at paragraph 64 citing *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at paras. 10, 23, [2004] 1 S.C.R. 339):

> [64] … This Court has characterized the purpose of the *Copyright Act* as a balance between authors' and users' rights. The same balance applies to broadcasters and users. In *Théberge*, Binnie J. recognized that the *Copyright Act*
>
> > is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated). [para. 30]

[46] In essence, the NFL argues that there is another purpose of the *Copyright Act*—to create a non-discriminatory right. In my view, the NFL is trying to elevate a principle limited to a small

section in article 2006(1) of the CUSFTA pertaining to the remuneration for retransmission to a principle of general application across the *Copyright Act*. I see no conflict between the Final Order and the purpose of the *Copyright Act*.

(b) *Operational Conflict*

[47] Second, the NFL argues that the Final Order conflicts operationally with the *Copyright Act*. It argues that the Final Order conflicts with subsection 31(2)(*c*) because it is not "required or permitted by or under the laws of Canada". I disagree.

[48] The Final Order complies with each of the enumerated requirements in subsection 31(2) of the *Copyright Act* and so meets the requirements of the exception to the exclusive transmission rights. This past February when the Super Bowl was broadcast without simultaneous substitution, the program was (a) retransmitted by a local or distant signal, (b) this transmission was lawful under the *Broadcasting Act*, (c) it was retransmitted simultaneously and without alteration, and (d) the retransmitter, Bell, had paid for its licence. Paragraph (e) was not applicable as the Governor in Council had not made any regulation.

[49] The NFL's argument that the Final Order conflicts operationally with paragraph 31(2)(*c*) specifically must fail following the Court's conclusion above that the Final Order was within the CRTC's jurisdiction. The NFL argued that "[i]f a BDU wishes to take the benefit of the user right in a manner permitted under s. 31(2)(*c*) of the *Copyright Act*, it must comply with any signal alteration requirements mandated under the 'laws of Canada', and the ***only*** such law of Canada that is applicable is the *Sim Sub Regulations*" [emphasis in original]. Having found that the Final Order made pursuant to paragraph 9(1)(*h*), by way of subsection 4(3) of the Sim Sub

Regulations—a law of Canada—was within the CRTC's jurisdiction, there can be no operational conflict with paragraph 31(2)(*c*) of the *Copyright Act*.

[50] Thus I see no conflict of purpose or operational conflict between the Final Order and the *Copyright Act*.

VI. Conclusion

[51] I would dismiss the appeal with costs.

"David G. Near"
J.A.

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

"I agree.
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

AN APPEAL FROM BROADCASTING REGULATORY POLICY CRTC 2016-334, ENTITLED *Simultaneous substitution for the Super Bowl*, AND BROADCASTING ORDER CRTC 2016-335, ENTITLED *Distribution of Canadian television stations that broadcast the Super Bowl*, DATED August 19, 2016.

DOCKET:	A-472-16
STYLE OF CAUSE:	BELL CANADA AND BELL MEDIA INC. v. ATTORNEY GENERAL OF CANADA AND ASSOCIATION FOR CANADIAN ADVERTISERS AND ALLIANCE OF CANADIAN CINEMA. TELEVISION AND RADIO ARTISTS
AND DOCKET:	A-471-16
STYLE OF CAUSE:	NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC AND NFL PRODUCTIONS LLC v. ATTORNEY GENERAL OF CANADA AND ASSOCIATION FOR CANADIAN ADVERTISERS AND ALLIANCE OF CANADIAN CINEMA. TELEVISION AND RADIO ARTISTS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 17, 2017
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	WEBB J.A. GLEASON J.A.
DATED:	DECEMBER 18, 2017

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