

# Developments in Communications Law: The 2012–2013 Term — The *Broadcasting Reference*, the Supreme Court and the Limits of the CRTC

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## I. INTRODUCTION

The release of *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*<sup>1</sup> on December 13, 2012 appears to mark a fundamental shift in judicial attitudes towards the jurisdiction of the Canadian Radio-television and Telecommunications Commission (the “CRTC”). In many respects the archetype of an “expert” administrative tribunal, the CRTC has traditionally been given a very free rein by the courts on matters pertaining to its jurisdiction. By and large, the courts have permitted the CRTC to engage in any licensing or regulation-making activity that is reasonably related to one of its broad policy objectives under the *Broadcasting Act*<sup>2</sup> or the *Telecommunications Act*.<sup>3</sup> The *Broadcasting Reference* may signal the end of this era, and herald the beginning of a newly restrictive approach to the authority of the CRTC.

The decision is all the more remarkable for the divisions it provoked in both levels of court. Interestingly, the number of judges who would have upheld the CRTC’s jurisdiction (four in the Supreme Court of Canada, and two in the Federal Court of Appeal) was the same as the number who ultimately prevailed in finding the CRTC’s proposed

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<sup>1</sup> [2012] S.C.J. No. 68, [2012] 3 S.C.R. 489 (S.C.C.) [hereinafter the “*Broadcasting Reference*”].

<sup>2</sup> S.C. 1991, c. 11.

<sup>3</sup> S.C. 1993, c. 38.

value-for-signal regime (the “VFS Regime”) to be invalid (five in the Supreme Court, and one in the Federal Court of Appeal). Even more interesting is the basis for the majority’s decision in the Supreme Court. While the primary issue for the Court of Appeal, the litigants and indeed the CRTC was the potential for a conflict between the VFS Regime and the *Copyright Act*, Rothstein J. for the majority founded the principal part of his decision upon the CRTC’s lack of jurisdiction under the *Broadcasting Act* itself. Even though the appeal could have been allowed solely on the basis of the parallel copyright arguments, the majority of the Court chose instead to deliberately circumscribe the jurisdiction of the CRTC.

The *Broadcasting Reference* has important implications for all public bodies that purport to derive their jurisdiction from general and open-ended statutory provisions. Yet it is particularly important for the CRTC. This paper seeks to unpack the meaning of the *Broadcasting Reference*, and explore its implications for the CRTC. Along the way, the paper will also address the impact of the *Broadcasting Reference* upon the intersection between copyright and communications law, and the potential significance of the *Broadcasting Reference* to statutory interpretation and constitutional law.

## II. BACKGROUND TO THE *BROADCASTING REFERENCE*

### 1. The Legislation Governing the CRTC

The CRTC is established under the *Canadian Radio-television and Telecommunications Act*.<sup>4</sup> However, the primary sources of its jurisdiction are the *Broadcasting Act* and the *Telecommunications Act*. These two statutes have different purposes, and imbue the CRTC with a diffuse set of regulatory powers.<sup>5</sup>

The *Broadcasting Act* has a largely cultural focus.<sup>6</sup> Section 3(1) declares a number of policy objectives for the Canadian broadcasting system, most of which are concerned with the content of programming (*e.g.*, as it relates to Canadian cultural sovereignty, the two official

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<sup>4</sup> R.S.C. 1985, c. C-22 [hereinafter “*CRTC Act*”].

<sup>5</sup> See *Telecommunications Workers Union v. Canada (C.R.T.C.)*, [2003] F.C.J. No. 1546, [2004] 2 F.C.R. 3, at para. 64 (F.C.A.).

<sup>6</sup> *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43, [2002] 2 S.C.R. 559, at para. 47 (S.C.C.) (“Canada’s broadcasting policy has a number of distinguishing features, and evinces a decidedly cultural orientation”).

languages, multiculturalism, program quality and diversity, and education). This is evident from the following provisions at issue in the *Broadcasting Reference*:

3(1) It is hereby declared as the broadcasting policy for Canada that

...

- (e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;
- (f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;
- (g) the programming originated by broadcasting undertakings should be of high standard;

...

- (s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,
  - (i) contribute significantly to the creation and presentation of Canadian programming, and
  - (ii) be responsive to the evolving demands of the public; and
- (t) distribution undertakings
  - (i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,

...

- (iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services,

Thus, as the Supreme Court summarized in the *Reference re Broadcasting Act* decision:

[T]he 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.<sup>7</sup>

These section 3(1) policy objectives are closely connected to the mandate of the CRTC. Section 3(2) of the *Broadcasting Act* declares that the Canadian broadcasting system constitutes a “single system”, and that the policy objectives in section 3(1) can best be achieved through the regulation and supervision of that system by “a single independent public authority”. Section 5(1) goes on to state that the objects of the CRTC in relation to broadcasting are to “regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)”.<sup>8</sup>

The powers conferred upon the CRTC to realize these objects are found primarily in sections 9 and 10 of the *Broadcasting Act*.<sup>9</sup> Section 9 enables the CRTC to undertake various licensing functions, and section 10 authorizes it to make regulations. The structure of these provisions follows a familiar pattern: the CRTC is authorized, “in furtherance of its objects”, to exercise its licensing or regulation-making powers in several specific ways, after which is found a general “basket clause” granting it the ability to exercise these powers as the CRTC itself deems appropriate. The provisions at issue in the *Broadcasting Reference* provided:

9(1) Subject to this Part, the Commission may, in furtherance of its objects,

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<sup>7</sup> *Reference re Broadcasting Act*, [2012] S.C.J. No. 4, [2012] 1 S.C.R. 142, at para. 4 (S.C.C.) [hereinafter the “*ISP Reference*”].

<sup>8</sup> Section 5(1) also states that the CRTC, in carrying out this mandate, is to have regard to the “regulatory policy” objectives set out in s. 5(2), subject to the *Broadcasting Act*, “the *Radiocommunication Act* and to any directions to the Commission issued by the Governor in Council under this Act”. However, s. 5(3) provides that these regulatory policy objectives are subordinate to the broadcasting policy objectives in s. 3(1). Neither the s. 5(2) regulatory policy objectives nor any Cabinet directions under the *Broadcasting Act* were at issue in the *Broadcasting Reference*.

<sup>9</sup> In addition to ss. 9 and 10, other provisions of the *Broadcasting Act* that confer specific powers upon the CRTC include s. 6 (issuing policy directives), s. 11 (making regulations on licence fees), s. 12(1) (holding inquiries), s. 12(2) (issuing mandatory orders), s. 17 (making determinations), s. 18(4) (convening public hearings) and s. 21 (making procedural rules).

- (b) issue licences for such terms not exceeding seven years and subject to such conditions related to the circumstances of the licensee
  - (i) as the Commission deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1),

...

- (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.

...

10(1) The Commission may, in furtherance of its objects, make regulations

...

- (g) respecting the carriage of any foreign or other programming services by distribution undertakings;

...

- (k) respecting such other matters as it deems necessary for the furtherance of its objects.

Most of the specific power-conferring provisions in section 10 focus upon the content of broadcasting programs and other cultural goals (*e.g.*, “the proportion of time that shall be devoted to the broadcasting of Canadian programs”, “what constitutes a Canadian program for the purposes of this Act”, the “character of advertising and the amount of broadcasting time that may be devoted to advertising” and “the proportion of time that may be devoted to the broadcasting of programs ... of a partisan political character”). In this regard, the specific power-conferring provisions applicable to the CRTC may be contrasted with those relating to the Canadian Broadcasting Corporation (the “CBC”) under sections 46 to 49 of the *Broadcasting Act*, whereby the CBC is given the authority to make contracts, acquire property rights, apply for expropriation orders and undertake various other economic activities.

It is also instructive to compare the scheme established by the *Broadcasting Act* with that of the *Telecommunications Act*. Unlike the *Broadcasting Act*, the policy objectives articulated in section 7 of the latter statute are not concerned with content *per se*, but rather with the

carriage of content.<sup>10</sup> As a result, the main focus of the *Telecommunications Act* is not cultural, but includes economic matters insofar as they bear upon the orderliness, reliability, affordability or efficiency of the Canadian telecommunications system.<sup>11</sup> As the Federal Court of Appeal observed in *MTS Allstream*:

[T]he objects of the *Telecommunications Act* include encouraging the efficient and orderly development of communications networks by providing a regulatory framework which is responsive to advances in telecommunications technology and to the introduction of a competitive business environment and market forces.<sup>12</sup>

This stands in contrast to the *Broadcasting Act*, which “mentions the economic significance of broadcasting only once, obliquely in amongst its 20 policy objectives”.<sup>13</sup>

As with the *Broadcasting Act*, the policy objectives identified in the *Telecommunications Act* are integral to the CRTC’s jurisdiction and mandate. Section 47 provides that the CRTC must exercise its powers and perform its duties under the statute “with a view to implementing the Canadian telecommunications policy objectives”. The *Telecommunications Act* also grants the CRTC several types of powers to discharge this function. Some of these powers bear similarities to the licensing and reg-

<sup>10</sup> This was emphasized in the *Broadcasting Reference*, *supra*, note 1, at para. 34, in addition to *Re Broadcasting Act (Canada)*, [2010] F.C.J. No. 849, [2012] 1 F.C.R. 219, at para. 47 (F.C.A.), *affd* [2012] S.C.J. No. 4, [2012] 1 S.C.R. 142 (S.C.C.). See also s. 36 of the *Telecommunications Act*, which provides that “Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.” It should be noted that the *Broadcasting Act* does have some concern with carriage, insofar as it applies to distribution and not merely programming undertakings. However, the presence of “programs”, *i.e.*, sounds or images which “inform, enlighten or entertain” the public and do not consist predominantly of alphanumeric text, is fundamental to the application of the *Broadcasting Act*. Absent the distribution of such programs, a distribution undertaking may potentially be regulated under the *Telecommunications Act*: see s. 4 of that statute, along with s. 4(4) of the *Broadcasting Act*.

<sup>11</sup> See also the *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355, which underlines the importance of competition and market forces in achieving the policy objectives of the *Telecommunications Act*.

<sup>12</sup> *MTS Allstream Inc. v. Edmonton (City)*, [2007] F.C.J. No. 340, [2007] 4 F.C.R. 747, at para. 64 (F.C.A.), leave to appeal refused [2007] S.C.C.A. No. 286 (S.C.C.). See also *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] S.C.J. No. 27, [2003] 1 S.C.R. 476, at para. 38 (S.C.C.) (“In short, the purpose of the *Telecommunications Act* is to encourage and regulate the development of an orderly, reliable, affordable and efficient telecommunications infrastructure for Canada”).

<sup>13</sup> S. Handa *et al.*, *Communications Law in Canada*, looseleaf (Markham, ON: LexisNexis Canada, 2000), at para. 6.84 [hereinafter “Handa”]. See s. 3(1)(d)(i) of the *Broadcasting Act* (“the Canadian broadcasting system should ... serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada”). See also s. 3(t)(ii) and 3(t)(iii).

ulation-making powers in the *Broadcasting Act*, as for instance the general powers to impose conditions of service, tariffs and standards upon carriers in sections 24 and 32, and to make determinations, rules, orders and regulations in sections 48, 51, 52, 57, 67 and 68.<sup>14</sup>

Nonetheless, several specific powers granted to the CRTC under the *Telecommunications Act* focus on economics, contracts and property rights in a way that is not parallel to the *Broadcasting Act*.<sup>15</sup> These include the authority to: (a) ensure that just, reasonable, non-discriminatory and non-preferential rates are charged by carriers (sections 25, 27 and 28); (b) approve carrier working agreements and exemption clauses (sections 29 and 31); (c) forbear from exercising the foregoing powers in relation to particular telecommunications services where that would be consistent with the telecommunications policy objectives and not unduly impair the existence of a competitive market (section 34); (d) order carriers to provide or discontinue certain telecommunications services where competition is insufficient to ensure just and reasonable rates and the absence of discrimination and undue preferences and disadvantages (section 35); (e) order carriers to connect their facilities to any other telecommunications facilities (section 40); (f) order the construction or modification of any telecommunications facilities, or the alteration of any transmission lines (sections 42 to 44); and (g) approve a carrier's decision to apply to the responsible Minister for the expropriation of property where required to provide telecommunications services to the public (section 46).

## 2. The Traditional Approach to CRTC Jurisdiction

It is no exaggeration to say that the courts have traditionally taken a very broad approach to the CRTC's jurisdiction under the *Broadcasting Act* and *Telecommunications Act*.<sup>16</sup> As noted by Peter Grant, writing in 2010:

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<sup>14</sup> The CRTC is also granted specific licensing powers in relation to international telecommunication services and submarine cables in ss. 16 and 17 of the *Telecommunications Act*.

<sup>15</sup> This distinction between the economic and non-economic focus of the CRTC's powers under the *Telecommunications Act* and *Broadcasting Act* has been noted by many commentators: see, e.g., L. Salter & F. Odartey-Wellington, *The CRTC and Broadcasting Regulation in Canada* (Toronto: Thomson Reuters, 2008), at 627 and 650-51. The differences between the two statutes are also reflected in the ministers responsible for them, the Minister of Industry for the *Telecommunications Act*, and the Minister of Canadian Heritage for the *Broadcasting Act*: see s. 4(1) and (2)(i) of the *Department of Canadian Heritage Act*, S.C. 1995, c. 11, and s. 2 of the *Telecommunications Act*, s.v., "minister".

<sup>16</sup> Until 1976, the CRTC was known as the Canadian Radio-television Commission; it only acquired jurisdiction over telecommunications (from the Canadian Transport Commission), and

Since its inception in 1968, the CRTC has been the subject of 104 court challenges, where parties have sought to overturn its broadcast or telecom decisions. Fully 88 of these attempts failed, giving the Commission a formidable success rate of 85%. ...<sup>17</sup>

Early decisions evinced a judicial willingness to curb the jurisdiction of the CRTC.<sup>18</sup> In *Confederation Broadcasting (Ottawa) Ltd. v. Canada (C.R.T.C.)*,<sup>19</sup> a majority of the Supreme Court of Canada held that the CRTC acted in excess of its jurisdiction under the 1968 *Broadcasting Act*<sup>20</sup> when it coupled its decision to renew the appellant's licence with a peremptory denial of its ability to apply for a further licence renewal at the end of the new term. Section 17(1)(c) of the statute permitted the CRTC to "issue renewals of broadcasting licences for such terms not exceeding five years as the Executive Committee considers reasonable and subject to ... such other conditions as comply with paragraph (a)". These "paragraph (a)" conditions referred to in section 17(1)(c) included any conditions that the Executive Committee "deems appropriate for the implementation of the broadcasting policy enunciated in section 2 of this Act". Nevertheless, in contrast to the minority judgment,<sup>21</sup> the majority refused to find that section 17(1)(c) authorized the CRTC's decision.<sup>22</sup> Justice Laskin (as he then was) observed:

The *Broadcasting Act* nowhere gives such a power expressly; and in view of the range of authority to revoke, suspend, renew, and amend

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became the Canadian Radio-television and Telecommunications Commission, with the 1976 enactment of the *Canadian Radio-television and Telecommunications Act*, S.C. 1974-75-76, c. 49. As a result, much of the formative jurisprudence relating to the jurisdiction of the CRTC that is discussed below arose in the context of broadcasting, not telecommunications. The references to the "CRTC" in this discussion should be taken to include references to the Canadian Radio-television Commission as it existed prior to 1976.

<sup>17</sup> P.S. Grant, *Communications Law and the Courts in Canada: An Annotated Guide to Judicial Decisions relating to the Regulation of Communications and Copyright in Canada* (Toronto: McCarthy Téroult LLP, 2010), at 7.

<sup>18</sup> See, e.g., *John Graham & Co. v. Canada (C.R.T.C.)*, [1975] F.C.J. No. 174, [1976] 2 F.C. 82, at paras. 5, 39-46 and 48-53 (F.C.A.); and *Canada (C.R.T.C.) v. London Cable TV Ltd.*, [1976] F.C.J. No. 66, [1976] 2 F.C. 621, at paras. 6-8 (F.C.A.), appeal quashed [1977] S.C.J. No. 26, [1977] 2 S.C.R. 740 (S.C.C.).

<sup>19</sup> [1971] S.C.J. No. 72, [1971] S.C.R. 906 (S.C.C.) [hereinafter "*Confederation Broadcasting*"].

<sup>20</sup> S.C. 1967-68, c. 25 [hereinafter the "1968 *Broadcasting Act*"].

<sup>21</sup> *Confederation Broadcasting*, *supra*, note 19, at 915-16 ("[I]t gave the licensee a nine-month renewal and said at the same time that it would throw the licence open to competition. What is wrong with this? This is the very job that the Commission was established to do under s. 17(1)(c) of the Act").

<sup>22</sup> *Id.*, at 917 and 928-32.

(a power which I have not thought it necessary to consider), as well as to issue licences, I do not think that I would be justified in finding such a power implied in the authority to renew. Indeed, s. 17(1)(c) appears to preclude it. ...<sup>23</sup>

However, the attitude of the courts began to shift with the Supreme Court's 1977 decision in *Capital Cities Communications Inc. v. C.R.T.C.*<sup>24</sup> One of the issues there was the jurisdiction of the CRTC to permit Canadian cable companies to delete commercial messages from programs received from broadcasters operating in the United States, based on a CRTC policy statement that endorsed this approach. In finding the policy statement valid, Laskin C.J.C. for the majority emphasized the "embrasive objects" of the CRTC in section 15 of the 1968 *Broadcasting Act* (the predecessor to section 5(1) of the current *Broadcasting Act*):

In my opinion, having regard to the embrasive objects committed to the Commission under s. 15 of the Act, objects which extend to the supervision of "all aspect[s] of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act", it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the *Broadcasting Act*. ...<sup>25</sup>

These comments by Laskin C.J.C. were taken up by the majority of the Supreme Court in *R. v. CKOY Ltd.*,<sup>26</sup> which was in many respects the leading case on the jurisdiction of the CRTC prior to the *Broadcasting Reference*. At issue there was whether the CRTC possessed jurisdiction under section 16 of the 1970 *Broadcasting Act*<sup>27</sup> (the predecessor to section 10 of the current *Broadcasting Act*) to make a regulation prohibiting radio stations and networks from broadcasting telephone interviews without the participant's consent. Justice Spence, writing for the majority, held that the test should be whether the regulation was connected to one of the broadcasting policies in section 3:

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<sup>23</sup> *Id.*, at 931-32.

<sup>24</sup> [1977] S.C.J. No. 119, [1978] 2 S.C.R. 141 (S.C.C.) [hereinafter "*Capital Cities*"].

<sup>25</sup> *Id.*, at 171.

<sup>26</sup> [1978] S.C.J. No. 64, [1979] 1 S.C.R. 2 (S.C.C.) [hereinafter "*CKOY*"].

<sup>27</sup> R.S.C. 1970, c. B-11 [hereinafter the "*1970 Broadcasting Act*"].

The grant of power to enact regulations is given to the Commission by s. 16 of the statute. By its opening words, such a power is directed to be exercised “in furtherance of its objects”. Section 15 is entitled “Objects of the Commission”. For our purposes, the said objects may be briefly stated in the last words of s. 15, “with a view to implementing the broadcasting policy enunciated in section 3 of this Act”. Therefore, I agree with the courts below that *the validity of any regulation enacted in reliance upon s. 16 must be tested by determining whether the regulation deals with a class of subject referred to in s. 3 of the statute and that in doing so the Court looks at the regulation objectively.*<sup>28</sup>

Further, in assessing whether a regulation possessed the requisite degree of connection, Spence J. suggested that courts should exhibit deference to the views of the CRTC:

I also agree with Evans J.A. when he states:

It is obvious from the broad language of the Act that Parliament intended to give to the Commission a wide latitude with respect to the making of regulations to implement the policies and objects for which the Commission was created.

Therefore, whether we consider that the impugned regulation will implement a policy or not is irrelevant so long as we determine objectively that it is upon a class of subject referred to in s. 3. I should add that as Evans J.A. noted there is no suggestion that the Commission acted capriciously. Of course, no allegation of bad faith has been advanced.<sup>29</sup>

Justice Spence also held that, where the regulation was enacted under the “very broad”<sup>30</sup> basket clause power in section 16(1)(b)(ix) of the 1970 *Broadcasting Act* (the predecessor to section 10(1)(k) of the current *Broadcasting Act*, quoted above), the CRTC would possess considerable discretion in setting the terms of its jurisdiction:

I find a basis for the enactment of Regulation 5(k) also in s. 16(1)(b)(ix) of the statute. It is to be noted that its very broad words are not, as are those of s. 16(1)(b)(i), confined to the policy expressed in s. 3(d) and, therefore, authorize one enactment of regulations to further any policy outlined in the whole of s. 3. ... Such regulation would, of course, have to be to further the “Broadcasting Policy of Canada” but it might be

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<sup>28</sup> *CKOY, supra*, note 26, at 11 (emphasis added).

<sup>29</sup> *Id.*, at 11-12.

<sup>30</sup> *Id.*, at 13.

difficult to fit it under any of the other numbered paragraphs of s. 16(1)(b). I find it of some importance that *the broad words appearing in s. 16(1)(b)(ix) “as it deems necessary” emphasize the discretion granted to the Commission in determining what is necessary for the furtherance of its objects.*<sup>31</sup>

Finally, Spence J. noted that “the Chief Justice of this Court gave a broad interpretation to the Commission’s powers under s. 15 of the *Broadcasting Act in Capital Cities*”.<sup>32</sup> Since the regulation at issue in *CKOY* “may well have been in furtherance”<sup>33</sup> of one or more of the policies in section 3 of the 1970 *Broadcasting Act*, “whether in our view successfully or not”,<sup>34</sup> Spence J. concluded it was *intra vires*.

In the wake of *CKOY*, courts adopted the view that “the Commission has been endowed with powers couched in the broadest of terms”.<sup>35</sup> With a handful of exceptions,<sup>36</sup> the courts routinely declined to find that the CRTC acted in excess of its jurisdiction, whether in the area of broadcasting<sup>37</sup> or telecommunications.<sup>38</sup>

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<sup>31</sup> *Id.*, at 13 (emphasis added).

<sup>32</sup> *Id.*, at 14.

<sup>33</sup> *Id.* See also 13 (“The Commission might well have concluded that the enactment of s. 5(k) was necessary to prevent development of programming which was the opposite of ‘high standard’”).

<sup>34</sup> *Id.*, at 12.

<sup>35</sup> *Assn. for Public Broadcasting in British Columbia v. C.R.T.C.*, [1980] F.C.J. No. 172, [1981] 1 F.C. 524, at para. 16 (F.C.A.).

<sup>36</sup> See, e.g., *Bell Canada v. C.R.T.C.*, [1982] F.C.J. No. 50, [1982] 2 F.C. 681, at paras. 10-12 (F.C.A.), leave to appeal refused [1982] S.C.C.A. No. 299, 43 N.R. 269n (S.C.C.); *T.W.U. v. C.R.T.C.*, [1988] F.C.J. No. 911, [1989] 2 F.C. 280, at paras. 5-12 (F.C.A.), leave to appeal refused [1988] S.C.C.A. No. 530, 102 N.R. 79n (S.C.C.); and *CHUM Ltd. v. Canada (Attorney General)*, [2005] F.C.J. No. 647, 2005 FCA 142, at para. 1 (F.C.A.). See as well *Alberta Government Telephones v. C.R.T.C.*, [1989] S.C.J. No. 84, [1989] 2 S.C.R. 225 (S.C.C.), where the Court held that the CRTC’s telecommunications jurisdiction did not extend to a provincial Crown agent since the *Railway Act*, R.S.C. 1970, c. R-2, from which the CRTC derived its telecommunications jurisdiction at the relevant time, did not bind the Crown. There were also a handful of cases where the CRTC was found to have committed errors of law more broadly: see, e.g., *Telus Communications Inc. v. Canada (Attorney General)*, [2005] F.C.J. No. 2058, 344 N.R. 219 (F.C.A.).

<sup>37</sup> See, e.g., *Cable Laurentide Ltée v. C.R.T.C.*, [1980] F.C.J. No. 57, [1980] 2 F.C. 441, at paras. 6-7 (F.C.A.); *Assn. for Public Broadcasting in British Columbia v. C.R.T.C.*, [1980] F.C.J. No. 172, [1981] 1 F.C. 524, at paras. 9-23 (F.C.A.); *Canadian Family Radio Ltd. v. Canada (C.R.T.C.)*, [1981] F.C.J. No. 929, at para. 1 (F.C.A.), leave to appeal refused [1982] S.C.C.A. No. 211, 42 N.R. 89 (S.C.C.); *CIBM-FM Mont Bleu Ltée v. C.R.T.C.*, [1990] F.C.J. No. 975, at paras. 14-18 (F.C.A.), leave to appeal refused [1990] C.S.C.R. no 512, [1991] 1 S.C.R. vi (S.C.C.); *Canadian Motion Picture Distributors Assn. v. Partners of Viewer’s Choice Canada*, [1996] F.C.J. No. 894, 137 D.L.R. (4th) 561, at paras. 5-7 (F.C.A.); *Canadian Broadcasting Corp. v. Métromédia CMR Montréal Inc.*, [1999] F.C.J. No. 1637, 254 N.R. 266, at paras. 7-15 (F.C.A.); *T.W.U. v. Canada (C.R.T.C.)*, [2003] F.C.J. No. 1546, [2004] 2 F.C.R. 3, at paras. 39-75 (F.C.A.); *Genex Communications Inc. v. Canada (Attorney General)*, [2005] F.C.J. No. 1440, [2006] 2 F.C.R. 199,

Thus, in *Canada (C.R.T.C.) v. CTV Television Network Ltd.*,<sup>39</sup> the Supreme Court rejected a challenge to a CRTC licence renewal condition that required the cross-appellant to present a specified amount of original new Canadian drama during its licence term. Chief Justice Laskin held that the condition was within the licensing jurisdiction of the CRTC under section 17 of the 1970 *Broadcasting Act* (the predecessor to section 9 of the current *Broadcasting Act*), despite the cross-appellant's argument that the condition should have been issued pursuant to the CRTC's regulation-making jurisdiction in section 16. In doing so, Laskin C.J.C. suggested that the same test for the validity of CRTC regulations proposed in *CKOY* should apply to exercises of the CRTC's licensing power:

The Federal Court of Appeal dealt at some length with the jurisdictional objection to the imposition of the condition ... Thurlow C.J. ... put the matter as follows [at p. 254]:

The authority conferred by section 17 to further the objects of the Commission is a broad one. ... *Prima facie it seems to be well within the power of the Committee under section 17, when renewing the appellant's licence, to impose a condition designed to further one of the objects of the broadcasting policy, provided the condition is one that is "related to the circumstances of" the appellant and provided that its imposition is not contrary to the Act*

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at paras. 59, 176-209 and 225 (F.C.A.), leave to appeal refused [2005] C.S.C.R. No. 485 (S.C.C.); and *Canadian Assn. of Broadcasters v. Canada*, [2008] F.C.J. No. 672, [2009] 1 F.C.R. 3, at paras. 90-92 (F.C.A.), leave to appeal discontinued [2008] S.C.C.A. No. 423 (S.C.C.).

<sup>38</sup> See, e.g., *Bell Canada v. C.R.T.C.*, 1984 CarswellNat 824, at paras. 3-7 (F.C.A.); *CNCP Telecommunications v. Canadian Business Equipment Manufacturers' Assn.*, [1985] F.C.J. No. 79, [1985] 1 F.C. 623, at paras. 13-29 (F.C.A.), leave to appeal refused [1985] S.C.C.A. No. 501, 62 N.R. 399n (S.C.C.); *Bell Canada v. Consumers' Assn. of Canada*, [1986] S.C.J. No. 8, [1986] 1 S.C.R. 190, at 207-208 (S.C.C.); *AGT Ltd. v. Canada (C.R.T.C.)*, [1994] F.C.J. No. 1959, 178 N.R. 378, at paras. 9-21 (F.C.A.); *Federation of Canadian Municipalities v. AT&T Canada Corp.*, [2002] F.C.J. No. 1777, [2003] 3 F.C. 379, at paras. 25-30 (F.C.A.), leave to appeal refused [2003] S.C.C.A. No. 97 (S.C.C.); *Telus Communications Inc. v. Canada (C.R.T.C.)*, [2004] F.C.J. No. 1808, [2005] 2 F.C.R. 388, at paras. 38-52 (F.C.A.), leave to appeal refused [2004] S.C.C.A. No. 573 (S.C.C.); *Allstream Corp. v. Bell Canada*, [2005] F.C.J. No. 1237, 338 N.R. 177, at paras. 32-35 (F.C.A.); *MTS Allstream Inc. v. Toronto (City)*, [2006] F.C.J. No. 1812, 359 N.R. 77, at paras. 13-18 (F.C.A.), leave to appeal refused [2007] S.C.C.A. Nos. 46-47 (S.C.C.); *MTS Allstream Inc. v. Edmonton (City)*, [2007] F.C.J. No. 340, [2007] 4 F.C.R. 747, at paras. 36-52 (F.C.A.), leave to appeal refused [2007] S.C.C.A. No. 286 (S.C.C.); *Wheatland County v. Shaw Cablesystems Ltd.*, [2009] F.C.J. No. 1264, 394 N.R. 323, at paras. 58-60 (F.C.A.); and *Rogers Cable Communications Inc. v. Bell Aliant Regional Communications, Limited Partnership*, [2010] F.C.J. No. 566, 2010 FCA 115, at paras. 12-13 (F.C.A.).

<sup>39</sup> [1982] S.C.J. No. 24, [1982] 1 S.C.R. 530 (S.C.C.) [hereinafter "CTV"].

or to a regulation that has been made in exercise of the power to make regulations contained in section 16. ...

...

I agree with this treatment of CTV's principal submission. ... The *CKOY* case turned on other considerations, but in recognizing that standards of programs include program content it merely reflected the broad interpretation given to the *Broadcasting Act* and to the powers thereunder vested in CRTC and in the Executive Committee respectively under ss. 16 and 17. I see nothing in the Act that precludes the Executive Committee from imposing the kind of condition of licence renewal that it imposed here when *it was authorized under s. 17(1) to further the objects of CRTC set out in s. 15 and to implement the broadcasting policy enunciated in s. 3.* ...<sup>40</sup>

Similarly, in *Canadian Broadcasting League v. C.R.T.C.*,<sup>41</sup> the Supreme Court affirmed a Federal Court of Appeal judgment which held that the CRTC's general licensing power in section 17(1)(a) of the 1970 *Broadcasting Act* (the predecessor to section 9(1)(b)(i) of the current *Broadcasting Act*, quoted earlier) enabled it to fix the maximum fees charged to cable television subscribers as part of a licence amendment. In the Court of Appeal below, Le Dain J. (as he then was) found that the *CKOY* test applied equally to the CRTC's regulation-making and licensing powers:

I conclude from these passages in the judgment of Spence J. in the *CKOY* case that while it is for the Court to determine objectively whether a regulation deals with or is upon a subject referred to in section 3 of the Act, a broad view is to be taken of what is embraced by that section, having regard to the latitude or discretion that has been committed to the Commission to determine what may be necessary in a particular case for the furtherance of its policy objectives.

What was said concerning the validity of a regulation under section 16 applies equally in my opinion to the validity of a condition attached to a licence under paragraph 17(1)(a). That section begins, like section 16, with the words "In furtherance of the objects of the Commission", and empowers the Executive Committee to subject a broadcasting licence to such conditions related to the circumstances of the licensee as it "deems appropriate for the implementation of the broadcasting

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<sup>40</sup> *Id.*, at 543 and 545 (emphasis added).

<sup>41</sup> [1985] S.C.J. No. 9, [1985] 1 S.C.R. 174 (S.C.C.), affg [1982] F.C.J. No. 91, [1983] 1 F.C. 182 (F.C.A.) [hereinafter "*Canadian Broadcasting*"].

policy enunciated in section 3”, an authority that is, if anything, even broader than that which is conferred by subparagraph 16(1)(b)(ix).<sup>42</sup>

Because the fee condition “would appear to be not only appropriate but necessary to further the policy objective[s]”<sup>43</sup> of the 1970 *Broadcasting Act*, Le Dain J. had little problem in finding it lay within the CRTC’s jurisdiction.

The same judicial approach was evident in the telecommunications field. In *Bell Canada v. Canada (C.R.T.C.)*,<sup>44</sup> the Supreme Court held that the CRTC could revisit its interim rate orders in effect during prior periods to assess whether they were just and reasonable, and make a retrospective order requiring carriers to refund revenues they earned during those periods if the interim rates were found to have been excessive. In identifying the source of the CRTC’s jurisdiction to do so, Gonthier J. observed that even though this power was not expressly set out under the predecessor legislation to the *Telecommunications Act*<sup>45</sup> (in contrast to other legislation), it could be derived by necessary implication:

The respondent argues that the power to revisit the period during which interim rates were in force cannot exist within the statutory scheme established by the *Railway Act* and the *National Transportation Act* because these statutes do not grant such a power explicitly, unlike s. 64 of the *National Energy Board Act*, R.S.C., 1985, c. N-7. The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes. I have found that, within the statutory scheme established by the *Railway Act* and the *National Transportation Act*, the power to make interim orders necessarily implies the power to revisit the period during which interim rates were in force. The fact that this power is provided explicitly in other statutes cannot modify this conclusion based as it is on the interpretation of these two statutes as a whole.<sup>46</sup>

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<sup>42</sup> *Id.*, at paras. 22-23.

<sup>43</sup> *Id.*, at para. 24.

<sup>44</sup> [1989] S.C.J. No. 68, [1989] 1 S.C.R. 1722 (S.C.C.) [hereinafter “*Bell Canada*”].

<sup>45</sup> See *supra*, note 3. The relevant legislation in force at the time included the *Railway Act*, R.S.C. 1985, c. R-3 and the *National Transportation Act*, R.S.C. 1985, c. N-20 (renamed the *National Telecommunications Powers and Procedures Act*).

<sup>46</sup> *Bell Canada*, *supra*, note 44, at 1756. See also 1762.

Indeed, in *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*,<sup>47</sup> the Supreme Court held that the CRTC's jurisdiction was so expansive that its decisions should prevail over those of another administrative tribunal where they were in operational conflict and the CRTC decision had a greater policy component. The CRTC in *Shaw* had ordered a telecommunications carrier to provide a cable company with access to its support structures for the purpose of installing cables, and held that the cable company should be permitted to decide whether the installation would be carried out by contractors of its own choosing or by the carrier's employees. It made this ruling despite an earlier labour arbitration board decision, which found that the carrier was in violation of its collective agreement with its workers union for permitting non-union members selected by the cable company to conduct the installation work. Justice L'Heureux-Dubé, writing for the Court on this point, found that the CRTC possessed jurisdiction to order that the cable company be responsible for the installation under the predecessor legislation to the *Telecommunications Act*,<sup>48</sup> whether as an aspect of its undoubted statutory authority to require carriers to allow cable companies access to their support structures and to regulate the terms of their support structure agreements, or as an aspect of its authority to prevent carriers from conferring any undue preference upon themselves in respect of their facilities.<sup>49</sup> In arriving at this decision, she referenced the "broad and important policy mandate of the CRTC", and noted that given this, it was "difficult to contemplate permitting the CRTC to mandate cable company access to telephone company infrastructure and not allowing the CRTC to mandate the quality of such access".<sup>50</sup> Further, as to the conflict with the labour arbitrator's decision, L'Heureux-Dube J. stated:

*The CRTC, in requiring BC Tel to let cable companies install their own facilities on BC Tel's support structure, was implementing a policy decision. It decided that, in order to fulfil Parliament's intention of regulating monopoly service providers in the public interest, such a requirement had to be imposed on BC Tel. In doing so, the CRTC restricted the activity BC Tel was authorized to engage in. The labour arbitration board, on the other hand, was merely interpreting a private*

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<sup>47</sup> [1995] S.C.J. No. 54, [1995] 2 S.C.R. 739 (S.C.C.) [hereinafter "*Shaw*"].

<sup>48</sup> Specifically, the *Railway Act* and the *National Telecommunications Powers and Procedures Act*.

<sup>49</sup> *Shaw*, *supra*, note 47, at paras. 33-40.

<sup>50</sup> *Id.*, at para. 43.

contract relating to the internal arrangements made by BC Tel to carry out the activities assigned to it. While there is no doubt that the labour arbitration board, in reaching its decision, was serving an important purpose, this does not change the fact that its task was to interpret an essentially private contract. The parties to this contract could not extend, whether intentionally or innocently, the scope of BC Tel's authorized activities as fixed by the CRTC to affect third parties. *The latter's decision therefore governs. Viewed otherwise, the CRTC's decision was also an expression of that tribunal's policy-making function, the decision of the labour arbitration board was not. ...*<sup>51</sup>

The only decision in which the Supreme Court substantively curtailed the CRTC's jurisdiction during this era was *Barrie Public Utilities v. Canadian Cable Television Assn.*<sup>52</sup> The case involved whether the CRTC could issue an order requiring provincially regulated electric power companies to provide cable companies with access to their power poles for the purpose of supporting cable transmission lines. The CRTC had found that it possessed this jurisdiction under section 43(5) of the *Telecommunications Act*, which allowed it to make orders requiring that a person who provides services to the public have access to "the supporting structure of a transmission line constructed on a highway or other public place". In finding that this power to order rights of access extended to power poles, the CRTC relied heavily upon the policy objectives in both section 7 of the *Telecommunications Act* and section 3(1) of the *Broadcasting Act*, and in particular, the policy in favour of "efficient" and "affordable" telecommunications and broadcasting services. In the view of the CRTC, providing cable companies with access to the power poles was necessary to ensure efficiency and affordability, since those companies would otherwise have to construct their own supporting structures.

The majority of the Supreme Court, *per* Gonthier J., held that the CRTC's interpretation of section 43(5) was textually and contextually

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<sup>51</sup> *Id.*, at para. 60 (emphasis added). See also paras. 64, 76 and 80. In a companion decision arising out of the same facts, *Telecommunications Workers Union v. Canada (C.R.T.C.)*, [1995] S.C.J. No. 55, [1995] 2 S.C.R. 781 (S.C.C.), the Supreme Court held that the CRTC did not act in excess of its jurisdiction by failing to follow an alleged policy of deferring to arbitral board decisions. At para. 37, L'Heureux-Dubé J. observed that such a policy, even if it existed, could not bind the CRTC, since "this would be an improper delegation or fettering of the CRTC's discretionary powers".

<sup>52</sup> [2003] S.C.J. No. 27, [2003] 1 S.C.R. 476 (S.C.C.) [hereinafter "*Barrie Public Utilities*"]. The *ISP Reference*, *supra*, note 7, could also be potentially viewed as curtailing the CRTC's jurisdiction, but for the reasons discussed below, it is submitted that the *ISP Reference* supports the traditional *CKOY* approach.

incorrect, since the provision related to “transmission” rather than “distribution” lines (which were the only types of lines the utilities’ power poles supported), some of the power poles stood on private land rather than on a “highway or other public place”, and section 2 of the *Telecommunications Act* defined “transmission facility” as a facility that transmitted “intelligence” rather than electricity. In addition, however, Gonthier J. found that the CRTC’s reliance upon the telecommunications and broadcasting policy objectives to support its interpretation was in error:

The consideration of legislative objectives is one aspect of the modern approach to statutory interpretation. Yet, courts and tribunals must invoke statements of legislative purpose to elucidate, not to frustrate, legislative intent. In my view, *the CRTC relied on policy objectives to set aside Parliament’s discernable intent* as revealed by the plain meaning of s. 43(5), s. 43 generally and the Act as a whole. In effect, *the CRTC treated these objectives as power-conferring provisions. This was a mistake.*<sup>53</sup>

While *Barrie Public Utilities* called into question the traditional *CKOY* approach of deferring to CRTC decisions taken in furtherance of the broadcasting or telecommunications policy objectives, it was subsequently limited by the Supreme Court’s decision in *Bell Canada v. Bell Aliant Regional Communications*.<sup>54</sup> In *Bell Aliant*, the CRTC ordered the creation of deferral accounts into which carriers would pay the difference between the amounts they actually charged their subscribers, and what they would have charged them under a maximum price cap adopted by the CRTC in the same decision (the “Price Caps Decision”). At the time of the Price Caps Decision, the CRTC did not determine how the funds in the deferral accounts were to be spent, but it subsequently ordered that they should be used for broadband expansion in rural and remote communities, and to improve accessibility to telecommunications services for individuals with disabilities, with any unexpended funds to be distributed to residential subscribers via a one-time credit or via prospective rate reductions. The carriers challenged the one-time credit on the ground that it involved a retrospective variation to the Price Caps Decision, which unlike the rate orders revisited in *Bell Canada*, was final rather than interim. As well, certain public interest groups challenged the direction that the funds be used for broadband expansion, arguing that this amounted to an

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<sup>53</sup> *Barrie Public Utilities, id.*, at para. 42 (emphasis added).

<sup>54</sup> [2009] S.C.J. No. 40, [2009] 2 S.C.R. 764 (S.C.C.) [hereinafter “*Bell Aliant*”].

inappropriate cross-subsidization of broadband expansion by residential telephone subscribers.

Both challenges were rejected by the Supreme Court, which found that the CRTC possessed the necessary jurisdiction under the *Telecommunications Act*. Justice Abella, writing for the Court, held that the CRTC's powers to "adopt any method" to determine just and reasonable rates under section 27(5) and to order carriers to adopt "any accounting method" under section 37(1)(a), coupled with the requirement in section 47(a) that it exercise its powers with a view to implementing the telecommunications policy objectives in section 7, meant that it had jurisdiction to order the creation and use of the deferral accounts for any purpose reasonably in furtherance of a section 7 policy:

In my view, it follows from the CRTC's broad discretion to determine just and reasonable rates under s. 27, its power to order a carrier to adopt any accounting method under s. 37, and its statutory mandate under s. 47 to implement the wide-ranging Canadian telecommunications policy objectives set out in s. 7, that the *Telecommunications Act* provides the CRTC with considerable scope in establishing and approving the use to be made of deferral accounts. They were created in accordance both with the CRTC's rate-setting authority and with the goal that all rates charged by carriers were and would remain just and reasonable.

A deferral account would not serve its purpose if the CRTC did not also have the power to order the disposition of the funds contained in it. In my view, the CRTC had the authority to order the disposition of the accounts in the exercise of its rate-setting power, provided that this exercise was reasonable.

I therefore agree with the following observation by Sharlow J.A.:

The Price Caps Decision required Bell Canada to credit a portion of its final rates to a deferral account, which the CRTC had clearly indicated would be disposed of in due course as the CRTC would direct. There is no dispute that the CRTC is entitled to use the device of a mandatory deferral account to impose a contingent obligation on a telecommunication service provider to make expenditures that the CRTC may direct in the future. It necessarily follows that the CRTC is entitled to make an order crystallizing that obligation and directing a particular expenditure, provided the expenditure can reasonably be

justified by one or more of the policy objectives listed in section 7 of the Telecommunications Act.<sup>55</sup>

Accordingly, in directing that a portion of the deferral funds be used to fund broadband expansion, the Court found that the CRTC was acting within its jurisdiction by pursuing various section 7 policy objectives (e.g., rendering reliable and affordable telecommunications services to Canadians in both urban and rural areas as part of its efforts to facilitate a national telecommunications framework):

[T]he policy objectives in s. 7, which the CRTC is always obliged to consider, demonstrate that the CRTC need not limit itself to considering solely the service at issue in determining whether rates are just and reasonable. The statute contemplates a comprehensive national telecommunications framework. It does not require the CRTC to atomize individual services. It is for the CRTC to determine a tolerable level of cross-subsidization.

...

In my view, the CRTC properly considered the objectives set out in s. 7 when it ordered expenditures for the expansion of broadband infrastructure and consumer credits. In doing so, it treated the statutory objectives as guiding principles in the exercise of its rate-setting authority. *Pursuing policy objectives through the exercise of its rate-setting power is precisely what s. 47 requires the CRTC to do* in setting just and reasonable rates.<sup>56</sup>

In hindsight, perhaps the most significant aspect of *Bell Aliant* was Abella J.'s reason for distinguishing *Barrie Public Utilities*. In finding that the CRTC's reliance upon the section 7 telecommunications policy objectives in that case as a source of jurisdiction did not preclude its recourse to those objectives in *Bell Aliant*, she stated:

I see nothing in this conclusion which contradicts the ratio in *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476. ... In deciding that the language of the *Telecommunications Act* did not give the CRTC the power to grant

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<sup>55</sup> *Id.*, at paras. 55-57 (underlining in original; emphasis added).

<sup>56</sup> *Id.*, at paras. 72 and 74 (emphasis added). See also para. 75. At paras. 58-69, Abella J. also rejected the carriers' argument that the CRTC did not have jurisdiction to direct the one-time credit as a retrospective variation of a final order, finding that there was in fact no "variation" of the Price Caps Decision at all, since the deferral accounts that were instituted as part of that Decision contemplated that the funds would remain encumbered and subject to future directions regarding their use.

access to the power poles, Gonthier J. for the majority concluded that *the CRTC had inappropriately interpreted the Canadian telecommunications policy objectives in s. 7 as power-conferring* (para. 42).

*The circumstances of Barrie Public Utilities are entirely distinct from those at issue before us. Here, we are dealing with the CRTC setting rates that were required to be just and reasonable, an authority fully supported by unambiguous statutory language.* In so doing, the CRTC was exercising a broad authority, which, according to s. 47, it was required to do “with a view to implementing the Canadian telecommunications policy objectives”. The policy considerations in s. 7 were factors that the CRTC was required to, and did, take into account.<sup>57</sup>

Thus, Abella J. suggested that the CRTC’s powers could be used to further its statutory policy objectives where, unlike in *Barrie Public Utilities*, it exercised a jurisdiction that was “fully supported by unambiguous statutory language”, such as just and reasonable rate-setting. She then underlined this point by distinguishing *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*,<sup>58</sup> in which the Supreme Court held that a statutory power to “impose any additional conditions that the Board considers necessary in the public interest” was too vague and open-ended to allow the Board to require that the proceeds from the sale of a regulated entity’s assets be distributed to its consumers:

In holding that the Board had no such authority [in *ATCO*], Bastarache J. relied in part on the conclusion that *the Board’s statutory power to make orders or impose conditions in the public interest was insufficiently precise* to grant the ability to distribute sale proceeds to ratepayers (para. 46). The ability of the Board to approve an asset sale, and *its authority to make any order it wished in the public interest, were necessarily limited by the context of the relevant provisions* (paras. 46-48 and 50). ...

*Unlike ATCO, in the case before us, the CRTC’s rate-setting authority and its ability to establish deferral accounts for this purpose are at the very core of its competence. The CRTC is statutorily authorized to adopt any method of determining just and reasonable rates. Furthermore, it is required to consider the statutory objectives in the exercise of its authority, in contrast to the permissive, free-floating direction to consider the public interest that existed in ATCO. ...*<sup>59</sup>

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<sup>57</sup> *Id.*, at paras. 49-50 (emphasis added).

<sup>58</sup> [2006] S.C.J. No. 4, [2006] 1 S.C.R. 140 (S.C.C.) [hereinafter “*ATCO*”].

<sup>59</sup> *Bell Aliant, supra*, note 54, at paras. 52-53 (emphasis added).

As discussed below, this distinction between an “insufficiently precise” and “free-floating” enabling provision, and one “fully supported by unambiguous statutory language”, was to play a central role in the *Broadcasting Reference*.

The final decision which will be addressed here is the *ISP Reference*. This 2012 ruling from the Supreme Court held that Internet service providers (“ISPs”) did not constitute “broadcasting undertakings” that fell within the scheme of the *Broadcasting Act*, since they merely provided infrastructure that enabled end-users to access content made available on the Internet. At one level, the *ISP Reference* could be viewed as a curtailment of the CRTC’s jurisdiction, since the Court found that a particular sector of the communications industry was exempt from its authority under the *Broadcasting Act*. Nonetheless, the better view is that the *ISP Reference* was simply an affirmation of the traditional *CKOY* approach to CRTC jurisdiction applied in *Bell Aliant*. The Court’s reason for excluding ISPs from the *Broadcasting Act* was that, because ISPs do not select, originate or package content, they have nothing to do with the culturally oriented broadcasting policy objectives in section 3(1), which “focus on content”.<sup>60</sup>

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.*<sup>61</sup>

In other words, the Court reiterated its view that the broadcasting policy objectives were the lodestar of the CRTC’s jurisdiction under the *Broadcasting Act*. It was the rejection of this principle, supported by a virtually unbroken line of Supreme Court cases stretching over 30 years, which lay at the heart of the *Broadcasting Reference*.

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<sup>60</sup> *ISP Reference*, *supra*, note 7, at para. 4.

<sup>61</sup> *Id.*, at para. 5 (emphasis added).

### III. THE DECISIONS BELOW

#### 1. The CRTC Policy and Reference

The *Broadcasting Reference* arose out of a Broadcasting Regulatory Policy issued by the CRTC on March 22, 2010.<sup>62</sup> One of the issues considered in the CRTC Policy was the extent to which there should be revenue support for conventional television broadcasters. Under the CRTC's existing model, private conventional television stations (referred to herein as "Broadcasters") were generally not entitled to be paid by cable or satellite companies (referred to herein as "Broadcasting Distribution Undertakings", or "BDUs") for the retransmission of their local communication signals by BDUs to BDU subscribers.<sup>63</sup> While the CRTC did require BDUs to provide Broadcasters with some benefits in exchange for the right to retransmit their signals (*e.g.*, priority carriage, preferential channel placement, simultaneous substitution, payments into a local improvement fund, and negotiated payments for retransmission of distant signals), their local signals were available for free over the air to anyone with a television set and an antenna. Further, owing to the fragmentation of viewers brought about by recent changes to the broadcasting business environment (*e.g.*, specialty television services, direct-to-home satellite services and new media platforms), and the corresponding drop in traditional television ratings, Broadcasters had access to fewer advertising dollars than in the past, which was their only source of revenue. By contrast, BDUs had grown their revenues at an enormous rate. The result, according to the CRTC, was a reduction in the Broadcasters' ability to contribute to the creation and presentation of Canadian programming of a high standard.<sup>64</sup> As the CRTC put it, "the system is not working well in 2010 in ensuring that conventional television broadcasters have the means to continue to meet their obligations under the Act".<sup>65</sup>

To address these concerns, and achieve the broadcasting policy objectives under section 3(1) of the *Broadcasting Act*, the CRTC found it

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<sup>62</sup> *A group-based approach to the licensing of private television services* – Broadcasting Regulatory Policy CRTC 2010-167, March 22, 2010 [hereinafter the "CRTC Policy"].

<sup>63</sup> Under s. 2(1) of the *Broadcasting Act*, the Broadcasters are referred to as "programming undertakings" and the BDUs as "distribution undertakings", both of which fall within the broader definition of "broadcasting undertakings" that are subject to the CRTC's jurisdiction.

<sup>64</sup> CRTC Policy, *supra*, note 62, at para. 159.

<sup>65</sup> *Id.*, at para. 162.

was “necessary” to implement the VFS Regime.<sup>66</sup> In contrast to imposing a mandatory fee for carriage upon BDUs, which the CRTC had previously considered but rejected,<sup>67</sup> the VFS Regime would rely upon market forces to compensate Broadcasters, and permit those Broadcasters who opted into the VFS Regime to negotiate fair value consideration with BDUs (subject to limited intervention by the CRTC). The centrepiece of the VFS Regime was the creation of a new right: the right of Broadcasters to require that BDUs delete any of the Broadcasters’ programs from the communication signals distributed by the BDUs. This deletion right would form the basis for the Broadcasters’ negotiation leverage with the BDUs. If a Broadcaster opted into the VFS Regime, it would acquire this deletion right in exchange for foregoing its existing regulatory benefits, though Broadcasters were also free to remain outside the VFS Regime if they chose.<sup>68</sup>

While the CRTC held that the VFS Regime was necessary to give effect to the policy objectives in section 3(1) of the *Broadcasting Act*, it chose not to directly implement the VFS Regime in the CRTC Policy itself. The reason for this stemmed from two legal opinions presented to the CRTC during the public hearing which divided over whether it possessed the jurisdiction to introduce the VFS Regime in light of the *Copyright Act*. While the first opinion took the view that the CRTC was within its rights to implement the VFS Regime, the other opinion asserted that BDUs had a right to retransmit the Broadcasters’ signals without negotiation or remuneration under the *Copyright Act*.<sup>69</sup> As a result, the CRTC declined to decide whether it possessed jurisdiction to implement the VFS Regime, and initiated a Reference to the Federal Court of Appeal to determine this issue.<sup>70</sup> It was this CRTC Reference that ultimately led to the Supreme Court’s decision in the *Broadcasting Reference*.

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<sup>66</sup> *Id.*, at paras. 163 and 166.

<sup>67</sup> See *Regulatory frameworks for broadcasting distribution undertakings and discretionary programming services* – Broadcasting Public Notice CRTC 2008-100, October 30, 2008, at paras. 331-334.

<sup>68</sup> For a useful summary of the VFS Regime, see the *Broadcasting Reference*, *supra*, note 1, at para. 7.

<sup>69</sup> R.S.C. 1985, c. C-42.

<sup>70</sup> *Reference to the Federal Court of Appeal – Commission’s jurisdiction under the Broadcasting Act to implement a negotiated solution for the compensation for the fair value of private local conventional television signals* – Broadcasting Order CRTC 2010-168, March 22, 2010 [hereinafter the “CRTC Reference”].

It is noteworthy that the principal impetus behind the CRTC Reference was not whether the CRTC possessed the jurisdiction to implement the VFS Regime under the *Broadcasting Act*. At the time, most parties appeared to assume on the basis of *CKOY* that the CRTC's licensing and regulation-making powers in sections 9 and 10 gave it the authority to introduce the VFS Regime, provided this was in furtherance of the broadcasting policy objectives in section 3(1) of the *Broadcasting Act*. Thus, when explaining the source of its VFS Regime authority in the CRTC Policy and CRTC Reference, the CRTC simply referred in passing to sections 3(1)(e), (f), (2), 5(1), 9 and 10 of the *Broadcasting Act*.<sup>71</sup>

Instead, the main reason for the CRTC Reference was the concern that the VFS Regime would effectively grant the Broadcasters a new copyright inconsistent with the provisions of the *Copyright Act* and, in particular, sections 21 and 31. The former provision gives Broadcasters a copyright in communication signals:

21(1) Subject to subsection (2), a broadcaster has a copyright in the communication signals that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:

...

(c) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast ...

By virtue of section 21(1)(c), a Broadcaster may refuse to permit another "broadcaster" from retransmitting its communications signals. However, the definition of "broadcaster" in section 2 of the *Copyright Act* excludes BDUs from the scope of this right:

"broadcaster" means a body that, in the course of operating a broadcasting undertaking, broadcasts a communication signal in accordance with the law of the country in which the broadcasting undertaking is carried on, but excludes a body whose primary activity in relation to communication signals is their retransmission ...

Accordingly, the copyright created by section 21(1)(c) of the *Copyright Act* does not itself permit broadcasters to preclude BDUs from

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<sup>71</sup> CRTC Policy, *supra*, note 62, at para. 152; CRTC Reference, *id.*, at paras. 1-2. As noted by Rothstein J. in *Broadcasting Reference*, *supra*, note 1, at para. 21, "[t]he CRTC did not refer to the jurisdiction-conferring provisions in ss. 9 and 10" in the CRTC Policy. However, the CRTC did refer to s. 10 (and s. 9, by implication) in the CRTC Reference.

retransmitting their communications signals. Were the VFS Regime to be interpreted as imbuing Broadcasters with a right in the nature of a copyright over their communication signals as against BDUs, it would seem inconsistent with Parliament's decision to refrain from granting Broadcasters this right in the *Copyright Act* itself.

As to section 31 of the *Copyright Act*, its relevance pertained to the copyright granted Broadcasters under section 3(1)(f),<sup>72</sup> which provides:

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

...

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication, ...

By virtue of section 3(1)(f), Broadcasters may possess a copyright in the dramatic works (or television programs) carried in their communication signals, and not merely in those communication signals themselves as under section 21. Further, in contrast to the copyright in communication signals provided for in section 21, section 3(1)(f) does not preclude Broadcasters from asserting this copyright against BDUs. Standing alone, the existence of this copyright would arguably support the CRTC's jurisdiction to give Broadcasters the deletion right under the VFS Regime. However, section 31 of the *Copyright Act* limits the extent of the section 3(1)(f) copyright as against BDUs where the dramatic work is carried in a communication signal. By virtue of this provision, BDUs possess a "user right" to retransmit works carried in such signals, and are not even obligated to pay any royalties to the broadcaster where the signal in question is a local rather than distant one:

31(1) In this section,

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<sup>72</sup> For a recent discussion of the scope of the s. 3(1)(f) copyright, see *Entertainment Software Assn. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] S.C.J. No. 34, [2012] 2 S.C.R. 231 (S.C.C.); and *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] S.C.J. No. 35, [2012] 2 S.C.R. 283 (S.C.C.).

“retransmitter” means a person who performs a function comparable to that of a cable retransmission system, but does not include a new media retransmitter;

“signal” means a signal that carries a literary, dramatic, musical or artistic work and is transmitted for free reception by the public by a terrestrial radio or terrestrial television station.

(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

- (a) the communication is a retransmission of a local or distant signal;
- (b) the retransmission is lawful under the *Broadcasting Act*;
- (c) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;
- (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
- (e) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(b).

Given that Parliament granted BDUs the right to retransmit dramatic works in communication signals (in effect, imposing a form of “compulsory licence” upon Broadcasters), which can be exercised without any payment obligation where the signals are local, it appeared inconsistent with the *Copyright Act* for the CRTC to give Broadcasters the right to delete programs retransmitted on local signals absent the payment of compensation by BDUs.

## 2. The Federal Court of Appeal

The CRTC Reference was argued before the Federal Court of Appeal in September 2010, and the Court delivered its judgment on February 28, 2011.<sup>73</sup> The majority of the Court, *per* Sharlow J.A. (Layden-Stevenson J.A. concurring), found that the proposed VFS Regime was within the CRTC’s jurisdiction. Justice Nadon, in a notable dissent, would

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<sup>73</sup> *Reference re Broadcasting Act*, [2011] F.C.J. No. 197, [2012] 4 F.C.R. 231 (F.C.A.), rev’d [2012] S.C.J. No. 68, [2012] 3 S.C.R. 489 (S.C.C.) [hereinafter the “FCA Decision”].

have found the VFS Regime *ultra vires* based on its inconsistency with section 31(2)(d) of the *Copyright Act*.

The reasons of the majority focus almost exclusively upon the CRTC's jurisdiction under the *Copyright Act*, not the *Broadcasting Act*.<sup>74</sup> In considering the *Copyright Act* issues, Sharlow J.A. began by asserting that, under section 21(1)(c), Broadcasters are given a copyright which "includes the sole right to authorize a *BDU* to retransmit those signals to the public simultaneously with its broadcast".<sup>75</sup> She then stated that, under section 31(2), a *BDU* will "not infringe the *section 21* copyright" if it complies with the section 31(2) requirements when retransmitting the signal.<sup>76</sup> Justice Sharlow concluded that, because one of those requirements (in section 31(2)(b)) is that the retransmission must be lawful under the *Broadcasting Act*, the *BDUs* cannot take advantage of the section 31(2) user right unless they act in accordance with any regulations or conditions of licence made by the CRTC, including those designed to implement the VFS Regime. In her view, therefore, there was no conflict between the *Copyright Act* and the VFS Regime. Rather, "[i]n paragraph 31(2)(b) of the *Copyright Act*, Parliament has permitted the Commission to limit the transmission rights under subsection 31(2) by imposing any regulatory or licensing condition consistent with the Commission's statutory mandate as stated in the *Broadcasting Act*".<sup>77</sup>

With respect, these comments appear to conflate the copyright in communication signals and dramatic works dealt with in sections 21 and 31. Section 21 does not grant Broadcasters the sole right to authorize *BDUs* to retransmit their signals, as suggested by Sharlow J.A., only the right to authorize retransmission by "broadcasters". And as discussed above, *BDUs* are expressly excluded from the definition of "broadcaster" in section 2 of the *Copyright Act*. Further, section 31(2) does not permit *BDUs* to retransmit *signals* without breaching the Broadcasters' section 21 copyright, since no such copyright in signals exists as against *BDUs* under section 21 at all. Rather, section 31(2) permits *BDUs* to retransmit the *works* included within the signals without breaching the Broadcasters' copyright in section 3(1)(f). Because Sharlow J.A. wrongly concluded

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<sup>74</sup> See paras. 25-28 of the FCA Decision, *id.*, where Sharlow J.A., after noting that the *BDUs* did not challenge the CRTC's rationale for implementing the VFS Regime, summarily concluded that the VFS Regime was within the CRTC's *Broadcasting Act* jurisdiction, subject only to the *Copyright Act* issues.

<sup>75</sup> *Id.*, at para. 33 (emphasis added).

<sup>76</sup> *Id.*, at para. 36 (emphasis added).

<sup>77</sup> *Id.*, at para. 39.

that section 21 grants Broadcasters a copyright against BDUs that is subject only to the section 31 user right, she did not consider the consequences of Parliament's decision to limit the section 21 copyright in communication signals so that it is only enforceable against other Broadcasters, not BDUs. As is discussed below, this aspect of section 21 played an important role in the Supreme Court's reasoning in the *Broadcasting Reference*.

#### IV. THE *BROADCASTING REFERENCE*

In April 2012, the appeal from the FCA Decision was argued before a nine-member panel of the Supreme Court, who reserved judgment for nearly eight months. A closely divided Court allowed the appeal. The majority of the Court, *per* Rothstein J. (McLachlin C.J.C. and LeBel, Fish and Moldaver JJ. concurring) found that the proposed VFS Regime was *ultra vires* the CRTC. The minority, led by Abella and Cromwell JJ. (Deschamps and Karakatsanis JJ. concurring), would have upheld the FCA Decision.

The reasons of the majority are striking in that they rely not only upon the conflict between the VFS Regime and the *Copyright Act*, but also (and indeed primarily) upon the CRTC's lack of jurisdiction under the open-ended provisions of the *Broadcasting Act* itself. As noted above, this issue was largely ignored by both the Federal Court of Appeal and the CRTC. Further, it was an issue that was unnecessary for the Supreme Court to address given its acceptance of the copyright arguments. Accordingly, the majority's decision to allow the appeal on this basis would appear to reflect a deliberate policy choice by the Supreme Court to impose limits upon the jurisdiction of the CRTC.

##### 1. No Jurisdiction under the *Broadcasting Act*

As noted, the primary reason Rothstein J. found the proposed VFS Regime *ultra vires* was that "a contextual reading of the provisions of the *Broadcasting Act* themselves reveals that they were not meant to authorize the CRTC to create exclusive rights for broadcasters to control the exploitation of their signals or works by retransmission".<sup>78</sup> In arriving at this conclusion, Rothstein J. made three important points.

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<sup>78</sup> *Broadcasting Reference*, *supra*, note 1, at para. 13.

First, he observed that general policy statements, such as those found in section 3(1) of the *Broadcasting Act*, can only limit rather than create jurisdiction:

Policy statements, such as the declaration of Canadian broadcasting policy found in s. 3(1) of the *Broadcasting Act*, are not jurisdiction-conferring provisions. They describe the objectives of Parliament in enacting the legislation and, thus, they circumscribe the discretion granted to a subordinate legislative body (Sullivan, at pp. 387-88 and 390-91). As such, declarations of policy cannot serve to extend the powers of the subordinate body to spheres not granted by Parliament in jurisdiction-conferring provisions.<sup>79</sup>

This is consistent with the general public law principle that statutory purposes serve to constrain (not enlarge) the discretion of public bodies.<sup>80</sup> It is also consistent with *Barrie Public Utilities*, where the Supreme Court held that it was a “mistake” for the CRTC to rely upon the policy objectives in section 3(1) of the *Broadcasting Act* and section 7 of the *Telecommunications Act* “as power-conferring provisions”.<sup>81</sup>

Second, in view of the jurisdictional impotency of section 3(1) standing alone, Rothstein J. found that it was necessary to locate the CRTC’s jurisdiction to implement the VFS Regime in either its licensing or regulation-making powers in sections 9 and 10 of the *Broadcasting Act*. It was here that the majority of the Court broke most clearly with its prior jurisprudence. In contrast to *CKOY*, where the Court held that the validity of CRTC regulations should be tested by asking whether they are related to one of the broadcasting policy objectives, Rothstein J. found that congruity with a policy objective is a necessary but not sufficient condition for the CRTC to acquire jurisdiction under sections 9 and 10:

In my opinion, *CKOY* cannot stand for the proposition that establishing any link, however tenuous, between a proposed regulation and a policy objective in s. 3 of the Act is a sufficient test for conferring jurisdiction on the CRTC. Such an approach would conflict with the principle that

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<sup>79</sup> *Id.*, at para. 22.

<sup>80</sup> See, e.g., *Oakwood Development Ltd. v. St-Francois Xavier*, [1985] S.C.J. No. 49, [1985] 2 S.C.R. 164, at 173-74 (S.C.C.); *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] S.C.J. No. 28, [2003] 1 S.C.R. 539, at paras. 93-94 (S.C.C.); and *ATCO*, *supra*, note 58, at paras. 46 and 49-50.

<sup>81</sup> *Barrie Public Utilities*, *supra*, note 52, at para. 42.

policy statements circumscribe the discretion granted to a subordinate legislative body.<sup>82</sup>

This aspect of Rothstein J.'s reasons was hotly contested by the minority, who in reliance upon *CKOY* would have held that "the proposed regime is within the CRTC's regulatory jurisdiction under the *Broadcasting Act*, since it is demonstrably linked to several of the policies in s. 3"<sup>83</sup>.

After making this point, Rothstein J. went on to draw a distinction between "general regulation making or licensing provisions", such as sections 9(1)(b)(i), (h) and 10(1)(k) of the *Broadcasting Act*, and "true jurisdiction-conferring provisions", such as section 27(5) of the *Telecommunications Act* at issue in *Bell Aliant*. In his view, the former "general" provisions must be construed so that they are limited by the latter "specific" ones, and not merely by the broadcasting policy objectives in section 3(1):<sup>84</sup>

The difference between general regulation making or licensing provisions and true jurisdiction-conferring provisions is evident when this case is compared with *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764. ... The CRTC's jurisdiction over the setting of rates under s. 27 of the *Telecommunications Act*, S.C. 1993, c. 38, provides that rates must be just and reasonable. Under that section, the CRTC is specifically empowered to determine compliance with that requirement and is

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<sup>82</sup> *Broadcasting Reference*, *supra*, note 1, at para. 25. The majority's reasons on this point bear some resemblance to those of the High Court of Australia in *Paull v. Munday* (1976), 9 A.L.R. 245 (H.C.A.), where Gibbs J. held that a regulation which achieved the purposes of the enabling statute (preventing the emission of air impurities from fuel-burning equipment) was nonetheless *ultra vires* because it went beyond the scope of the regulation-making power that was granted (by prohibiting the use of fuel-burning equipment in the first place). That said, the regulation-making authority in the *Paull* statute was considerably more specific than in the *Broadcasting Reference*.

<sup>83</sup> *Broadcasting Reference*, *id.*, at para. 97. See also para. 101 ("Courts have consistently determined the validity of the CRTC's exercises of power under any of these provisions by applying the *CKOY* test: was the power used in connection with a policy objective in s. 3(1)?").

<sup>84</sup> As noted at para. 32 of the *Broadcasting Reference*, *id.*, general jurisdictional provisions are constrained by the overall purposes of the statute. Indeed, the more broadly drawn a jurisdictional provision is, the more likely it is to be constrained by the statutory objects: *ATCO*, *supra*, note 58, at paras. 74-75. Interestingly, there were some cases prior to the *Broadcasting Reference* that suggested that the broadcasting policy objectives did not necessarily constrain the jurisdiction of the CRTC: see, e.g., *Capital Cities*, *supra*, note 24, at 168 ("I would not read s. 3(c), a general object clause, as prevailing over the specific licensing authority of the Commission, an authority which is under a generally applicable statute"). There was also some suggestion that, where the CRTC acts pursuant to a direction issued by Cabinet under s. 26 of the *Broadcasting Act*, it may act for purposes that are not found in s. 3: *New Brunswick Broadcasting Co. v. C.R.T.C.*, [1984] F.C.J. No. 164, at para. 18 (F.C.A.), leave to appeal refused (1984), 13 D.L.R. (4th) 77n, 58 N.R. 76n (S.C.C.).

conferred the express authority to “adopt any method or technique that it considers appropriate” for that purpose (s. 27(5)).

This broad, express grant of jurisdiction authorized the CRTC to create and use the deferral accounts at issue in that case. This stands in marked contrast to the provisions on which the broadcasters seek to rely in this case, which consist of a general power to make regulations under s. 10(1)(k) and a broad licensing power under s. 9(1)(b)(i). Jurisdiction-granting provisions are not analogous to general regulation making or licensing authority because the former are express grants of specific authority from Parliament while *the latter must be interpreted so as not to confer unfettered discretion not contemplated by the jurisdiction-granting provisions of the legislation.*

That is the fundamental point. *Were the only constraint on the CRTC’s powers under s. 10(1) to be found in whether the enacted regulation goes towards a policy objective in s. 3(1), the only limit to the CRTC’s regulatory power would be its own discretionary determination of the wisdom of its proposed regulation in light of any policy objective in s. 3(1). This would be akin to unfettered discretion. ...*

A broadly drafted basket clause, such as s. 10(1)(k), or an open-ended power to insert “such terms and conditions as the [regulatory body] deems appropriate” (s. 9(1)(h)) cannot be read in isolation: *ATCO*, at para. 46. Rather, “[t]he content of a provision ‘is enriched by the rest of the section in which it is found ...’<sup>85</sup>

In effect, therefore, Rothstein J. required that the general or “basket clause” licensing and regulation-making provisions be read *ejusdem generis* with the more specific licensing and regulation-making provisions alongside which they are found.<sup>86</sup> If none of the specific jurisdictional provisions contemplate that the statutory powers will be used for the purpose in question, then the CRTC cannot draw the authority to use those powers for that purpose from the general basket clause power merely because it is consistent with the ultimate objects of the statute. It is notable that Rothstein J.’s concern here with affording the CRTC an

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<sup>85</sup> *Broadcasting Reference, id.*, at paras. 26-29 (emphasis added). See as well *ATCO, supra*, note 58, at para. 46. Interestingly, there is some similarity between Rothstein J.’s reasoning and that of the majority in *Confederation Broadcasting, supra*, note 19, discussed above in the text accompanying footnotes 19-23.

<sup>86</sup> *Broadcasting Reference, id.*, at para. 2 (“The *Broadcasting Act* grants the CRTC wide discretion to implement regulations and issue licences with a view to furthering Canadian broadcasting policy as set out in the *Broadcasting Act*. However, these powers must be exercised within the statutory framework of the *Broadcasting Act*”).

unlimited discretion under the general regulation-making provisions was echoed in the *CKOY* dissent.<sup>87</sup>

Third, applying this test to the provisions at issue before the Court, Rothstein J. concluded that the general licensing and regulation-making provisions in sections 9 and 10 of the *Broadcasting Act* did not grant the CRTC authority to implement the VFS Regime. This was because the specific jurisdictional provisions in section 10 did not contemplate the use of the CRTC's licensing or regulation-making powers to create exclusive proprietary rights, or to regulate matters of economics as opposed to those of culture:

In substance, the value for signal regime would regulate the economic relationships between BDUs and broadcasters. ... This program deletion right is intended to give the broadcasters the necessary leverage to require compensation from the BDUs.

...

*[N]one of the specific fields for regulation set out in s. 10(1) pertain to the creation of exclusive rights for broadcasters to authorize or prohibit the distribution of signals or programs, or to control the direct economic relationship between the BDUs and the broadcasters.*

...

On their face, ss. 9(1)(h) and 10(1)(g) could, for example, allow the CRTC to require the BDUs to distribute to Canadians certain types of programs, arguably, because they are deemed to be important for the country's cultural fabric. However, it is a far cry from concluding that, coupled with ss. 10(1)(k) and 9(1)(b)(i), they entitle the CRTC to create exclusive control rights for broadcasters.

This interpretation is consistent with a reading of the Act in its entire context. *The Broadcasting Act has a primarily cultural aim. The other powers enumerated in s. 10(1) deal with such matters as the allocation of broadcasting time and the setting of standards for programs. In addition, the objectives of the Broadcasting Act, declared in s. 3(1), when read together, target "the cultural enrichment of*

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<sup>87</sup> See *CKOY*, *supra*, note 26, at 7, *per* Martland J.:

[C]ounsel for the respondent took the position 'that it is for the Commission, and not for the Court, to determine what regulations are necessary for the furtherance of its objects'... I do not agree that Parliament has granted to the Commission autocratic powers to control every phase of the activities of broadcasters. ... The Commission is an administrative body and can only legislate within the express limits defined by the Act. ... It is for the Courts to decide whether a regulation is in furtherance of the objects of the Commission as defined in the Act.

*Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse*" (*ISP Reference*, at para. 4). While such declarations of policy may not be invoked as independent grants of power, they should be given due weight in interpreting specific provisions of an Act ...

In sum, nowhere in the Act is there a reference to the creation of exclusive control rights over signals or programs. Reading the *Broadcasting Act* in its entire context reveals that the creation of such rights is too great a stretch from the core purposes intended by Parliament and from the powers granted to the CRTC under the *Broadcasting Act*.<sup>88</sup>

The foregoing comments attracted considerable criticism from the minority, who, relying upon prior jurisprudence,<sup>89</sup> would have held that "the mandate granted to the CRTC under the *Broadcasting Act* is both economic and cultural ... not 'primarily cultural', as asserted by Justice Rothstein".<sup>90</sup> In their view, "regulations and licensing conditions imposed by the CRTC in furtherance of economic objectives listed in the *Broadcasting Act*, but absent any specific grant of power", should be upheld.<sup>91</sup> Nonetheless, it is difficult to reconcile the minority's position with the difference in focus between the *Broadcasting Act* and the *Telecommunications Act*.<sup>92</sup> Given the many provisions in the *Telecommunications Act* that deal with economic regulation, and the far fewer such provisions in the *Broadcasting Act*, the "primary" purposes of

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<sup>88</sup> *Broadcasting Reference*, *supra*, note 1, at paras. 19, 29 and 31-33 (emphasis added). It is curious that Rothstein J. focused solely upon the character of the specific jurisdictional provisions in s. 10 in this passage, and not also those in s. 9, despite holding that the VFS Regime could not be sustained under the general provisions of either s. 9 or s. 10.

<sup>89</sup> The cases cited by the minority on this issue included: *Canadian Broadcasting*, *supra*, note 41; *Canadian Motion Picture Distributors Assn. v. Partners of Viewer's Choice Canada*, [1996] F.C.J. No. 894, 137 D.L.R. (4th) 561 (F.C.A.); and *T.W.U. v. Canada (C.R.T.C.)*, [2003] F.C.J. No. 1546, [2004] 2 F.C.R. 3 (F.C.A.).

<sup>90</sup> *Broadcasting Reference*, *supra*, note 1, at para. 102. See also paras. 103-106.

<sup>91</sup> *Id.*

<sup>92</sup> The minority's position is also inconsistent with *Re Broadcasting Act (Canada)*, [2010] F.C.J. No. 849, [2012] 1 F.C.R. 219, at para. 49 (F.C.A.), *affd* [2012] S.C.J. No. 4, [2012] 1 S.C.R. 142 (S.C.C.), where Noël J.A. held that "The *primary focus* [of the *Broadcasting Act*] is on the *cultural enrichment* of Canada through the broadcasting of programs which involve a significant amount of Canadian artistic creativity in their production, encourage Canadian expression and the use of Canadian talent, and which reflect Canada's linguistic duality and multicultural society." At para. 3 of the *ISP Reference*, *supra*, note 7, which affirmed this decision, the Supreme Court unanimously agreed with the "reasons" of Noël J.A. below.

the latter statute cannot be said to include the regulation of economic rights and relationships.<sup>93</sup>

## 2. Conflict with the *Copyright Act*

In addition to finding that the CRTC lacked the jurisdiction *simpliciter* to implement the VFS Regime under the *Broadcasting Act*, Rothstein J. held that the VFS Regime would be invalid by virtue of its inconsistency with the *Copyright Act*. In particular, he found that the VFS Regime was contrary to each of sections 21, 31 and 89 of the latter statute. Prior to examining his specific reasons for this, it is important to briefly outline the analytical framework that he employed.

Justice Rothstein relied upon two different presumptions of statutory interpretation to explain the relevance of the *Copyright Act* to the issue of the CRTC's jurisdiction. The first was the presumption of coherence between related statutes. According to this principle, "Parliament is presumed to intend 'harmony, coherence, and consistency between statutes dealing with the same subject matter'".<sup>94</sup> According to Rothstein J., the *Broadcasting Act* and *Copyright Act*, together with the *Telecommunications Act* and *Radiocommunication Act*,<sup>95</sup> are "part of an interrelated scheme".<sup>96</sup> It followed that "where multiple interpretations of a provision are possible, the presumption of coherence requires that the two statutes be read together so as to *avoid conflict*".<sup>97</sup>

The second presumption relied on by Rothstein J. was derived from the notion that "[o]rdinarily ... an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation",<sup>98</sup> unless this is

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<sup>93</sup> The approach taken by Rothstein J. also finds some support in *Capital Cities*, *supra*, note 24, at 169, where Laskin C.J.C. found that the CRTC acted in excess of its jurisdiction by purporting to make its consent a prerequisite to the settlement of a Federal Court action by U.S. broadcasters against Canadian cable companies ("There may be issues in a settlement which could not be of any concern to the Commission in respect of its authority, and it is an overreaching for it to include a requirement in its decision of its consent to the settlement of private litigation").

<sup>94</sup> *Broadcasting Reference*, *supra*, note 1, at para. 37.

<sup>95</sup> R.S.C. 1985, c. R-2.

<sup>96</sup> *Broadcasting Reference*, *supra*, note 1, at para. 34.

<sup>97</sup> *Id.*, at para. 38 (emphasis in original).

<sup>98</sup> *Id.*, at para. 39. It is important to note that this principle applies to subordinate legislation promulgated under a *federal* statute that conflicts with another *federal* enactment. Where the subordinate legislation and the conflicting statute are alternatively federal and provincial, the applicable principle should be the constitutional doctrine of paramountcy.

authorized by statute.<sup>99</sup> By virtue of this principle (referred to herein as the “principle of subordinate legislative conflict”), he held that a statutory grant of regulation-making authority should be interpreted so as not to authorize regulations in conflict with another statute:

[A]s it would be impermissible for the CRTC, a subordinate legislative body, to implement subordinate legislation in conflict with another Act of Parliament, the open-ended jurisdiction-conferring provisions of the *Broadcasting Act* cannot be interpreted as allowing the CRTC to create conflicts with the *Copyright Act*.<sup>100</sup>

Given these two presumptions, Rothstein J. held that the relevant question was whether recognizing a jurisdiction to implement the VFS Regime under the *Broadcasting Act* would bring that statute into conflict with the *Copyright Act*, such that an interpretation of the former statute that did not authorize the VFS Regime was to be preferred.<sup>101</sup> In

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<sup>99</sup> See *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] S.C.J. No. 1, [1992] 1 S.C.R. 3, at 38 (S.C.C.) (“Just as subordinate legislation cannot conflict with its parent legislation ... so too it cannot conflict with other Acts of Parliament ... unless a statute so authorizes”). Because it may be possible for a statute to authorize subordinate legislation that conflicts with another statute through a Henry VIII clause, the determinative issue is not whether a conflict between subordinate legislation and a statute exists, but whether that conflict is justified by the subordinate legislation’s enabling statute. It is likely for this reason that Rothstein J. did not rely solely on the principle that precludes subordinate legislation from conflicting with another statute in assessing the validity of the VFS Regime under the *Copyright Act*, but rather used that principle as a starting point for the interpretive presumption that the *Broadcasting Act* did not authorize the VFS Regime to the extent it conflicted with the *Copyright Act*.

<sup>100</sup> *Broadcasting Reference*, *supra*, note 1, at para. 39. This presumption bears some resemblance to the presumption that enabling legislation does not authorize subordinate legislation which is inconsistent with the Constitution: see *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038, at 1078 (S.C.C.), *per* Lamer J. (as he then was), dissenting on other grounds (“As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied”). However, it is also different in that an enabling statute is capable of authorizing subordinate legislation that conflicts with another statute enacted by the same legislature, whereas an enabling statute that purports to authorize subordinate legislation that conflicts with the Constitution would itself be *ultra vires*.

<sup>101</sup> Justice Rothstein did not address what would happen if the interpretive exercise led to an *unavoidable* conflict between the two statutes, *i.e.*, where the only possible interpretation of them to be arrived at after a textual, contextual and purposive analysis was that the *Broadcasting Act* conferred jurisdiction upon the CRTC to implement the VFS Regime, and that this jurisdiction was directly inconsistent with the *Copyright Act*. Had Rothstein J. found such a conflict to exist (which would have been purely hypothetical, given his initial conclusion that the *Broadcasting Act* did not grant the CRTC jurisdiction to implement the VFS Regime even independently of the *Copyright Act*), it would likely have been resolved based on interpretive presumptions relating to which enactment’s provisions were more specific and/or enacted later in time: see *Lévis (City) v. Fraternité*

approaching this issue, he defined the concept of “conflict” in a relatively broad way. According to Rothstein J., such a conflict may arise either where two statutes are in a direct operative conflict (*i.e.*, one statute requires what another statute prohibits), or where the purposes of one statute would be frustrated by the other.<sup>102</sup> He based this principle not only upon the Court’s prior statutory conflict decision in *Lévis (City) v. Fraternité des policiers de Lévis Inc.*,<sup>103</sup> but also upon cases involving the constitutional doctrine of federal paramountcy:

Cases applying the doctrine of federal paramountcy present some similarities in defining conflict as either operational conflict or conflict of purpose (*Friends of the Oldman River Society*, at p. 38). These definitions of legislative conflict are therefore helpful in interpreting two statutes emanating from the same legislature. The CRTC’s powers to impose licensing conditions and make regulations should be understood as constrained by each type of conflict. Namely, in seeking to achieve its objects, the CRTC may not choose means that either operationally conflict with specific provisions of the *Broadcasting Act*, the *Radiocommunication Act*, the *Telecommunications Act*, or the *Copyright Act*; or which would be incompatible with the purposes of those Acts.<sup>104</sup>

Turning to the issue of whether such a conflict existed, Rothstein J. held that the VFS Regime was contrary to both section 21 and section 31 of the *Copyright Act*. As to section 21, he noted that the section 21(1)(c) copyright it created in communication signals could only be enforced against other “broadcasters”, which does not include BDUs, given the definition of that term in section 2.<sup>105</sup> Accordingly, by permitting

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*des policiers de Lévis Inc.*, [2007] S.C.J. No. 14, [2007] 1 S.C.R. 591, at para. 58 (S.C.C.) [hereinafter “*Lévis (City)*”].

<sup>102</sup> It is noteworthy that Rothstein J. did not suggest that this concept of “purpose” conflict is applicable only to the presumption of coherence, and inapplicable to the presumption following from the principle of subordinate legislative conflict. This suggests that subordinate legislation may be invalid where it conflicts with the purposes of any statute enacted by the same level of government as that which enacted its enabling legislation, provided this is not authorized expressly or by necessary implication in the enabling legislation itself. In other words, if the *Broadcasting Reference* is applied to the fullest extent of its terms, it would mean that the *vires* of any federal regulation is open to challenge on the ground that it is inconsistent with the purposes of any federal statute, however unrelated the two pieces of legislation may be. Given the number and variety of federal statutes and regulations, and the inevitable tension between some of their purposes, it remains to be seen how this aspect of the *Broadcasting Reference* will be treated by the courts in future cases.

<sup>103</sup> *Lévis (City)*, *supra*, note 101, at para. 54.

<sup>104</sup> *Broadcasting Reference*, *supra*, note 1, at para. 45. For a recent discussion of these two forms of conflict in the constitutional paramountcy context, see *Marine Services International Ltd. v. Ryan Estate*, [2013] S.C.J. No. 44, 361 D.L.R. (4th) 195, at paras. 65-84 (S.C.C.).

<sup>105</sup> *Broadcasting Reference*, *supra*, note 1, at para. 50.

Broadcasters to prohibit the retransmission of their signals by BDUs, the VFS Regime would grant them a right that was withheld by Parliament under section 21.<sup>106</sup> Importantly, Rothstein J. acknowledged that one could read section 21 as merely speaking to the copyright relationship between Broadcasters, and as not precluding another public body like the CRTC from regulating the relationship between Broadcasters and BDUs; in other words, he acknowledged that there was no *operational* conflict.<sup>107</sup> This was in fact the interpretation of section 21 advanced by the minority.<sup>108</sup> Nonetheless, Rothstein J. concluded that the VFS Regime would still be contrary to the *purpose* of section 21, which was to strike a balance between the rights of owners and users:

In my view, s. 21(1) represents the expression by Parliament of the appropriate balance to be struck between broadcasters' rights in their communication signals and the rights of the users, including BDUs, to those signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in the *Copyright Act*, specifically excluding BDUs from the scope of the broadcasters' exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime. *The value for signal regime would upset the aim of the Copyright Act to effect an appropriate "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"...*<sup>109</sup>

Interestingly, Rothstein J. then went on to note that this conclusion was supported by the legislative history of section 21. In particular, although the Broadcasters had made submissions to the government that they should be given the right to prohibit retransmission of their signals

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<sup>106</sup> *Id.*, at para. 62.

<sup>107</sup> *Id.*, at para. 63.

<sup>108</sup> *Id.*, at para. 111:

There is nothing in either the definition of "broadcaster" or in s. 21(1)(c) of the *Copyright Act* that purports to immunize BDUs from licensing requirements put in place by the CRTC in accordance with its broadcasting mandate. BDUs derive their right to retransmit signals only from licences granted pursuant to s. 9 of the *Broadcasting Act*, and must meet the conditions imposed by the CRTC on their retransmission licences, including those set out in the proposed regime.

It is interesting to note here that none of the reasons in the *Broadcasting Reference* referred to s. 3(1)(b) of the *Broadcasting Act*, which provides that "the Canadian broadcasting system ... makes use of radio frequencies that are public property".

<sup>109</sup> *Id.*, at para. 67 (emphasis added). See also para. 64 ("[Section] 21 cannot be considered devoid of its purpose. 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").

by BDUs, and had criticized the narrow scope of the section 21(1)(c) right, Parliament did not move to amend section 21 in response. Accordingly, there had been a “specific Parliamentary choice not to change the balance struck in the *Copyright Act* between broadcasters and BDUs”.<sup>110</sup>

The recent legislative history of the *Copyright Act* supports the view that Parliament made deliberate choices in respect of copyright and broadcasting policy. The history evidences Parliament’s intent to facilitate simultaneous retransmission of television programs by cable and limit the obstacles faced by the retransmitters.

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[I]n the context of repeated urging from the broadcasters, Parliament’s silence strongly suggests that it is Parliament’s intention to maintain the balance struck by s. 21 ...<sup>111</sup>

Justice Rothstein applied a similar analysis to section 31. He observed that although section 3(1)(f) conferred on Broadcasters a copyright in the pre-recorded programs or compilations of programs carried in their signals, as distinct from the section 21 copyright in those signals themselves, and this copyright included the right to retransmit these works by telecommunication to the public, the copyright was circumscribed by section 31(2).<sup>112</sup> Pursuant to that provision, BDUs were granted an exception to the Broadcasters’ section 3(1)(f) copyright, in the nature of a user right, that permitted them to retransmit their programs through local or distant signals where the requirements of subsections 31(2)(a)-(e) are satisfied.<sup>113</sup> While section 31(2)(d) did allow Broadcasters to receive royalties for such retransmissions from BDUs, it applied only to distant signals, not to the local signals at issue in the *Broadcasting Reference*.<sup>114</sup> Further, even for distant signals, section 31(2)(d) did not allow Broadcasters to prohibit retransmission by BDUs, but merely gave them the right to receive a royalty determined by the Copyright Board through a collective society.<sup>115</sup> Given these features of section 32,<sup>116</sup> Rothstein J. found that it would be contrary to the purpose

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<sup>110</sup> *Id.*, at para. 81.

<sup>111</sup> *Id.*, at paras. 71 and 73.

<sup>112</sup> *Id.*, at paras. 51, 53 and 58.

<sup>113</sup> *Id.*, at paras. 54-56.

<sup>114</sup> *Id.*, at para. 57.

<sup>115</sup> *Id.*, at para. 58.

<sup>116</sup> It is interesting that Rothstein J. placed little weight upon the fact that s. 31(2)(d) required the payment of royalties by BDUs in respect of the retransmission of works through distant as

of the provision to grant Broadcasters a deletion right as against BDUs in respect of programs carried in their signals, even though this would not result in any operative statutory conflict:

Again, although the exception to copyright infringement established in s. 31 on its face does not purport to prohibit another regulator from imposing conditions, directly or indirectly, on the retransmission of works, *it is necessary to look behind the letter of the provision to its purpose, which is to balance the entitlements of copyright holders and the public interest in the dissemination of works.* The value for signal regime would effectively overturn the s. 31 exception to the copyright owners' s. 3(1)(f) communication right. *It would disrupt the balance established by Parliament.*<sup>117</sup>

As with section 21, Rothstein J. also relied upon the legislative history of the *Copyright Act* to buttress this conclusion, noting that when Parliament extended the section 3(1)(f) right to the retransmission of works by telecommunication in 1988, it adopted the section 31 regime in response to the question of whether the copyright owner's consent should be required for the retransmission of their works by television signals.<sup>118</sup> Accordingly, Parliament had made a "deliberate policy choice in enacting the compulsory licence exception, or user's rights, regime under s. 31(2)".<sup>119</sup>

These arguments did not impress the minority, who stated that "[t]he fact that Parliament may have decided not to impose royalties on the retransmission of local signals for the benefit of copyright owners has nothing to do with whether the BDUs can be required to compensate local stations for a different purpose, namely, to fulfill the conditions of their retransmission licence under the *Broadcasting Act*".<sup>120</sup> In their view, the fact that section 31(2)(b) required any retransmission to be "lawful under

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opposed to local signals alone. This aspect of s. 31(2) was the primary factor behind Nadon J.A.'s dissent in the FCA Decision, and was one of the main arguments addressed by the minority in the *Broadcasting Reference*. It would seem that Rothstein J. considered this aspect of s. 31(2)(d) to be largely irrelevant, since s. 31(2) did not permit Broadcasters to prohibit retransmission of either local or distant signals. Since the right at the heart of the VFS Regime was a right to prohibit retransmission, and not a mere royalty right akin to the one granted in respect of distant signals in s. 31(2)(d), Rothstein J.'s decision to avoid the distant/local distinction was a reasonable one.

<sup>117</sup> *Broadcasting Reference, supra*, note 1, at para. 70 (emphasis added). See also para. 76 ("The value for signal regime would rewrite the balance between the owners' and users' interests as set out by Parliament in the *Copyright Act*. Because the CRTC's value for signal regime is inconsistent with the purpose of the *Copyright Act*, it falls outside of the scope of the CRTC's licensing and regulatory jurisdiction under the *Broadcasting Act*").

<sup>118</sup> *Id.*, at paras. 74-75.

<sup>119</sup> *Id.*, at para. 78.

<sup>120</sup> *Id.*, at para. 116.

the *Broadcasting Act*” demonstrated “Parliament’s clear intention that the conditions placed on BDUs under the *Broadcasting Act* in furtherance of Canada’s broadcasting policy are ranked ahead of the BDUs’ statutory right to retransmit signals under s. 31(2) of the *Copyright Act*”.<sup>121</sup> However, Rothstein J. found that the reference to “lawful under the *Broadcasting Act*” in section 31(2)(b) was too general to suggest that Parliament intended “to empower a subordinate regulatory body to disturb the balance struck following years of studies”.<sup>122</sup>

As a final matter, Rothstein J. held that the VFS Regime was contrary to section 89 of the *Copyright Act*, which provides:

89. No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this section shall be construed as abrogating any right or jurisdiction in respect of a breach of trust or confidence.

Through its use of the word “Act” in section 89 rather than “enactment”, which the *Interpretation Act*<sup>123</sup> defines as including only statutes (and not also regulations, as in the case of an “enactment”), Rothstein J. found that Parliament intended to preclude the creation of copyright in subordinate legislation as opposed to a statute.<sup>124</sup> As he observed, “Parliament did not intend that a subordinate regulatory body could create copyright by means of regulation or licensing conditions”.<sup>125</sup> He then held that, because the VFS Regime would give Broadcasters a new right that was “functionally equivalent” to a copyright,<sup>126</sup> it was contrary to section 89,<sup>127</sup> even though the minority pointed out certain differences between this right and a copyright *per se*.<sup>128</sup>

My colleagues assert that there are functional differences between copyright and the proposed regulatory scheme. With respect, *the differences that they point to do not alter the fundamental functional equivalence between the proposed regime and a copyright*. Section 21 of the *Copyright Act* empowers broadcasters to prohibit the retransmission of

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<sup>121</sup> *Id.*, at para. 117.

<sup>122</sup> *Id.*, at para. 78.

<sup>123</sup> R.S.C. 1985, c. I-21.

<sup>124</sup> *Broadcasting Reference*, *supra*, note 1, at para. 80. It is notable that Rothstein J. reached this conclusion even though s. 89 states that copyright may be created “under” an Act of Parliament, and not merely “by” an Act of Parliament.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*, at para. 67.

<sup>127</sup> *Id.*, at para. 81.

<sup>128</sup> *Id.*, at para. 122.

their signals if certain conditions are met; the value for signal regime does exactly the same thing. ... Describing this new right granted to broadcasters under the value for signal regime as a series of regulatory changes does not alter the true character of the right being created. *Not calling it copyright does not remove it from the scope of s. 89.* If that type of repacking was all that was required, s. 89 would not serve its intended purpose of restricting the entitlement to copyright to grants under and in accordance with Acts of Parliament.<sup>129</sup>

## V. IMPLICATIONS OF THE *BROADCASTING REFERENCE*

The *Broadcasting Reference* has the potential to be a tremendously important decision, with implications for many different public bodies and areas of the law. The discussion that follows explores these implications as they relate to the jurisdiction of the CRTC, the intersection between copyright and communications law, and conflict resolution in the area of statutory interpretation and constitutional law.

### 1. New Limits on the Jurisdiction of the CRTC

It is difficult to overstate the significance of the *Broadcasting Reference* to the jurisdiction of the CRTC. The Supreme Court effectively overruled its earlier decision in *CKOY* and narrowed the CRTC's jurisdiction under the *Broadcasting Act* for the first time since *Confederation Broadcasting*,<sup>130</sup> even though this was not necessary to decide the appeal as it did, and even though the CRTC made an undisputed finding that its actions were necessary to further the policy objectives of the *Broadcasting Act*.<sup>131</sup> The test that must now be met for the CRTC to acquire jurisdiction under the *Broadcasting Act*, in

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<sup>129</sup> *Id.*, at para. 82 (emphasis added).

<sup>130</sup> See *supra*, note 19. While the Court had also narrowed the CRTC's jurisdiction in *Barrie Public Utilities*, *supra*, note 52, the power which the CRTC purported to exercise in that case flowed from the *Telecommunications Act*, not the *Broadcasting Act*.

<sup>131</sup> It may be noted that the *Broadcasting Reference* did not involve an appeal from a CRTC decision respecting its own jurisdiction, but rather a reference. As a result, there was no need for the Court to consider whether the CRTC was entitled to deference. It is unclear what effect this had on the majority's judgment. While there is some suggestion that reasonableness is the appropriate standard of review for certain jurisdictional decisions of the CRTC (see *Bell Aliant*, *supra*, note 54, at paras. 1, 24, 26, 34-35, 37-39, 42, 55-56, 59 and 77), the bulk of the Court's case law holds that CRTC jurisdictional issues should be reviewed on a correctness standard: see *Bell Canada*, *supra*, note 44, at 1743-47; *Shaw*, *supra*, note 47, at para. 31; and *Barrie Public Utilities*, *supra*, note 52, at paras. 9-19.

circumstances where it seeks to perform a licensing or regulation-making function and where there is no alleged conflict with a related statute such as the *Copyright Act*, would appear to be as follows:

- (a) The power must be derived expressly or by necessary implication from either a specific jurisdiction-conferring provision or a general regulation-making or licensing provision, not merely from the policy objectives in section 3(1) themselves.
- (b) If the power flows from a specific jurisdiction-conferring provision (e.g., the ability in section 10(1)(a) to make a regulation “respecting the proportion of time that shall be devoted to the broadcasting of Canadian programs”), it must be exercised in furtherance of the broadcasting policy objectives in section 3(1) (and also, given section 5(1), in a manner consistent with the *Radiocommunication Act*, any Cabinet directions issued under the *Broadcasting Act* and the regulatory policy objectives in section 5(2)).
- (c) If the power flows from a general regulation-making or licensing provision (e.g., the power in section 9(1)(h) to impose such conditions on licensees “as the Commission deems appropriate”, or the power in section 10(1)(k) to make regulations respecting such matters “as it deems necessary for the furtherance of its objects”), then:
  - (i) the power must be exercised in furtherance of the broadcasting policy objectives in section 3(1) (and also, given section 5(1), in a manner consistent with the *Radiocommunication Act*, any Cabinet directions issued under the *Broadcasting Act* and the regulatory policy objectives in section 5(2)); and
  - (ii) the power must also pertain to a matter analogous to one of the specific fields of regulation set out in section 10(1) or (presumably) section 9(1),<sup>132</sup> which relate primarily to matters of culture as opposed to, e.g., “exclusive control rights for broadcasters” or the “direct economic relationship between the BDUs and the broadcasters”.<sup>133</sup>

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<sup>132</sup> The reason the power may only “presumably” be analogous to one of the specific fields of regulation in s. 9(1) is that, as discussed at footnote 88 above, Rothstein J. focused solely upon the character of the specific powers in s. 10(1) — not those in s. 9(1) — when defining the ambit of the general authority in s. 9(1)(b)(i) and (h) (in addition to that of the general authority in s. 10(1)(k)): see the *Broadcasting Reference*, *supra*, note 1, at paras. 29 and 32. It stands to reason, however, that the general authority in s. 9(1)(b)(i) and (h) should be informed in part by the specific fields of regulation in s. 9 itself.

<sup>133</sup> At para. 28 of the *Broadcasting Reference*, *id.*, Rothstein J. also suggested that the CRTC’s discretionary statutory powers must be exercised “within the confines of the ... principles

Future litigation involving this test will likely focus upon the final requirement, and in particular, what is included within the scope of the CRTC's "primarily cultural" residual jurisdiction under the general licensing and regulation-making provisions of the *Broadcasting Act*. The *Broadcasting Reference* appears to exclude the "direct" regulation of economic rights from this authority. Accordingly, save where the CRTC acts in accordance with a specific jurisdiction-conferring provision that gives it power over an economic field (e.g., section 9(1)(f), which allows it to block distribution contracts between licensees and telecommunications carriers, section 10(1)(l), which allows it to make regulations requiring licensees to submit information regarding their financial affairs, or section 11(1)(c), which allows it to make regulations requiring the payment of licence fees), it is unlikely to have the power to directly intervene in economic relationships. That would appear to be so even where — as in the *Broadcasting Reference* itself — it does so in order to further the cultural policy objectives in section 3(1).<sup>134</sup> Importantly, then, the *Broadcasting Reference* imposes cultural limits upon the *means* that the CRTC may employ to achieve its policy ends, not merely upon those ends themselves, as *CKOY* had done.

Given these developments, it is open to question whether other conduct by the CRTC represents a valid exercise of its broadcasting powers. It is also interesting to consider what impact the *Broadcasting Reference*

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generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation". It is interesting to note that a similar test to that set out above would likely apply to the CRTC's jurisdiction under the *Telecommunications Act*, given the finding in *Barrie Public Utilities*, *supra*, note 52, that the policy objectives in s. 7 of the *Telecommunications Act* are not themselves power-conferring. However, as discussed below, the fields of regulation contained in the specific jurisdiction-conferring provisions of the *Telecommunications Act* have a different focus than in the *Broadcasting Act* (and unlike in the case of its broadcasting jurisdiction, which can arise only under the *Broadcasting Act*, the CRTC may acquire telecommunications jurisdiction under a special Act, not merely under the *Telecommunications Act* itself: see s. 12 of the *CRTC Act* and s. 47 of the *Telecommunications Act*). As well, pursuant to s. 47 of the *Telecommunications Act*, the CRTC's powers derived from either a specific jurisdiction-conferring provision or a general regulation-making or licensing provision would have to be exercised in furtherance of the telecommunications policy objectives in s. 7 and the rate objectives in s. 27, and in a manner consistent with any Cabinet directions or ministerial technical standards issued under the *Telecommunications Act*: see *Telus Communications Inc. v. Canada (C.R.T.C.)*, [2004] F.C.J. No. 1808, [2005] 2 F.C.R. 388, at paras. 47-50 (F.C.A.), leave to appeal refused [2004] S.C.C.A. No. 573 (S.C.C.).

<sup>134</sup> Conversely, where the CRTC does act in accordance with a specific power-conferring provision involving economic matters, then the *Broadcasting Reference* suggests that the handful of broadcasting policy objectives in s. 3(1) concerned with economics should be relevant to the scope of its discretion, at least insofar as they may constrain it.

may have upon the CRTC's jurisdiction under the *Telecommunications Act*. As discussed earlier, the *Telecommunications Act* contains many more specific jurisdiction-conferring provisions than the *Broadcasting Act*. As a result, issues pertaining to the CRTC's residual jurisdiction under the general provisions of the *Telecommunications Act* are likely to arise with less frequency. Where such issues do arise, they may also have a very different outcome than under the *Broadcasting Act*, given the different policy objectives of the two statutes outlined above.<sup>135</sup>

Further, in contrast to the "primarily cultural" focus of the *Broadcasting Act*, the *Telecommunications Act* is very much concerned with matters of economic regulation.<sup>136</sup> Indeed, section 7(c) of the *Telecommunications Act* provides that one of the policy objectives of the statute is "to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications". As well, section 34(3) of the *Telecommunications Act* provides that the CRTC may only forbear from regulating a telecommunications service where this would be unlikely to impair "the establishment or continuance of a competitive market for that service". The implication is that, in the absence of forbearance, the CRTC's powers include the direct regulation of economic relationships.<sup>137</sup>

## 2. The Intersection Between Copyright and Communications Law

Another significant implication of the *Broadcasting Reference* concerns the weight that the Supreme Court attributed to the *Copyright Act* in determining the scope of the CRTC's jurisdiction under the *Broadcasting Act*. In light of the judgment, the *Copyright Act* must now be considered an integral component of the statutory scheme governing the CRTC. Indeed, the Court effectively elevated it to the status of a "fourth pillar" of Parliament's communications regime, alongside the *Broadcasting Act*, the *Telecommunications Act* and the *Radiocommunication Act*.<sup>138</sup>

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<sup>135</sup> See the text accompanying footnotes 6-15 above.

<sup>136</sup> See Handa, *supra*, note 13, at para. 15.20; and M. Ryan, *Canadian Telecommunications Law and Regulation*, looseleaf (Toronto: Carswell, 2005), at para. 600.

<sup>137</sup> See also s. 35(1), which states that the CRTC may order carriers to provide a telecommunications service in a particular manner in order to achieve the goal of just and reasonable rates, where the relevant service is "not subject to a degree of competition that is sufficient to ensure just and reasonable rates and prevent unjust discrimination and undue or unreasonable preference or disadvantage".

<sup>138</sup> See the *Broadcasting Reference*, *supra*, note 1, at para. 34:

In *Bell ExpressVu*, at para. 52, Justice Iacobucci also considered the *Copyright Act* when interpreting a provision of the *Radiocommunication Act*, saying that "there is a connection between these two statutes". Considering that the *Broadcasting Act* and the

It will therefore be vital to consider the *Copyright Act* in future disputes regarding the CRTC. The CRTC may not acquire jurisdiction under either the *Broadcasting Act* or the *Telecommunications Act* where this would conflict with the *Copyright Act*, save perhaps in extraordinary circumstances where such a conflicting interpretation of the two statutes is unavoidable. In the *Broadcasting Reference*, this meant that the CRTC could not create a right that derogated from the carefully balanced scheme in the *Copyright Act*, nor, in light of section 89, a right that was the “functional equivalent” of a copyright. Yet the types of conflict that may arise between the CRTC’s enabling legislation and the *Copyright Act* are potentially much broader, and are likely to arise again in future cases.

An example of this is the recent decision in *BCE Inc. v. Telus Communications Co.*, which was decided after the *Broadcasting Reference*, and refers to it.<sup>139</sup> The case involved an appeal from a CRTC decision which found that Bell conferred an undue preference upon itself by entering into agreements with the National Football League (“NFL”) and National Hockey League (“NHL”) to acquire exclusive programming rights to some of their content for its mobile platform. As part of that decision, the CRTC ordered Bell to file a report outlining how it would ensure that Telus had access to the programming. The Federal Court of Appeal granted leave to appeal from the decision, based partly on the argument that the CRTC’s order was inconsistent with the rights of the NFL and NHL under the *Copyright Act*. While the appeal was later dismissed on the ground of mootness, the Court of Appeal left the copyright issue open, and noted that “this Court would benefit in a future case from a ruling of the Commission that takes [the *Broadcasting Reference*] into account”.<sup>140</sup>

Plainly, the CRTC’s jurisdiction over the regulation of content in the *Broadcasting Act* creates a serious potential for conflicts with the *Copyright Act*. It is unlikely, therefore, that the *Broadcasting Reference* will be the last word on this subject.

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*Radiocommunication Act* are clearly part of the same interconnected statutory scheme, it follows, in my view, that there is a connection between the *Broadcasting Act* and the *Copyright Act* as well. The three Acts (plus the *Telecommunications Act*) are part of an interrelated scheme.

<sup>139</sup> *BCE Inc. v. Telus Communications Co.*, [2013] F.C.J. No. 206, 2013 FCA 58 (F.C.A.).

<sup>140</sup> *Id.*, at para. 7.

### 3. A Return to the Doctrine of Occupied Field?

A final aspect of the *Broadcasting Reference* that may be of interest is the Court's approach to the issue of "conflict" between two statutes. In holding that the *Broadcasting Act* would conflict with the *Copyright Act* if the former were found to authorize the VFS Regime, Rothstein J. ostensibly relied upon the concept of "purpose" conflict. Nonetheless, the "purpose" of the *Copyright Act* which he found would be violated by the VFS Regime was simply the goal of creating an "appropriate balance" between copyright owners and users through its provisions. Even though the *Copyright Act* did not state that the section 21 copyright and section 31 compulsory licence regime were intended to be exclusive, Rothstein J. found that they were exclusive, based on Parliament's inaction in the face of numerous legislative proposals to grant Broadcasters more extensive rights. In other words, Rothstein J. found that the "purpose" of the *Copyright Act* was to serve as a complete code for regulating the copyrights of Broadcasters in communication signals and the programs transmitted by them. By contrast, the minority judgment emphasized that the limited rights conferred upon Broadcasters under sections 21 and 31 did not expressly prevent the CRTC from granting them additional rights under the *Broadcasting Act*.<sup>141</sup>

The majority's approach to purpose conflict thus bears considerable resemblance to the doctrine of "occupied field". This doctrine has been the subject of several decisions by the Supreme Court in the area of constitutional law, where it was famously rejected in *O'Grady v. Sparling*.<sup>142</sup> The Court recently affirmed this point in *Canadian Western Bank v. Alberta*:

Nevertheless, there will be cases in which imposing an obligation to comply with provincial legislation would in effect frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions. ... [T]he impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also be sufficient to trigger the application of the doctrine of federal paramountcy. This point was recently reaffirmed in *Mangat and in Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13.

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<sup>141</sup> See the *Broadcasting Reference*, *supra*, note 1, at paras. 111 and 115-116.

<sup>142</sup> [1960] S.C.J. No. 48, [1960] S.C.R. 804, at 806-807 and 811-12 (S.C.C.).

That being said, care must be taken not to give too broad a scope to *Hall, Mangat* and *Rothmans*. *The Court has never given any indication that it intended, in those cases, to reverse its previous decisions and adopt the “occupied field” test it had clearly rejected in O’Grady in 1960.* The fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject. As this Court recently stated, “to impute to Parliament such an intention to ‘occup[y] the field’ in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since at least *O’Grady*” (*Rothmans*, at para. 21).<sup>143</sup>

Justice Rothstein’s judgment could be viewed as inconsistent with this jurisprudence, since he found sections 21 and 31 to be exhaustive even though there was no “clear statutory language” in the *Copyright Act* indicating that Parliament had intended to occupy the field through them. Moreover, while the *Broadcasting Reference* was not a constitutional case, Rothstein J. relied upon paramountcy case law in defining the two types of conflict that could engage the presumptions of statutory interpretation he ultimately invoked. It stands to reason, therefore, that the type of conflict which Rothstein J. identified in the *Broadcasting Reference* may also be sufficient to engage the paramountcy doctrine.

That said, it appears unlikely that the majority obliquely intended to resurrect the doctrine of occupied field through the *Broadcasting Reference*, particularly in the area of constitutional law, which was not the focus of its judgment. The more interesting aspect of the decision is that it illustrates the flexibility of purpose conflict, and shows how concepts similar to the doctrine of occupied field can be imported under its rubric. Despite the Court’s statement in *Canadian Western Bank* that purpose conflict should not be taken as a return to the doctrine of occupied field, the *Broadcasting Reference* underscores how the purpose conflict test can be used to achieve virtually the same result.

In the field of copyright, future decisions involving purpose conflict are likely to interpret the doctrine quite broadly. Indeed, the Supreme Court has frequently held that “copyright is a creature of statute and the rights and remedies provided by the *Copyright Act* are exhaustive”.<sup>144</sup>

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<sup>143</sup> [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, at paras. 73-74 (S.C.C.) (emphasis added). *Cf. Husky Oil Operations v. M.N.R.*, [1995] S.C.J. No. 77, [1995] 3 S.C.R. 453, at paras. 84-85 (S.C.C.).

<sup>144</sup> See, e.g., *Euro-Excellence Inc. v. Kraft Canada Inc.*, [2007] S.C.J. No. 37, [2007] 3 S.C.R. 20, at paras. 3 and 8 (S.C.C.).

Accordingly, statutory bodies who seek to regulate in areas covered by the *Copyright Act* must tread very carefully indeed.

## VI. CONCLUSION

The majority's decision in the *Broadcasting Reference* to limit the CRTC's residual jurisdiction to the specific fields of power conferred in its enabling statute, regardless of whether that jurisdiction is notionally exercised in furtherance of one of its statutory policy objectives, suggests that the ends no longer justify the means for the CRTC. In the context of the *Broadcasting Act*, the result appears to be that the CRTC either must exercise one of the specific powers granted to it by the statute, which as the majority in the *Broadcasting Reference* held are "primarily cultural", or must limit the exercise of its general powers to primarily cultural areas. The CRTC should not go beyond this cultural mandate to create exclusive control rights or regulate direct economic relationships, save insofar as this is authorized under a specific jurisdiction-conferring provision. Furthermore, it should ensure that its decisions respect related legal regimes, such as the one embodied in the *Copyright Act*.

That being said, the ultimate significance of the *Broadcasting Reference* will depend upon whether future generations of the Court choose to follow Rothstein J.'s approach, or instead limit it to its facts, as the Court in *Bell Aliant* sought to do to its earlier decision in *Barrie Public Utilities*. In this respect, the composition of the panel who heard the *Broadcasting Reference* may be significant. One member of the majority, Fish J., has already retired from the Court, and two other members of the majority — LeBel and Rothstein JJ. — will approach the mandatory retirement age within the next two-and-a-half years. By contrast, while one member of the minority has already retired (Deschamps J.), none of the remaining three judges in the minority will approach the mandatory retirement age for nearly eight years.

While Rothstein J.'s reasons may be viewed as radical by some, given the traditional approach to the CRTC taken in *CKOY*, his fundamental concern was to ensure that the CRTC not be permitted to establish the limits of its own jurisdiction.<sup>145</sup> Interestingly, when the Supreme Court

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<sup>145</sup> See *Broadcasting Reference*, *supra*, note 1, at para. 28:

That is the fundamental point. Were the only constraint on the CRTC's powers under s. 10(1) to be found in whether the enacted regulation goes towards a policy objective in

constitutionalized the right to judicial review in *Crevier v. Quebec (Attorney General)*, Laskin C.J.C. expressed a similar concern, noting that “[i]t cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review”.<sup>146</sup> The Court affirmed this principle more recently in *Dunsmuir v. New Brunswick*,<sup>147</sup> where it said that “neither Parliament nor any legislature can completely remove the courts’ power to review the actions and decisions of administrative bodies”.<sup>148</sup> In other words, it is fundamental to the rule of law that the jurisdiction of statutory bodies like the CRTC not be self-executing, save perhaps in extraordinary situations where a federal enactment expresses this result with irresistible clarity.<sup>149</sup> Justice Rothstein’s insistence that the generally worded provisions of the *Broadcasting Act* should be limited by its specific ones reflects an awareness of this principle. And it cannot be doubted that there are problems with attributing an unlimited scope to general statutory language. As Lord Hoffmann recognized in a different context, blind reliance on general statutory words carries “too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process”.<sup>150</sup> Rather, “the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost”.<sup>151</sup>

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s. 3(1), the only limit to the CRTC’s regulatory power would be its own discretionary determination of the wisdom of its proposed regulation in light of any policy objective in s. 3(1). This would be akin to unfettered discretion.

<sup>146</sup> *Crevier v. Quebec (Attorney General)*, [1981] S.C.J. No. 80, [1981] 2 S.C.R. 220, at 238 (S.C.C.). See also 237 (“I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review”).

<sup>147</sup> [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190, at para. 31 (S.C.C.) [hereinafter “*Dunsmuir*”].

<sup>148</sup> *Id.*, at para. 52. See also *MacMillan Bloedel Ltd. v. Simpson*, [1995] S.C.J. No. 101, [1995] 4 S.C.R. 725, at paras. 15 and 35 (S.C.C.).

<sup>149</sup> Despite the statement from *Dunsmuir* quoted above, there remains some uncertainty over whether Parliament, as opposed to the provincial legislatures, has the constitutional authority to make a statutory body’s non-constitutional decisions completely immune from judicial review: see P. Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf (Toronto: Carswell, 2007), vol. 1, at para. 7.3(f). It is interesting to consider whether the *Broadcasting Reference* has an impact on this debate. In any event, even assuming that it is open to Parliament to adopt such a measure, it should require the clearest statutory language to achieve this result: see H. Woolf *et al.*, *De Smith’s Judicial Review*, 7th ed. (London: Sweet & Maxwell, 2013), at 263.

<sup>150</sup> *R. v. Secretary of State for the Home Department, Ex Parte Simms*, [1999] 3 All E.R. 400, [2000] 2 A.C. 115, at 131 (H.L.).

<sup>151</sup> *Id.*

