

FEDERAL COURT OF APPEAL

B E T W E E N:

**BELL CANADA, BELL MOBILITY INC., MTS INC., NORTHERNTEL,
LIMITED PARTNERSHIP, ROGERS COMMUNICATIONS PARTNERSHIP,
SASKATCHEWAN TELECOMMUNICATIONS, TÉLÉBEC, SOCIÉTÉ EN
COMMANDITE and TELUS COMMUNICATIONS COMPANY**

Appellants

- and -

**AMTELECOM LIMITED PARTNERSHIP, BRAGG COMMUNICATIONS INC., DATA &
AUDIO-VISUAL ENTERPRISES WIRELESS INC., GLOBALIVE WIRELESS
MANAGEMENT CORP., HAY COMMUNICATIONS CO-OPERATIVE LIMITED, HURON
TELECOMMUNICATIONS CO-OPERATIVE LIMITED, MORNINGTON
COMMUNICATIONS CO-OPERATIVE LIMITED, NEXICOM MOBILITY INC.,
NORTHWESTEL INC., PEOPLE'S TEL LIMITED PARTNERSHIP, PUBLIC MOBILE INC.,
QUADRO COMMUNICATIONS CO-OPERATIVE INC., QUEBECOR MEDIA INC.,
SOGETEL MOBILITÉ INC., THUNDER BAY TELEPHONE, VAXINATION
INFORMATIQUE, CONSUMERS' COUNCIL OF CANADA, DIVERSITYCANADA
FOUNDATION, MEDIA ACCESS CANADA, MOUVEMENT PERSONNE D'ABORD DU
QUÉBEC, PUBLIC INTEREST ADVOCACY CENTRE, CONSUMERS' ASSOCIATION OF
CANADA, COUNCIL OF SENIOR CITIZENS' ORGANIZATIONS OF BRITISH
COLUMBIA, OPENMEDIA.CA, SERVICE DE PROTECTION ET D'INFORMATION DU
CONSOMMATEUR, UNION DES CONSOMMATEURS, CANADIAN WIRELESS
TELECOMMUNICATIONS ASSOCIATION, COMMISSIONER FOR COMPLAINTS FOR
TELECOMMUNICATIONS SERVICES INC., COMPETITION BUREAU OF CANADA,
GLENN THIBEAULT, HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA,
GOVERNMENT OF MANITOBA, GOVERNMENT OF THE NORTHWEST TERRITORIES,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, ATTORNEY GENERAL OF
QUEBEC, GOVERNMENT OF YUKON, OFFICE OF THE PRIVACY COMMISSIONER OF
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APPELLANTS' MEMORANDUM OF FACT AND LAW

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PART I – CONCISE STATEMENT OF FACT

Overview

1. The appellants provide wireless services to millions of customers across Canada. They appeal from the Canadian Radio-television and Telecommunications Commission's Wireless Code decision, Telecom Regulatory Policy CRTC 2013-271, insofar as the decision purports to give the Wireless Code that it establishes application to contracts concluded between wireless service providers and their customers before the Wireless Code came into force on 2 December 2013.

2. The Wireless Code decision interferes with the appellants' contractual rights: it purports to render unenforceable important terms of millions of wireless service contracts entered into before the Wireless Code came into force. Among these terms are those that make customers liable for early cancellation fees if they terminate early a fixed-term contract under which they were provided with a subsidized wireless device. In purporting to render unenforceable these and other contractual terms, the Wireless Code would deprive the appellants of significant benefits of their service contracts with millions of customers, while they remain subject to the burdens of those same contracts.

3. Unless its enabling statute gives it the power to do so, either expressly or by necessary implication, a rule-making body has no authority to make rules that affect vested rights, including contractual rights, or to impose rules that apply retrospectively. The *Telecommunications Act* gives the CRTC no express or implied power to interfere with vested rights or to engage in retrospective rule-making. The CRTC therefore exceeded its jurisdiction and erred in law by purporting to apply the Wireless Code to contracts entered into between wireless service providers and their customers before the Wireless Code came into force. This appeal should be allowed, and the CRTC's Wireless Code decision set aside insofar as it purports to render the Wireless Code applicable to contracts entered into before the Code came into force.

The appellants

4. The appellants are wireless service providers that provide mobile telephone services to consumers and businesses across Canada. They were parties in the Wireless Code proceeding before the CRTC.¹

Types of wireless service contracts

5. Wireless services are offered to customers either on a pre-paid basis or under a contract that provides that the customer will pay for the service on a monthly basis. Contracts providing for the latter type of services, known as post-paid services, are by far the more common. In offering post-paid services to their customers, wireless service providers enter into fixed- or indeterminate-term (i.e., month-to-month) wireless service contracts.²

6. Before the Wireless Code came into force, fixed-term contracts ranged in length from one to three years.³ Customers who entered into fixed-term contracts usually did so in order to obtain a wireless device for free or at a significantly reduced purchase price.

7. Consumers overwhelmingly chose three-year fixed-term contracts over other available terms. For example, 90% of all contracts entered into by SaskTel customers were for a three-year fixed term, while only 3% of customers chose one- or two-year terms.⁴ This was largely because of the favourable device subsidies offered under three-year contracts, including the possibility of obtaining a device for free.⁵

8. The ordinary retail price of a new wireless device depends on the device, but in some cases, can exceed \$700. Device subsidies allowed many customers to obtain wireless devices at

¹ Telecom Notice of Consultation CRTC 2012-557, para. 21, Appeal Book, Tab 8.

² Final Written Comments of CWTA at para. 45, Appeal Book, Tab 50; Reply Comments of Rogers at para. 36, Appeal Book, Tab 29.

³ Reply Comments of Rogers, paras. 36-37, Appeal Book, Tab 29; Final Written Comments of Rogers, para. 7, Appeal Book, Tab 53; Final Written Comments of Bell, paras. 28-29, Appeal Book, Tab 51.

⁴ Final Written Comments of Rogers, para. 7, Appeal Book, Tab 53; Transcript, Vol. 4 at 8761, Appeal Book, Tab 39.

⁵ Final Written Comments of Rogers, para. 7, Appeal Book, Tab 53; Transcript, Vol. 4 at 7099, Appeal Book, Tab 39.

reduced prices.⁶ Three-year contracts provided a consumer-friendly way of lowering wireless device prices compared to the alternative of requiring the customer to pay several hundred dollars up front for such a device.⁷

Early cancellation fees before the Wireless Code came into force

9. Under all contracts providing for a device subsidy entered into before the Wireless Code came into force, the wireless service provider is entitled to recover a portion of the subsidy from the customer if the customer terminates the contract before the end of the term.

10. These contracts use a variety of different mechanisms to compensate the carrier for the device subsidy if the customer terminates the contract before it expires. The mechanism varies by contract and by carrier, but generally involves a cancellation fee for early termination which declines over time.

11. Under some contracts, the cancellation fee declines at a fixed rate over the term of the contract so that it is at zero at the end of the term. If a customer cancels a contract early, the customer must pay an early cancellation fee in an amount determined by reference to the unpaid portion of the device subsidy, which declines at a linear rate through the contract term.⁸ For example, using a \$450 device and straight-line amortization, a customer obtains a \$150 device subsidy in exchange for entering into a one-year fixed-term contract, a \$300 device subsidy in exchange for entering into a two-year fixed-term contract, and a \$450 device subsidy in exchange for entering into a three-year fixed-term contract. If the customer cancels the three-year contract after one year, the customer is liable to repay the remaining \$300 device subsidy at that time, which represents the remaining two years of the three-year contract.⁹

⁶ Reply Comments of Rogers, paras. 36-37, Appeal Book, Tab 29.

⁷ Reply Comments of Bell, para. 45, Appeal Book, Tab 25.

⁸ TELUS Oral Presentation, pp. 6-7, Appeal Book, Tab 34; Transcript Vol. 1 at 1645-46, 1730-37, Appeal Book, Tab 32.

⁹ Final Written Comments of TELUS, paras. 79-80, Appeal Book, Tab 56; Final Written Comments of MTS, para. 10, Appeal Book, Tab 52; Transcript, Vol. 1 at 1646, Appeal Book, Tab 32; Responses to Interrogatories of TELUS, page 81, Appeal Book, Tab 24; Responses to Interrogatories of MTS, Appendix 1, Appeal Book, Tab 21.

12. Under other contracts, a device subsidy is treated as a grant to the customer that never has to be repaid, subject to the customer maintaining the service for the agreed-upon term. If the customer terminates the contract early, the carrier has the right to receive a cancellation fee, calculated according to the number of months remaining in the contract term or another formula set out in the contract.¹⁰

13. The situation is similar for indeterminate-term contracts involving a device subsidy, except that device subsidy reduction mechanisms are tied to a percentage of the customer's monthly bills rather than a fixed period of time. When carriers offer a device subsidy based on a monthly contract, the customer's device subsidy is paid off gradually as a percentage of each monthly bill, until it is paid off in full. If the customer cancels the contract, the customer is liable to pay any outstanding balance of the device subsidy.¹¹

The Wireless Code

14. The Wireless Code decision establishes the Wireless Code, a set of mandatory requirements applicable to all wireless service contracts entered into between wireless service providers and individuals or small businesses.¹² The Wireless Code imposes requirements dealing with early cancellation fees, data roaming and overage charges, mobile device unlocking, security deposits and device disconnection, among others.¹³

15. The Wireless Code's requirements with respect to early cancellation fees are set out at Section G of the Code. In the case of fixed-term contracts under which a customer received a subsidized device upon signing the contract, the following requirements apply:

¹⁰ Final Written Comments of Rogers, paras. 93-95, Appeal Book, Tab 53; Transcript, Vol. 2 at 3717-20, Appeal Book, Tab 35; Transcript Vol. 4 at 7053-61, 7074-79, Appeal Book, Tab 39; Reply Comments of SaskTel at para. 18, Appeal Book, Tab 30; Responses to Interrogatories of Rogers, Appendix A pages 5, 10, Appeal Book, Tab 23; Response to Interrogatory #3 of SaskTel, pages 5-6, Supplementary Appeal Book, Tab 75.

¹¹ Transcript, Volume 2 at 4025-36, Appeal Book, Tab 35; Transcript, Vol. 3 at para. 5964, Appeal Book, Tab 37; Transcript, Vol. 4 at 7280, Appeal Book, Tab 39; Reply Comments of Rogers, para. 38, Appeal Book, Tab 29.

¹² Wireless Code decision, Appeal Book, Tab 2.

¹³ Wireless Code, Appeal Book, Tab 3, Appendix 1.

- (a) the early cancellation fee must not exceed the value of the device subsidy;
- (b) the early cancellation fee must be reduced by an equal amount each month, for the lesser of 24 months or the total number of months in the contract term; and
- (c) the early cancellation fee must be reduced to zero by the lesser of 24 months or the end of the contract term.¹⁴

16. When calculating the early cancellation fee for purposes of the Wireless Code, the value of the device subsidy is the retail price of the customer's mobile device minus the amount that the customer paid for the device when the contract was entered into. The retail price is the lesser of the manufacturer's suggested retail price and the price set for the device when it is purchased from the provider without a contract.¹⁵

Legal authority for establishment of the Wireless Code

17. In promulgating the Wireless Code, the CRTC relied on its authority under section 24 of the Act,¹⁶ which states:

The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.¹⁷

18. Until it established the Wireless Code, the CRTC had largely forborne from regulating the conditions applicable to wireless services contracts, as authorized by section 34 of the *Telecommunications Act* (the "Act").¹⁸

19. In Telecom Decision CRTC 2012-556, which led to the Wireless Code proceeding and the issuance of the Wireless Code decision, the CRTC stated that it considered it necessary to

¹⁴ Wireless Code, Section G, Appeal Book, Tab 3, Appendix 1.

¹⁵ Wireless Code, Section G, Appeal Book, Tab 3, Appendix 1.

¹⁶ Wireless Code decision, para. 394, Appeal Book, Tab 2.

¹⁷ *Telecommunications Act*, S.C. 1993, c. 38, s. 24.

¹⁸ See *e.g.* Telecom Decision CRTC 96-14, *Regulation of Mobile Telecommunications Services*; Telecom Decision CRTC 96-15, *Regulation of Wireless Services*; Telecom Decision CRTC 98-19, *Forbearance from Regulation of Mobile Wireless Services Provided by Municipally Owned Telephone Companies*.

impose a section 24 condition that all wireless service providers abide by a mandatory code to address the clarity and content of mobile wireless service contracts and related issues.¹⁹

20. Nothing in section 24 or elsewhere in the Act either expressly or impliedly gives the CRTC the power to impose mandatory conditions with respect to contracts that have already been concluded when those conditions first become mandatory.

Coming into force of the Wireless Code

21. The CRTC issued the Wireless Code decision on 3 June 2013. Paragraph 368 of the decision states:

[T]he Commission determines that all aspects of the Wireless Code will take effect on **2 December 2013**.

22. Paragraphs 369 and 394 of the Wireless Code decision provide the following with respect to contracts entered into or modified after the Wireless Code comes into force:

369. The Commission finds that where an obligation relates to a specific contractual relationship between a [wireless service provider] and a customer, the Wireless Code should apply if the contract is entered into, amended, renewed or extended on or after **2 December 2013**.

...

394. The Commission **directs** Canadian carriers that provide retail mobile wireless voice and data services to individuals and small business consumers to adhere to the rules set out in the attached Wireless Code, as a condition of providing these services pursuant to section 24 of the Act no later than **2 December 2013**.

23. With respect to contracts entered into before the Wireless Code comes into force, paragraph 369 states:

In addition, in order to ensure that all consumers are covered by the Wireless Code within a reasonable time frame, the Wireless Code should apply to all contracts, no matter when they are entered into, by no later than **3 June 2015**.

¹⁹ Telecom Decision CRTC 2012-556, para. 27, Appeal Book, Tab 6.

24. The CRTC's use of the word "should" in paragraph 369 created uncertainty as to whether the CRTC intended to make the Wireless Code applicable to pre-existing contracts on a mandatory or voluntary basis as of 3 June 2015. The Canadian Wireless Telecommunications Association, which represents the interests of some of the appellants among others, requested clarification from the CRTC as to whether the Wireless Code was intended to apply on a mandatory basis to contracts entered into before the Code comes into force.²⁰

25. The CRTC responded through its staff, in a letter dated 18 June 2013. The letter confirmed that the CRTC intended the Code to apply on a mandatory basis to all contracts after 3 June 2015, regardless of whether the contract was entered into before the Wireless Code comes into force. The letter stated (emphasis added):

It is clear that the Commission intended the final 3 June 2015 implementation date to be a mandatory date. Consequently, after 3 June 2015, early cancellation fees for **all** wireless service contracts will be determined in accordance with the formula set out in the Code.²¹

The application of the Wireless Code as of 3 June 2015 would affect millions of pre-existing wireless contracts

26. If the Wireless Code were to apply to all wireless contracts as of 3 June 2015, regardless of when they were entered into, millions of contracts entered into before the Wireless Code came into force would be affected.

27. Indeed, the Wireless Code would apply to any contract entered into before 2 December 2013 with a term that expires after 3 June 2015. This includes contracts entered into even before the CRTC issued the Wireless Code decision.

28. The appellants submitted to the CRTC, on a confidential basis, detailed evidence as to the number of contracts that would be affected if the Code were made applicable to their respective customer bases within one, two or three years of the promulgation of the Wireless Code.²² From

²⁰ Letter from CWTA to CRTC, June 12, 2013, Appeal Book, Tab 66.

²¹ Letter from CRTC staff to CWTA, June 18, 2013, Appeal Book, Tab 67.

²² MTS Response to UT5, p. 2, Appeal Book, Tab 44; Rogers Response to UT, p.3, Appeal Book, Tab 45; TELUS Response to UT14, pp.1-2, Appeal Book, Tab 49.

this confidential data, the CRTC concluded that approximately 80% of wireless customers would be covered by the Wireless Code by 3 June 2015 if the Code applied only to contracts entered into or modified after the Code came into force.²³

29. It follows that, absent paragraph 369 of the Wireless Code decision, which purports to make the Wireless Code applicable to all contracts as of 3 June 2015, 20% of all wireless contracts would not be subject to the Code by 3 June 2015. As of February 2013, there were more than 27 million wireless subscribers in Canada.²⁴ The Wireless Code decision therefore purports to apply to several million contracts entered into before the Wireless Code came into force.²⁵

30. In contrast, the evidence before the CRTC was that no pre-existing contracts would be affected if the Wireless Code applied only to pre-existing contracts as of three years after the Code came into force (2 December 2016).²⁶ This is because no fixed-term contracts with terms exceeding three years are offered in the marketplace.

Impact of application of the Wireless Code to pre-existing contracts

31. The application of the Wireless Code to contracts entered into before the Wireless Code came into force would override or render unenforceable substantial terms of these contracts.

32. The main terms of contracts that would be overridden are those relating to early cancellation fees. However, other terms would also be rendered unenforceable. As SaskTel explained at the CRTC hearing:

SaskTel's concern with retroactivity is that we have over 600,000 existing contracts with our customers by which we sold to each of them a package of services with a certain set of terms attached to that package of services. To now apply a different set of terms and conditions to those contracts via the Wireless Code, without the opportunity to reconsider the rest of the contractual relationship,

²³ Letter from CRTC staff to CWTA, June 18, 2013, Appeal Book, Tab 67.

²⁴ Transcript, Vol. 1 at 1250, Appeal Book, Tab 32.

²⁵ Letter from CRTC staff to CWTA, June 18, 2013, Appeal Book, Tab 67.

²⁶ MTS Response to UT5, p. 2, Appeal Book, Tab 44.

may leave a gap between the totality of what we thought we had contracted for and what would then be in place.²⁷

33. Take, for example, a three-year contract entered into on 3 May 2013, one month before the CRTC issued the Wireless Code decision. This contract, validly entered into and executed, would be in effect until 2 May 2016. It would specify such matters as the customer's rate plan, the amount of any device subsidy and the formula by which any early cancellation fees would be calculated.

34. But for the application of the Wireless Code, on 3 June 2015 there would be 11 months remaining on this three-year contract. If the customer were to decide to terminate the contract as of that date, he or she would be required to pay an early cancellation fee in accordance with the formula set out in the contract.

35. However, if the Wireless Code were to apply to this contract as of 3 June 2015, the customer would be entitled to terminate the contract without paying any early cancellation fee as of 3 June 2015, even though there would be 11 months remaining on the contract's term. This is because the Code requires that early cancellation fees be zero after two years, even if the device subsidy has not been fully repaid.

36. Effectively, after 3 June 2015, customers with pre-existing three-year contracts would be entitled to cancel their contracts after two years without repaying the unpaid amounts of the device subsidies that they are contractually obligated to repay. Wireless service providers would be prohibited by the Code from recovering those unpaid device subsidies from any of these customers.

37. Similarly, under many indeterminate-term contracts, the device subsidy is repaid according to a specified formula and may not be repaid in full within two years.²⁸ Therefore, customers who entered into indeterminate-term contracts before 3 June 2013 (before the Code

²⁷ Transcript, Vol. 3 at 8725, Appeal Book, Tab 37.

²⁸ Intervention of TELUS, para. 27, Appeal Book, Tab 19 ; Transcript, Volume 2 at 4025-36, Appeal Book, Tab 35; Transcript, Vol. 3 at para. 5964, Appeal Book, Tab 37; Transcript, Vol. 4 at 7280, Appeal Book, Tab 39; Reply Comments of Rogers, para. 38, Appeal Book, Tab 29.

was announced) may not have repaid their device subsidy in full by 3 June 2015, but would nevertheless be entitled to cancel their contracts without an early cancellation fee as of that date if the Code applies to them.

38. Therefore, applying the Wireless Code to pre-existing contracts would prohibit wireless service providers from recovering early cancellation fees to which they are entitled under their contracts, and for which they bargained in exchange for providing customers with device subsidies. These bargains were validly concluded both before the Wireless Code decision was issued and before the Code came into force.

Parties' position before the CRTC

39. During the Wireless Code proceeding, the appellants expressed the position that the CRTC has no jurisdiction to make the Wireless Code applicable to contracts entered into before the Wireless Code came into force.²⁹ In support of this position, SaskTel submitted a legal opinion which concluded that the CRTC lacked jurisdiction to engage in retrospective rule-making, and that rendering the Wireless Code applicable to pre-existing contracts would exceed the CRTC's jurisdiction under the Act.³⁰

40. The only respondent to raise a substantive objection to the appellants' position was Public Interest Advocacy Centre, which submitted that the CRTC has jurisdiction to impose conditions that have incidental rate effects if the purpose is to achieve a social justice policy.³¹ The respondent Union des consommateurs acknowledged that retroactive application of the early cancellation fee provisions would amount to a "puzzle."³² CIPPIC stated that "elements" of the

²⁹ Opening Statement of Bell, paras. 50-51, Appeal Book, Tab 38; Final Written Comments of Bell, paras. 77-80, Appeal Book, Tab 51; Intervention of Rogers at p. 24, Appeal Book, Tab 16; Final Written Comments of MTS, para. 35, Appeal Book, Tab 52; Intervention of SaskTel, para. 26, Appeal Book, Tab 18; Final Written Comments of SaskTel at paras. 18-24, Appeal Book, Tab 55; Intervention of TELUS, para. 62, Appeal Book, Tab 19; Written Reply Comments of TELUS, para. 50, Appeal Book, Tab 63; Transcript, Vol. 2 at 2744-56, 3625-28, Appeal Book, Tab 35; Transcript, Vol. 3 at 6991, Appeal Book, Tab 37.

³⁰ Final Written Comments of SaskTel, Appeal Book, Tab 55.

³¹ Final Written Comments of PIAC/CAC/COSCO, para. 50, Appeal Book, Tab 54.

³² Final Written Comments of Union des consommateurs, p. 26, Appeal Book, Tab 57.
[translation]

Code should apply to pre-existing contracts, but did not specify whether this included the provisions of the Code governing early cancellation fees.³³ Neither of them submitted that the CRTC had jurisdiction to impose the Code on pre-existing contracts that provide for early cancellation fees.

41. Despite the submissions made on this issue, the Wireless Code decision contains no analysis whatsoever of the CRTC's jurisdiction to make the Wireless Code applicable to pre-existing contracts.

PART II – POINTS IN ISSUE

42. The points in issue in this appeal are:

- (a) what is the standard of review applicable to the Wireless Code decision, insofar as it purports to make the Wireless Code applicable to contracts entered into before 2 December 2013; and
- (b) did the CRTC exceed its jurisdiction or err in law by purporting to make the Wireless Code applicable to contracts entered into before 2 December 2013.

PART III – SUBMISSIONS

43. The CRTC exceeded its jurisdiction and erred in law by purporting to render the Wireless Code applicable to contracts between wireless service providers and their customers entered into before the Wireless Code came into force. Even if the decision is reviewable on a reasonableness standard, it falls outside the range of reasonable decisions that the CRTC could have made based on the law and the record before it.

³³ Final Comments of CIPPIC, Appendix B, p. 3, Appeal Book, Tab 36.

Decision to apply the Wireless Code to pre-existing contracts is reviewable on a correctness standard

44. This appeal relates entirely to the CRTC’s jurisdiction under the Act to interfere with vested rights and engage in retrospective rule-making. Appeals from the CRTC on a question of jurisdiction outside the CRTC’s specialized expertise are reviewable on a correctness standard.³⁴

45. The CRTC has no specialized expertise in interpreting the Act to determine whether the Act grants it the power to interfere with vested rights or to engage in retrospective rule-making. This issue is a question of true jurisdiction in the narrow sense. It does not warrant any deference by this Court.³⁵

46. Further, whether a rule-making body has jurisdiction to make rules that interfere with vested rights or that have a retrospective effect is of fundamental importance to the legal system. The exercise of that jurisdiction involves a potential “flagrant violation of natural justice” and engages “aspects of the rule of law.”³⁶ The importance of the question calls for review by this Court on a correctness standard.³⁷

47. This is particularly the case in light of the CRTC’s failure to provide any analysis in the Wireless Code decision of its jurisdiction to make the Wireless Code applicable to pre-existing contracts, despite having received a legal opinion and submissions on this point.

Wireless Code decision interferes with vested rights and applies retrospectively

48. In purporting to apply to all pre-existing contracts by 3 June 2015, the Wireless Code decision interferes with the appellants’ vested rights and applies retrospectively.

³⁴ *Edmonton (City) v. 360Networks Canada Ltd./London Connect Inc.*, 2007 FCA 106; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28.

³⁵ *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 59; *Telus v. Canada (Attorney General)*, 2014 FC 1 at para. 59.

³⁶ *Upper Canada College v. Smith* (1920), 61 S.C.R. 413 at 417; *Apotex Inc. v. Merck & Co.*, 2011 FCA 329 at para. 53, leave to appeal to SCC refused (2012), 436 N.R. 382 (note).

³⁷ *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 60.

49. A rule interferes with vested rights if it purports to apply to rights under contracts that were entered into before the rule came into force.³⁸ Similarly, a rule has retrospective application if it imposes new results in respect of a past event, including a contract.³⁹

50. The appellants and other wireless service providers have entered into millions of contracts with customers throughout Canada that have terms that expire after 3 June 2015.⁴⁰ It follows that if the Wireless Code applies on a mandatory basis to all contracts after that date, the conditions set out in the Wireless Code will apply to all of those contracts that remain in effect as of 3 June 2015. For example, in the case of a three-year contract entered into on 3 May 2013, the conditions set out in the Wireless Code will apply to the contract as of 3 June 2015 – two years and one month into the contract’s three-year term.

51. To impose the Wireless Code’s requirements on contracts entered into before the Wireless Code comes into force would override and render unenforceable significant terms of contracts validly entered into by contracting parties. Among other things, wireless service providers would be prohibited from receiving the benefit of contracts they entered into (an early cancellation fee if a contract is terminated before its term ends) after they have already assumed the associated burden of those contracts (including providing the customer with a subsidized wireless device). This amounts to an interference with the vested rights that wireless service providers have under those contracts.

52. Further, the Wireless Code decision purports to give the Wireless Code retrospective application. If applied to pre-existing contracts, the Wireless Code decision would impose new conditions on contracts that were entered into before the Code came into force. This amounts to a retrospective application of new rules on pre-existing contracts.

³⁸ *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73 at paras. 30, 32, 37-38, 49; *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1997] 1 S.C.R. 271 at 282.

³⁹ *Épiciers Unis Métro-Richelieu Inc., division Éconogros v. Collin*, 2004 SCC 59 at para. 46.

⁴⁰ See paras. 28 and 29 above.

No jurisdiction to impair pre-existing contractual rights

Subordinate rule-makers have no jurisdiction to interfere with vested rights or to engage in retrospective rule-making

53. Both this Court and the Supreme Court of Canada have repeatedly held that a subordinate rule-maker like the CRTC has no power to make rules that interfere with vested rights, including contractual rights, or to make rules that apply retrospectively, unless its enabling statute confers that power either expressly or by necessary implication.⁴¹

54. A statute can only be interpreted to give a decision-maker this power by necessary implication if the power is “practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature.”⁴²

55. Where an enabling statute is silent, as is the case here, the rule-maker is presumed not to have the power to interfere with vested rights or to engage in retrospective rule-making.⁴³

56. The reasons for this important rule are obvious. To interfere with rights that were lawfully acquired is unfair and contrary to the rule of law. As the Supreme Court has noted in relation to the presumption against interference with vested rights:

[S]peaking generally it would not only be widely inconvenient but a flagrant violation of natural justice to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time.⁴⁴

57. This Court has explained the rationale for the rules in similar terms (emphasis added):

⁴¹ *Bell Canada v. C.T.E.A.*, [2003] 1 S.C.R. 884 at para. 47; *British Columbia (Attorney General) v. Parklane Private Hospital Ltd.*, [1975] 2 S.C.R. 47 at para. 16; *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684 at 690-692; *Ass’n Internationale des commis du détail v. Commission des Relations de Travail du Québec et al.*, [1971] S.C.R. 1043 at 1048; *Apotex Inc. v. Merck & Co.*, 2011 FCA 329 at para. 30, leave to appeal to SCC refused (2012), 436 N.R. 382 (note); *Casamiro Resource Corp. v. British Columbia (Attorney General)*, [1991] B.C.J. No. 1097 at 10 (B.C.C.A.); Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008), at p. 727.

⁴² *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para. 51.

⁴³ *Apotex Inc. v. Merck & Co.*, 2011 FCA 329 at para. 31, leave to appeal to SCC refused (2012), 436 N.R. 382 (note).

⁴⁴ *Upper Canada College v. Smith* (1920), 61 S.C.R. 413 at 417.

The concern of courts about unauthorized regulations that cause retrospective or retroactive effects or interfere with vested rights is founded upon aspects of the rule of law. Citizens choose how to act in the belief that the state will impose the legal consequences determined by the legal text discoverable at that time and not on other texts which were not in existence at the time of the relevant action. [...] *It is unfair to change the rules later and catch those who planned their affairs under the former law.*⁴⁵

CRTC has no jurisdiction to interfere with vested rights or to engage in retrospective rule-making

58. Section 24 of the Act, on which the CRTC relied in establishing the Wireless Code, allows the CRTC to impose conditions that wireless service providers must meet when offering and providing a telecommunications service.⁴⁶ It provides:

24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.

59. Section 24 does not, either expressly or by necessary implication, permit the CRTC to impose conditions on wireless carriers that interfere with vested contractual rights or that have retrospective application. To interpret section 24 as allowing the CRTC to impose conditions retrospectively is not “practically necessary” to achieve Parliament’s objective in enacting section 24.

60. No other provision in the Act authorizes the CRTC to interfere with vested rights or to engage in retrospective rule-making with respect to the conditions applicable to contracts entered into between wireless carriers and their customers. On the contrary, section 61 of the Act, which addresses the coming into force of the CRTC’s decisions, is silent as to whether the CRTC’s decisions may have retrospective effect.⁴⁷

⁴⁵ *Apotex Inc. v. Merck & Co.*, 2011 FCA 329 at para. 53, leave to appeal to SCC refused (2012), 436 N.R. 382 (note).

⁴⁶ *Telecommunications Act*, s. 24.

⁴⁷ *Telecommunications Act*, s. 61.

61. The Supreme Court of Canada has consistently held that the CRTC has no power to set rates retrospectively in the absence of a provision in the Act expressly allowing it to do so.⁴⁸

62. Further, the Supreme Court of Canada has already held that the CRTC has no power to issue guidelines or to set rates with retrospective application. With respect to guidelines, the Court stated that the CRTC's "guidelines, like all subordinate legislation, are subject to the presumption against retroactivity. Since the Act does not contain explicit language indicating an intent to dispense with this presumption, no guideline can apply retroactively."⁴⁹ This is because "[l]ike all powers to make subordinate legislation, the Commission's guideline power ... is strictly constrained."⁵⁰

63. There is no reason to treat the CRTC's condition-making power any differently. The CRTC has no jurisdiction to impose conditions on contracts entered into between wireless carriers and their customers before the Wireless Code came into force.

64. There is no basis for the position that Public Interest Advocacy Centre took before the CRTC that the CRTC has jurisdiction to engage in retrospective rule-making if its purpose is to achieve a social justice policy objective under section 7 of the Act.⁵¹ Nothing in section 7 or elsewhere in the Act grants the CRTC that power. Section 7 sets out the objectives of Canadian telecommunications policy. It does not give the CRTC any powers at all, let alone the power to make retrospective rules.⁵² The Centre's position is also contrary to the authorities, which establish that the CRTC does not have jurisdiction to interfere with vested rights and engage in retrospective rule-making. Further, since virtually all legislation can be said to have a social justice policy objective, it would also turn on its head the presumption that where legislation is

⁴⁸ *Bell Canada v. Canada (C.R.T.C.)*, [1989] 1 S.C.R. 1722 at paras. 44-46; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40 at paras. 59-63.

⁴⁹ *Bell Canada v. C.T.E.A.*, [2003] 1 S.C.R. 884 at para. 47.

⁵⁰ *Bell Canada v. C.T.E.A.*, [2003] 1 S.C.R. 884 at para. 50.

⁵¹ Final Written Comments of PIAC/CAC/COSCO, para. 50, Appeal Book, Tab 54.

⁵² *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476 at para. 42.

silent a rule-maker has no power to interfere with vested rights or engage in retrospective rule-making.⁵³

65. As set out above, the Wireless Code decision interferes with the Applicants' vested rights and purports to render the Wireless Code applicable retrospectively to millions of wireless service contracts by rendering unenforceable significant terms of those contracts.

66. The CRTC exceeded its jurisdiction and erred in law by purporting to give the Wireless Code this effect. Even if the decision is reviewable on a reasonableness standard, it falls outside the range of reasonable decisions that the CRTC could have made on the law and the record before it. This appeal should therefore be allowed.


PART IV – ORDER SOUGHT

67. The appellants respectfully request an order:

- (a) striking out the second sentence of paragraph 369 of the Wireless Code decision; and
- (b) granting the appellants their costs of this appeal.

January 24, 2013

ALL OF WHICH IS RESPECTFULLY SUBMITTED



John B. Laskin / Myriam Seers

Counsel for the Appellants

⁵³ *Re Royal Canadian Mounted Police Act (Canada)*, [1991] 1 F.C. 529 at paras. 34-35 (F.C.A.).

PART V – AUTHORITIES

CRTC DECISIONS

1. Telecom Decision CRTC 96-14, *Regulation of Mobile Telecommunications Services*
2. Telecom Decision CRTC 96-15, *Regulation of Wireless Services*
3. Telecom Decision CRTC 98-19, *Forbearance from Regulation of Mobile Wireless Services Provided by Municipally Owned Telephone Companies*

CASES

4. *Apotex Inc. v. Merck & Co.*, 2011 FCA 329, leave to appeal to SCC refused (2012), 436 N.R. 382
5. *Apotex Inc. v. Wellcome Foundation Ltd.* (1998), 81 C.P.R. (3d) 443 (Fed. C.A.)
6. *Ass'n Internationale des commis du détail v. Commission des Relations de Travail du Québec et al.*, [1971] S.C.R. 1043
7. *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4
8. *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28
9. *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40
10. *Bell Canada v. C.T.E.A.*, [2003] 1 S.C.R. 884
11. *Bell Canada v. Canada (C.R.T.C.)*, [1989] 1 S.C.R. 1722
12. *British Columbia (Attorney General) v. Parklane Private Hospital Ltd.*, [1975] 2 S.C.R. 47
13. *Casamiro Resource Corp. v. British Columbia (Attorney General)*, [1991] B.C.J. No. 1097 (B.C.C.A.)
14. *Del Zotto v. Canada (Minister of National Revenue - M.N.R.)* (2000), 257 N.R. 56 (Fed. C.A.)
15. *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73
16. *Dunsmuir v. New Brunswick*, 2008 SCC 9
17. *Edmonton (City) v. 360Networks Canada Ltd./London Connect Inc.*, 2007 FCA 106
18. *Épiciers Unis Métro-Richelieu Inc., division Éconogros v. Collin*, 2004 SCC 59
19. *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1997] 1 S.C.R. 271
20. *Martin v. Canada (Minister of Human Resources Development)* (1999), 252 N.R. 141
21. *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684
22. *R. v. S.(S.)*, [1990] 2 S.C.R. 254

23. *R. v. Walker*, [1970] S.C.R. 649
24. *Re Royal Canadian Mounted Police Act (Canada)*, [1991] 1 F.C. 529
25. *Telewizja Polsat S.A. v. Radiopol Inc.*, 2005 FC 1179
26. *Telus v. Canada (Attorney General)*, 2014 FC 1
27. *Upper Canada College v. Smith* (1920), 61 S.C.R. 413

SECONDARY SOURCES

28. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008)

APPENDIX A

STATUTES AND REGULATIONS

<i>Telecommunications Act</i> , S.C. 1993, c. 38	<i>Loi sur les télécommunications</i> , L.C. 1993, ch. 38
<p>Objectives</p> <p>7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives</p> <p style="padding-left: 40px;">(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;</p> <p style="padding-left: 40px;">(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;</p> <p style="padding-left: 40px;">(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;</p> <p style="padding-left: 40px;">(d) to promote the ownership and control of Canadian carriers by Canadians;</p> <p style="padding-left: 40px;">(e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;</p> <p style="padding-left: 40px;">(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;</p> <p style="padding-left: 40px;">(g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of</p>	<p>Politique</p> <p>7. La présente loi affirme le caractère essentiel des télécommunications pour l'identité et la souveraineté canadiennes; la politique canadienne de télécommunication vise à :</p> <p style="padding-left: 40px;">a) favoriser le développement ordonné des télécommunications partout au Canada en un système qui contribue à sauvegarder, enrichir et renforcer la structure sociale et économique du Canada et de ses régions;</p> <p style="padding-left: 40px;">b) permettre l'accès aux Canadiens dans toutes les régions — rurales ou urbaines — du Canada à des services de télécommunication sûrs, abordables et de qualité;</p> <p style="padding-left: 40px;">c) accroître l'efficacité et la compétitivité, sur les plans national et international, des télécommunications canadiennes;</p> <p style="padding-left: 40px;">d) promouvoir l'accession à la propriété des entreprises canadiennes, et à leur contrôle, par des Canadiens;</p> <p style="padding-left: 40px;">e) promouvoir l'utilisation d'installations de transmission canadiennes pour les télécommunications à l'intérieur du Canada et à destination ou en provenance de l'étranger;</p> <p style="padding-left: 40px;">f) favoriser le libre jeu du marché en ce qui concerne la fourniture de services de télécommunication et assurer l'efficacité de la réglementation, dans le cas où celle-ci est nécessaire;</p> <p style="padding-left: 40px;">g) stimuler la recherche et le développement au Canada dans le domaine des télécommunications ainsi que l'innovation en ce qui touche la fourniture de services dans ce domaine;</p> <p style="padding-left: 40px;">h) satisfaire les exigences économiques et sociales des usagers des services de</p>

<p>telecommunications services;</p> <p>(h) to respond to the economic and social requirements of users of telecommunications services; and</p> <p>(i) to contribute to the protection of the privacy of persons.</p>	<p>télécommunication;</p> <p>i) contribuer à la protection de la vie privée des personnes</p>
<p>24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.</p>	<p>24. L'offre et la fourniture des services de télécommunication par l'entreprise canadienne sont assujetties aux conditions fixées par le Conseil ou contenues dans une tarification approuvée par celui-ci.</p>
<p>Forbearance by Commission</p> <p>34. (1) The Commission may make a determination to refrain, in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 in relation to a telecommunications service or class of services provided by a Canadian carrier, where the Commission finds as a question of fact that to refrain would be consistent with the Canadian telecommunications policy objectives.</p> <p>Idem</p> <p>(2) Where the Commission finds as a question of fact that a telecommunications service or class of services provided by a Canadian carrier is or will be subject to competition sufficient to protect the interests of users, the Commission shall make a determination to refrain, to the extent that it considers appropriate, conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 in relation to the</p>	<p>Exemption</p> <p>34. (1) Le Conseil peut s'abstenir d'exercer — en tout ou en partie et aux conditions qu'il fixe — les pouvoirs et fonctions que lui confèrent normalement les articles 24, 25, 27, 29 et 31 à l'égard des services — ou catégories de services — de télécommunication fournis par les entreprises canadiennes dans les cas où il conclut, comme question de fait, que son abstention serait compatible avec la mise en oeuvre de la politique canadienne de télécommunication.</p> <p>Exemption</p> <p>(2) S'il conclut, comme question de fait, que le cadre de la fourniture par les entreprises canadiennes des services — ou catégories de services — de télécommunication est suffisamment concurrentiel pour protéger les intérêts des usagers — ou le sera —, le Conseil doit s'abstenir, dans la mesure qu'il estime indiquée et aux conditions qu'il fixe, d'exercer les pouvoirs et fonctions que lui confèrent normalement les articles 24, 25, 27, 29 et 31 à l'égard des services ou catégories de</p>

<p>service or class of services.</p> <p>Exception</p> <p>(3) The Commission shall not make a determination to refrain under this section in relation to a telecommunications service or class of services if the Commission finds as a question of fact that to refrain would be likely to impair unduly the establishment or continuance of a competitive market for that service or class of services.</p> <p>Effect of forbearance</p> <p>(4) The Commission shall declare that sections 24, 25, 27, 29 and 31 do not apply to a Canadian carrier to the extent that those sections are inconsistent with a determination of the Commission under this section.</p>	<p>services en question.</p> <p>Exception</p> <p>(3) Le Conseil ne peut toutefois s'abstenir, conformément au présent article, d'exercer ses pouvoirs et fonctions à l'égard des services ou catégories de services en question s'il conclut, comme question de fait, que cela aurait vraisemblablement pour effet de compromettre indûment la création ou le maintien d'un marché concurrentiel pour leur fourniture.</p> <p>Effet de l'abstention</p> <p>(4) Le Conseil doit déclarer que les articles 24, 25, 27, 29 et 31 ne s'appliquent pas aux entreprises canadiennes dans la mesure où ils sont incompatibles avec toute décision prise par lui au titre du présent article.</p>
<p>Conditional decisions</p> <p>61. (1) The Commission may, in any decision, provide that the whole or any portion of the decision shall come into force on, or remain in force until, a specified day, the occurrence of a specified event, the fulfilment of a specified condition, or the performance to the satisfaction of the Commission, or of a person named by it, of a requirement imposed on any interested person.</p>	<p>Effet des décisions</p> <p>61. (1) Le Conseil peut, dans ses décisions, prévoir une date déterminée pour leur mise à exécution ou cessation d'effet — totale ou partielle — ou subordonner celle-ci à la survenance d'un événement, à la réalisation d'une condition ou à la bonne exécution, appréciée par lui-même ou son délégué, d'obligations qu'il aura imposées à l'intéressé.</p>
<p>64. (1) An appeal from a decision of the Commission on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with the leave of that Court.</p>	<p>64. (1) Avec son autorisation, il peut être interjeté appel devant la Cour d'appel fédérale, sur des questions de droit ou de compétence, des décisions du Conseil.</p>