

**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  
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MUNRO, FREDERICK A. NAKOS, RAINER SCHOENEN and DANIEL SOKOLOV

Respondents

**MEMORANDUM OF FACT AND LAW OF THE CANADIAN RADIO-  
TELEVISION AND TELECOMMUNICATIONS COMMISSION**

**CANADIAN RADIO-TELEVISION  
AND TELECOMMUNICATIONS  
COMMISSION**

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## **PART I – FACTS**

### **A. Overview**

1. This appeal arises from Telecom Regulatory Policy CRTC 2013-271 (the “Wireless Code Decision”),<sup>1</sup> in which the Canadian Radio-television and Telecommunications Commission (the “CRTC” or the “Commission”) required, as a condition of providing retail mobile wireless voice and data services (“wireless services”), that Canadian carriers adhere to the rules set out in the Wireless Code (or the “Code”). This decision was the result of a public proceeding in which the appellants, respondents and many other parties, including individual Canadians, provided their input and were nearly unanimous in the view that the CRTC should establish a mandatory code of conduct for mobile wireless services.

2. The Wireless Code Decision provides that the Code will take effect on 2 December 2013, and will apply to (1) all new or amended wireless services contracts from that date, and (2) all contracts, no matter when they were entered into, by no later than 3 June 2015 (the “final implementation date”).

3. The appellants argue that the application of the Wireless Code to all contracts by 3 June 2015 will interfere with their vested rights set out in contracts entered into before the coming into force of the Code and therefore constitutes retrospective rule-making, which they argue is outside the CRTC’s jurisdiction.

4. In response, the CRTC submits that the “rights” alleged by the appellants to be vested contractual rights are not vested, as they are at best conditional, crystallizing only if an intervening action occurs. Therefore, the imposition of the Wireless Code as a condition of providing wireless services does not interfere with any “vested right” and, hence, there is no retrospective rule-making.

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<sup>1</sup> Telecom Regulatory Policy CRTC 2013-271, *The Wireless Code*, 3 June 2013, Appeal Book (“AB”), Tab 2.

5. In the alternative, to the extent that the CRTC did affect vested rights or applied its rules retrospectively, it did so in the proper exercise of its powers under the *Telecommunications Act* (the “Act”),<sup>2</sup> to regulate the rates, terms and conditions upon which telecommunications services are provided in Canada and address situations of undue preference and unjust discrimination.

6. Even if the final implementation date affected vested rights, the CRTC submits that section 24 and subsections 27(2) - (4) of the Act provide the CRTC the power to affect vested rights and apply rules retrospectively, by necessary implication. To interpret the Act otherwise would permit wireless carriers to use long-term contracts as a way to shield their activities from regulatory oversight.

7. The final implementation date of 3 June 2015 for the Wireless Code is a proper exercise of the CRTC’s powers in the Act, as this date reflects a polycentric finding by the CRTC which provides certainty to all parties and balances the interests of both customers and wireless carriers.

## **B. The CRTC’s Regulatory Powers over Telecommunications**

8. Parliament has given the CRTC, through the Act, a broad mandate to regulate the offering and provision of telecommunications services by Canadian carriers (or “carriers”). Canadian carriers are those subject to the legislative authority of Parliament and who own or operate the facilities used to provide telecommunications services to the public for compensation.<sup>3</sup> The appellants and their wireless services of concern in this appeal are subject to the CRTC’s regulatory powers under the Act.

### **a. Purposes of the Act**

9. The CRTC must exercise its regulatory powers in accordance with the purposes set out in section 47 of the Act which reads as follows:

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<sup>2</sup> *Telecommunications Act*, L.C. 1993, ch. 38.

<sup>3</sup> *Ibid.*, s. 2 and 23.

The Commission shall exercise its powers and perform its duties under this Act and any special Act

- (a) with a view to implementing the Canadian telecommunications policy objectives and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with section 27; and
- (b) in accordance with any orders made by the Governor in Council under section 8 or any standards prescribed by the Minister under section 15.

10. The Canadian telecommunications policy objectives (the “policy objectives”) are set out in section 7 of the Act. These objectives include the following :

- (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;
- (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;
- (c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications; [...]
- (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; [...] and
- (h) to respond to the economic and social requirements of users of telecommunications services.

11. Subsection 27(1) of the Act mandates that every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable. Subsection 27(2) stipulates that no Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage. Subsection 27(3) grants the CRTC the power to determine, as a question of fact, whether a Canadian carrier has complied with these and other specified requirements of the Act.

12. Pursuant to section 8 of the Act, the Governor in Council has issued the *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives* (the “Policy Direction”)<sup>4</sup>. The CRTC is directed to, among other things, “rely on market forces to the extent feasible” and, “when relying on regulation, use measure that efficient and proportionate to their purpose and interfere with the operation of competitive market forces to the minimum extent necessary”.<sup>5</sup>

**b. The Powers of the CRTC under the Act**

13. In order to meet these purposes, the Act grants the CRTC very broad discretionary authority under Part III to regulate the business activities of Canadian carriers.

14. The fundamental premise of this authority is set out in section 24 of the Act which allows the CRTC to impose any condition on a carrier that provides telecommunications services in a tariff or otherwise. Broad discretionary authority is also explicit in a number of regulatory measures specified in the Act.

15. For instance, the Act provides the CRTC with a tariff setting power that can be used to specify the rate (or a range of rates) that a carrier can charge its customers using any method or technique it considers appropriate. The Act also gives the CRTC the authority to amend, suspend, disallow or substitute tariffs filed by a Canadian carrier. Canadian carriers looking to enter into various agreements with other private parties must seek approval of the CRTC.<sup>6</sup>

16. Moreover, subsection 32(g) of the Act allows the CRTC to determine any matter and make any order relating to the rates, tariffs or telecommunications services of Canadian carriers.

17. Section 34 of the Act specifies that the CRTC may or shall refrain from exercising its regulatory powers under sections 24, 25, 27, 29 and 31 (“forbearance”) in relation to a

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<sup>4</sup> P.C. 2006-1534, 14 December 2006, *Canada Gazette*, v.140, No.26, December 27, 2006, SOR/2006-35.

<sup>5</sup> *Ibid.*, subsections 1(a)(i) and (ii).

<sup>6</sup> The Act, *supra* note 2, s. 25(1), 29, 32(c)-(f), and 34.



telecommunications service or a class of services. It is given discretion to determine the scope of its forbearance from the listed sections. It can do so “to the extent necessary” and “in whole or in part and conditionally or unconditionally.”

### **C. The Evolution of the Regulation of Wireless Services**

#### **a. Forbearance**

18. The CRTC has, pursuant to section 34 of the Act, decided to refrain from exercising many, but not all of its powers with respect to wireless services. In particular, the CRTC forbore from exercising its powers to approve tariffs and to determine just and reasonable rates. However, it retained its powers, pursuant to subsections 27(2) - (4), to prevent carriers from engaging in activities that result in unjust discrimination or undue preference. It also retained the ability to exercise its powers and perform its duties under section 24 of the Act in order to maintain certain conditions and impose additional conditions on Canadian carriers who provide wireless services (“Wireless carriers”).<sup>7</sup>

19. The CRTC has periodically adapted the scope of forbearance to respond to the changing nature of the wireless services. For instance, although the CRTC had originally forborne from section 24 and subsections 27 (2) - (4) with respect to wireless data services, it later decided to amend this forbearance framework in order to apply these sections. It did so, both in order to ensure that wireless data services were subject to the same regulatory regime as that for wireless voice services, and so that it could impose, pursuant to section 24 of the Act, a condition requiring carriers providing wireless data services to comply with the CRTC’s internet traffic management practices framework.<sup>8</sup>

20. Over the years, the CRTC has imposed a number of conditions on Canadian carriers pursuant to section 24 of the Act. For instance, the CRTC has required all telecommunications service providers (“TSPs”), including Canadian carriers who provide wireless services to become members of the Commissioner for Complaints for

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<sup>7</sup> *Infra* note 13 at para. 6, AB, Tab 4 at 174.

<sup>8</sup> Telecom Decision CRTC 2010-445, *Modifications to forbearance framework for mobile wireless data services*, 30 June 2010.

Telecommunications Services Inc. (“CCTS”), an independent telecommunications consumer agency established in 2007 by several TSPs. Its mandate is to address certain complaints from individuals and small business retail customers with respect to services from which the CRTC has forborne from exercising some of its powers under the Act.<sup>9</sup>

21. The CRTC has also imposed a condition pursuant to section 24 of the Act requiring all Canadian carriers to re-open existing contracts and other arrangements with local voice over internet protocol (“VoIP”) service providers to insert a requirement that all resellers abide by the conditions respecting the provision of 9-1-1 service.<sup>10</sup>

**b. The Determination that Intervention is Needed**

22. On 22 December 2011, the CRTC received an application by the Public Interest Advocacy Centre (“PIAC”) requesting that the CRTC prohibit wireless carriers from requiring 30 days notice before cancellation of a wireless service contract. This practice allegedly resulted in customers being forced to pay their former carrier for services not provided while paying for services provided by their new carrier. PIAC argued that these billing practices were contrary to subsection 27(2) of the Act, several of the policy objectives, as well as the Policy Direction and several CRTC determinations.<sup>11</sup> On 8 March 2012, the CRTC received a second application by Rogers Communications Partnership (“Rogers”), in which it requested that the CRTC develop a national wireless services consumer code.

23. In the context of these applications, parties who requested a national wireless consumer code submitted that recent amendments to consumer protection legislation in

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<sup>9</sup> Telecom Decision CRTC 2007-130, *Establishment of an independent telecommunications consumer agency*, 20 December 2007 and again in Telecom Decision CRTC 2011-46, *Review of the Commissioner for Complaints for Telecommunications Services*, 26 January 2011.

<sup>10</sup> Telecom Decision CRTC 2005-61, *Follow-up to Emergency service obligations*, 20 October 2005; Telecom Decision CRTC 2007-44, *Routing of fixed/non-native and nomadic VoIP 9-1-1 calls to public safety answering points*, 15 June 2007; and Telecom Decision CRTC 2012-137, *VoIP 9-1-1 service - Modified contractual condition*, 7 March 2012.

<sup>11</sup> *Infra* note 13 at para.1, AB Tab 4 at 173 and *Intervention of PIAC/CAC/COSCO dated 4 December 2012*, Appendix A, AB, Tab 15 at 386-396.

some provinces clearly indicated a demand by Canadians for a national code for wireless services.<sup>12</sup>

24. In response to these developments, the CRTC issued Telecom Notice of Consultation CRTC 2012-206 (“Notice of Consultation 2012-206”),<sup>13</sup> in which it asked “whether there is evidence that Commission intervention in this matter is necessary and appropriate in light of the CRTC’s forbearance from the regulation of the wireless industry and the Policy Direction.” In particular, the CRTC sought comments on “whether the conditions for forbearance have changed sufficiently to warrant Commission intervention in the development of a national retail wireless services consumer code.”<sup>14</sup>

25. During this proceeding the CRTC received 970 submissions which came from wireless service providers (“WSPs”), individuals, consumer advocacy organizations, provincial and territorial governments, and industry organizations.

26. Based on the resulting written record, the CRTC issued Telecom Decision CRTC 2012-556 (“Decision 2012-556”).<sup>15</sup> The CRTC found that individuals were increasingly frustrated with their service providers. The CRTC noted the high percentage of complaints (60%) that were received by the CCTS with respect to wireless service. Almost all Canadian carriers who participated, including all but one of the appellants, agreed that the development of a wireless code was necessary. The CRTC also noted that the provincial consumer protections were not available to all Canadians and may not address issues unique to wireless services.<sup>16</sup>

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<sup>12</sup> *Infra* note 13 at para. 4, AB, Tab 4 at 173.

<sup>13</sup> *Proceeding to consider whether the conditions in the Canadian wireless market have changed sufficiently to warrant Commission intervention with respect to retail wireless services*, 4 April 2012, AB, Tab 4.

<sup>14</sup> *Ibid* at paras. 5 and 9, AB, Tab 4 at 174 and 175.

<sup>15</sup> Telecom Decision CRTC 2012-556, *Decision on whether the conditions in the mobile wireless market have changed sufficiently to warrant Commission intervention with respect to mobile wireless services*, 11 October 2012 (Decision 2012-566), AB, Tab 6.

<sup>16</sup> *Ibid* at paras. 4, 5, 8, 9, 24-27, AB, Tab 6 at 186-187, 190 and 191.

27. In Decision 2012-556, the CRTC determined that “competition in the mobile wireless market continues to be sufficient to protect the interests of users with respect to rates and choice of competitive service provider” and the CRTC must continue to forbear in this regard.<sup>17</sup>

28. However, the CRTC also found that “market forces alone cannot be relied upon to ensure that consumers have the information they need to participate effectively in the competitive mobile wireless market”. To ensure the fulfillment of the policy objectives set out in paragraphs 7(a), (b), (f), and (h) of the Act, the CRTC considered it necessary, using its powers pursuant to section 24 of the Act, to require all WSPs to abide by a mandatory code.<sup>18</sup>

#### **D. The Wireless Code Proceeding**

##### **a. The Process**

29. Concurrent with Telecom Decision 2012-556, the CRTC published Telecom Notice of Consultation CRTC 2012-557 (“Notice of Consultation 2012-557”),<sup>19</sup> which initiated a proceeding to establish a mandatory code to address the clarity and content of mobile wireless services and related issues. The CRTC called for comments, with supporting rationale, on the content of this code, to whom it should apply, and how it should be enforced, promoted, assessed and reviewed. The CRTC also invited parties to comment on a list of issues such as the clarity of contract terms and conditions, changes to contract terms and conditions, contract cancellation, expiration and renewal, etc.<sup>20</sup>

30. Wireless carriers were made parties to the proceeding and interested persons who wished to become parties were invited to make submissions. In response to interrogatories sent by the CRTC, wireless carriers filed copies of their contracts with

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<sup>17</sup> *Ibid* at paras. 19, 20 and 21, AB, Tab 6 at 189.

<sup>18</sup> *Ibid* at para. 27, AB, Tab 6 at 191.

<sup>19</sup> Notice of Consultation CRTC 2012-557, *Proceeding to establish a mandatory code for mobile wireless services*, 11 October 2012, AB, Tab 8.

<sup>20</sup> *Ibid* at paras. 14 and 15, AB, Tab 8 at 206 - 208.

consumers.<sup>21</sup> The CRTC held a public hearing from 11 to 15 February 2013. To facilitate further engagement by Canadians, the proceeding also included a two-phase online consultation on the issues discussed in the proceeding. Phase 2 began two weeks prior to the public hearing and closed on the last day of the oral hearing.<sup>22</sup>

31. Two weeks before the oral hearing, the CRTC issued a “Working Document” setting out the possible content of a wireless code. The CRTC stated that this document was not a preliminary view, but rather was designed to stimulate debate during the oral hearing and the second phase of the online consultation. The Working Document was based on proposals made and views expressed by parties on the record to that point.<sup>23</sup>

32. During the proceeding, the CRTC received comments from over 5,000 participants, including hundreds of individual Canadians. A total of 1,053 separate interventions were received and the two-stage online consultation triggered 1,832 further comments. Thirty one parties appeared before the CRTC. Following the hearing, the CRTC received 21 final written comments and 19 final written replies. Only a portion of this record is before the Court as part of the Appeal Book.

#### **b. The Wireless Code Decision**

33. On 3 June 2013, the CRTC issued the Wireless Code Decision, which established the Wireless Code. Canadian carriers who provide wireless services to individual or small business consumers were required, as a condition of providing these services pursuant to section 24 of the Act, to adhere to the Code.<sup>24</sup>

34. The CRTC indicated that the purpose of the Code was to “(i) ensure that consumers are empowered to make informed decisions about wireless services, and (ii)

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<sup>21</sup> See Tabs 20 – 24, AB at 754 - 1109 and Tabs 73 - 74, Supplementary Appeal Book (“Supp AB”) at 2713 - 2789.

<sup>22</sup> Notice of Consultation 2012-557, *supra* note 19, at paras. 21, 22, 25, 28 et 29, AB, Tab 8 at 210 and 211; Telecom Notice of Consultation CRTC 2012-557-3, *Proceeding to establish a mandatory code for mobile wireless services*, 28 January 2013 (Notice of Consultation 2012-557-3), AB, Tab 10.

<sup>23</sup> Notice of Consultation 2012-557-3, *supra* note 22, AB, Tab 10.

<sup>24</sup> Wireless Code Decision, *supra* note 19, at paras. 394-395, AB, Tab 2 at 71-72.

contribute to a more dynamic marketplace by making it easier for consumers to take advantage of competitive offers.”<sup>25</sup>

*Positions of parties during the proceeding*

35. As indicated in the Wireless Code Decision, “consumers who participated in this proceeding were primarily concerned with describing the problems they have encountered with their WSPs and the solutions they wanted the Commission to impose.”<sup>26</sup>

36. In general, parties were concerned that contracts “were overly long, complex, and difficult to understand, and that important information was hard to find or hidden in the fine print.” They wanted to know which services might cause them to incur additional charges, how early cancellation fees apply, and what impact upgrading their device would have on their wireless contract. The evidence presented showed that customers continued to be surprised by elements of their contracts.”<sup>27</sup> Customers had difficulty estimating the quantity of data that various programs consume, and therefore the impact such use would have on their monthly bill. All of these issues contributed to the serious and widespread problem of bill shock identified by consumers.<sup>28</sup>

37. The CRTC found that consumers’ most significant concerns related to the length of wireless services contracts and early cancellation fees. Several parties, including consumers and consumer groups, submitted that three-year contracts are too long and should be limited to two years. They argued that three-year contracts “(i) prevent consumers from taking advantage of the competitive market; (ii) are a barrier to keeping pace with technological progress; and (iii) are not consistent with the two-year contracts that are generally found in other countries”.<sup>29</sup> They expressed concern that device

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<sup>25</sup> *Ibid* at para. 2, AB, Tab 2 at 9.

<sup>26</sup> *Ibid* at para.16, AB, Tab 2 at 12.

<sup>27</sup> *Ibid* at paras. 32, 33 and 44, AB, Tab 2 at 15-17.

<sup>28</sup> *Ibid* at paras. 95 and 96, AB, Tab 2 at 27.

<sup>29</sup> *Ibid* at paras. 202 and 205, AB, Tab 2 at 41 and 42. See also *Transcript of Proceeding, Volume 1, 11 February 2013* at paras. 107 (PIAC), 1073-4 (CRTC Chairman), and 1507-9 (Union des consommateurs),

performance often degrades rapidly after two years, and that manufacturers' warranties often last only one year.<sup>30</sup>

38. Consumers also expressed considerable frustration over WSPs' ability to unilaterally change contract terms and conditions, including rates, while consumers are bound by three-year contracts with significant early cancellation fees. They considered that WSPs should not be allowed to unilaterally change contract terms and conditions. Consumers also considered that WSPs should give prior notice to consumers before changing contract terms and conditions and should allow customers to opt out of contract changes without paying a penalty.<sup>31</sup>

39. At the hearing, Media Access Canada submitted that people with disabilities have often experienced real challenges because of the fast changing nature of the products and services offered by WSPs. For example, when they purchase a mobile device or service with built-in accessibility features, it later may become unusable because of an upgrade that introduces new technology that breaks the built-in accessibility features in that product or service. Canadians with disabilities are then forced to pay for devices that they are incapable of using or to terminate their contract with substantial penalty fees.<sup>32</sup>

40. Most WSPs argued that they should be able to change at least some contract terms and conditions without requiring the customer's consent. WSPs' positions varied on whether "(i) they should be required to notify customers before changing the contract; (ii) customers should have the right to refuse a change or cancel service as a result of a change; and (iii) indeterminate and fixed-term contracts should be treated differently."<sup>33</sup>

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AB, Tab 32 at 1257, 1313 and 1336; as well as *Transcript of Proceeding, Volume 2, 12 February 2013* at paras. 4773 - 4777 (Mr. Munro), AB, Tab 35 at 1551.

<sup>30</sup> Wireless Code Decision, *supra* note 19, para. 216, Tab 2 at 44; *Transcript of Proceeding, Volume 3, 13 February 2013* at para. 6795 (Consumer Council of Canada), AB Tab 37 at 1708.

<sup>31</sup> Wireless Code Decision, *supra* note 19, at paras. 77-78, AB, Tab 2 at 23 and 24.

<sup>32</sup> *Transcript of Proceeding, Volume 3, February 13 2013* at paras. 5246-5250 and 5270-5272 (Media Access Canada), AB, Tab 37 at 1620 and 1622.

<sup>33</sup> Wireless Code Decision, *supra* note 19, at para. 81, AB, Tab 2 at 24.

41. As the CRTC noted, most WSPs submitted that the Wireless Code should not limit contract duration primarily because three-year contracts allow for low device pricing. They also argued that it was not necessary to limit contract length because customers can cancel their contracts at any time by paying early cancellation fees. Bell Canada *et al.* (“Bell Canada”) submitted evidence that devices older than two years are active on its network and that Canadians replace devices every 2.5 to 2.75 years. WSPs suggested that three-year contracts are not a barrier to Canadians having access to new and innovative technology.<sup>34</sup>

42. The record of the proceeding also reveals that the provision of locked devices by WSPs was also one of the most significant sources of consumer frustration with wireless services. Several parties argued that device locking makes it difficult for consumers to take advantage of competitive offers and limits them from using another WSPs’ services and therefore avoid roaming charges while travelling. Consumers submitted that “WSPs should be required to either (i) sell all devices unlocked; or (ii) unlock devices under reasonable terms and conditions, and for a reasonable price.” Consumers also argued that devices purchased at full price from a WSP should be sold unlocked.<sup>35</sup>

43. Most WSPs submitted that locking devices helps to ensure that they recover the substantial subsidies for devices they offer under contract and that locking helps to ensure that highly desirable devices intended for Canadian consumers are not sold to consumers in other countries by third parties.<sup>36</sup>

44. Consumers also submitted that cancellation practices were unfair and resulted in double-billing for wireless services when a consumer cancelled their service and moved to another WSP.<sup>37</sup>

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<sup>34</sup> *Ibid* at paras. 203 - 204, AB, Tab 2 at 41-42.

<sup>35</sup> *Ibid* at paras. 152 -157, AB, Tab 2 at 34-35; *Transcript of Proceeding, Volume 1, February 2013* at paras. 1440 – 1444 (Union des consommateurs), AB, Tab 32 at 1333; *Transcript of Proceeding, Volume 2, 12 February 2013* at paras. 3020 – 3022 (CIPPIC/OpenMedia), AB, Tab 35 at 1455.

<sup>36</sup> Wireless Code Decision, *supra* note 19, at paras. 158 -159, AB, Tab 2 at 35.

<sup>37</sup> *Ibid* at para. 257, AB, Tab 2 at 50.



*CRTC's findings of fact and determinations*

45. In the Wireless Code Decision, the CRTC noted that confusion around contract terms and conditions has been a significant source of consumer frustration and that despite improvements to the form of contracts by several WSPs, customers continue to be surprised by elements of their contract of which they were unaware.<sup>38</sup>

46. In response to concerns raised by Canadians, the CRTC found that the Wireless Code “should minimize consumers’ barriers to switching WSPs and to keeping pace with technological progress.” In particular, the CRTC considered that consumers should be able to switch WSPs, upgrade devices, and take advantage of competitive offers at least every two years. The CRTC found that, given the rapid pace of technological advancement, devices may continue to be functional after two years but they are less likely to be supported by their manufacturers, covered by a warranty, or technologically comparable to contemporary mobile devices.<sup>39</sup>

47. In its decision, the CRTC concluded that “the record of the proceeding is clear that market forces alone have not appropriately restricted early cancellation fees in a way that responds to consumer concerns.” The CRTC noted that a customer in an indeterminate contract could end up paying an early cancellation fee calculated over a maximum of a 48-month period. The CRTC concluded that permitting WSPs to require early cancellation fees over such long periods would be a barrier to consumers taking advantage of competitive offers.<sup>40</sup>

48. According to the CRTC, “the fundamental barrier to consumers taking advantage of competitive offers every two years was not the availability of three-year contracts in the marketplace, but rather the high early cancellation fees that many consumers must pay if they wish to upgrade devices or change WSPs.”<sup>41</sup>

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<sup>38</sup> *Ibid* at paras. 43-44, AB, Tab 2 at 17.

<sup>39</sup> *Ibid* at paras. 216-217, AB, Tab 2 at 44.

<sup>40</sup> *Ibid* at paras. 218 and 219, AB, Tab 2 at 44.

<sup>41</sup> *Ibid* at paras. 217-218, AB, Tab 2 at 44.

49. As a result, the CRTC addressed the high early cancellation fees, especially in relation to three-year contracts. The Wireless Code sets out a specific formula limiting the maximum early cancellation fee that can be charged by WSPs. The CRTC allowed flexibility for WSPs to impose even lower early cancellation fees and use early cancellation fees as a competitive differentiator.<sup>42</sup>

50. The CRTC created several other obligations, all focused on reducing switching costs and contributing to a more dynamic marketplace. As examples, the Wireless Code requires the WSPs to unlock phones after 90 days (or immediately where the phone is not subsidized); allows consumers to cancel their contract by notifying their WSP without a 30 day notice period; and prohibits WSPs from automatically extending a contract once its current terms ends on more than a month-to-month basis.<sup>43</sup>

51. The Wireless Code also includes a number of obligations specifically designed to address potential unjust discrimination with respect to services provided to persons with disabilities. These include the requirement to provide contracts in alternative formats and an extended trial period for persons with disabilities so that they have a longer period in which to test new devices.<sup>44</sup>

### **c. Coming Into Force of the Wireless Code**

#### *Positions of parties during the proceeding*

52. As mentioned in the Wireless Code Decision, individuals and consumer groups submitted during the proceeding that the Wireless Code should be implemented as soon as possible. They argued that the response of the public to the CRTC's proceeding, as

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<sup>42</sup> *Ibid* at paras. 216, 218, and 222 - 227, AB, Tab 2 at 44-45.

<sup>43</sup> *Ibid* at paras. 168, 262, 266, and 274, AB, Tab 2 at 36 and 51-53.

<sup>44</sup> Wireless Code Decision, *supra* note 19, at para. 336, AB, Tab 2 at 62.

well as the large and growing number of complaints submitted to the CCTS regarding WSPs' service offerings and practices warranted expeditious implementation.<sup>45</sup>

53. WSPs proposed implementation periods ranging from immediately to 24 months for various aspects of the Wireless Code. Many of them suggested a staggered implementation approach for different provisions, depending on their complexity. All parties agreed that the majority of the proposals could be implemented within 6 months.<sup>46</sup>

54. Almost all parties agreed that applying the Wireless Code to all existing contracts immediately would be impractical and disproportionate. The WSPs pointed out the costs of re-writing and re-signing contracts and that it would be difficult to calculate the early cancellation fee for older contracts, when the value of the device was not recorded at the time the contract was signed.<sup>47</sup>

55. Many parties commented on both the legality and practicality of applying certain obligations as part of the Wireless Code to existing contracts. Saskatchewan Telecommunications ("SaskTel") and PIAC both presented legal arguments. During the oral hearing, the Chair of the CRTC acknowledged the legal arguments on the record but asked the parties to focus their discussion on the practical obstacles to immediate application, leaving the legal arguments for a later time within the proceeding.<sup>48</sup>

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<sup>45</sup> *Ibid* para. 351, AB, Tab 2 at 64; *Intervention of PIAC/CAC/COSCO dated 2 December 2012* at paras. 238 and 2399, AB, Tab 15 at 382; *Reply Comments of PIAC/CAC/COSCO dated 18 December 2013* at paras. 139 - 144, AB, Tab 28 at 1195.

<sup>46</sup> Wireless Code Decision, *supra* note 19, at paras. 351 - 355, AB, Tab 2 at 64-65.

<sup>47</sup> *Ibid* para. 356, AB, Tab 2 at 65.

<sup>48</sup> Notice of Consultation 2012-557-3, *supra* note 22, Appendix, Section B2, AB, Tab 10 at 233; Wireless Code Decision, *supra* note 19, at para. 356, AB, Tab 2 at 65; *Final Written comment of SaskTel dated 1 March 2013* at para.18-27, attaching legal opinion from McCarthy Tétrault dated 5 February 2013, AB, Tab 55 at 2338-2340 and 2342-2349; *Final Written Comments of PIAC/CAC/COSCO dated 1 March 2013* at para. 50, AB, Tab 54 at 2189; *Transcript of the Proceeding, Volume 4, 14 February 2013* at para. 8904 (CRTC Chairman), AB, Tab 39 at 1844.

56. In response to questions at the hearing, the appellants filed information providing details on how many of their customers would be protected by a code after 1, 2 and 3 years if it were applied only when current contracts expire.<sup>49</sup>

57. Several WSPs stated that many of the Wireless Code's provisions that do not relate to a particular contract could be applied as of the implementation date across the board without any legal or practical issues.<sup>50</sup>

58. During the proceeding, consumer groups, Mobilicity, and the Competition Bureau alleged that some wireless carriers were actively seeking to lock as many people as possible into new three year contracts pending the CRTC's decision and before the Wireless Code came into force. To ensure that all Canadians benefit from the Code within a reasonable amount of time, PIAC suggested that the CRTC set an ultimate date for the application of the Code to all contracts in order to avoid wireless carriers extending contracts indefinitely to avoid application of the Code.<sup>51</sup>

59. Parties submitted that there are many technological advances in the wireless services market<sup>52</sup> and consumers very frequently upgrade their wireless handset devices well before contract termination.<sup>53</sup> SaskTel stated that "the vast majority of current post-paid contracts would, through natural customer churn, fall under a fully implemented Code within a two-year time frame".<sup>54</sup> In the period nearing termination of customer

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<sup>49</sup> See, for example, *Response to Undertaking #5 of MTS dated 22 February 2013*, AB, Tab 44 at 1985 - 1986; and *Response to Undertakings of Rogers Communications Company dated 22 February 2013* at para. 9, AB, Tab 45 at 1989. Much of the information was filed in confidence.

<sup>50</sup> Wireless Code Decision, *supra* note 19, at para. 357, AB, Tab 2 at 65.

<sup>51</sup> *Reply Comments of PIAC/CAC/COSCO dated 18 December 2013* at paras. 139 - 144, AB, Tab 28 at 1195; *Final Written Comments of PIAC/CAC/COSCO dated 1 March 2013* at paras. 46-51, AB, Tab 54 at 2188-90; *Transcript of Proceeding, Volume 3, 13 February 2013* at paras. 6306 - 6308 (Mobilicity), AB, Tab 37 at 1682.

<sup>52</sup> See, for example, *Transcript of Proceeding, Volume 2, 12 February 2013* at para. 3601 (Rogers), AB, Tab 35 at 1489; *Transcript of Proceeding, Volume 4, 14 February 2013* at paras. 7504 - 7505 (Bell), AB, Tab 39 at 1765.

<sup>53</sup> See, for example, *Transcript of Proceeding, Volume 4, 14 February 2013* at paras. 8727, 8728, 8912 - 24 (SaskTel), AB, Tab 39 at 1835, 1845 and 1846; *Transcript of Proceeding, Volume 5, 15 February 2013* at para. 9081 (MTS), AB, Tab 40 at 1856.

<sup>54</sup> *SaskTel Final Written Comments, 1 March 2013* at para. 24, AB, Tab 55 at 2340.

contracts, WSPs often reduce or waive certain of their fees, such as early cancellation fees by engaging in promotions to maintain or attract customers.<sup>55</sup>

60. During the hearing, the CRTC panel members questioned certain parties, including the WSPs, on the issue of setting an implementation date. For example, a Commissioner asked the Canadian Wireless Telecommunications Association (“CWTA”), and again Rogers, about it appearing to take until 2017 for the Code to be fully implemented.<sup>56</sup>

#### *CRTC’s findings of fact and determinations*

61. In its decision, the CRTC addressed two distinct implementation issues: “(i) when the Wireless Code would come into force; and (ii) when the Code’s requirements begin to dictate outcomes with respect to pre-existing contracts.”<sup>57</sup>

62. The CRTC noted that “the purpose of the Wireless Code is to ensure that consumers are empowered to make informed choices in the competitive market and to contribute to making that market more dynamic.” It noted that unreasonable delays in the implementation of the Code for some customers could be considered undue discrimination. Therefore, the CRTC considered that it would be in the best interest of consumers that the Code be implemented as soon as practicable.<sup>58</sup>

63. The CRTC also noted that the interest of consumers must be balanced with what is reasonable and technically feasible for WSPs to achieve. The CRTC considered that there were valid practical reasons why immediate application of the Wireless Code to all existing contracts may not be practical. The CRTC concluded that the costs and resources

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<sup>55</sup> See, for example, *Transcript of Proceeding, Volume 2, 12 February 2013* at paras. 4055 - 60 (Rogers), and paras. 4720 and 4721 (Mr. Lancione), AB, Tab 35 at 1512 and 1548; as well as *Transcript of Proceeding, Volume 5, 15 February 2013* at paras. 9236 -42 (MTS), AB, Tab 40 at 1864.

<sup>56</sup> *Transcript of Proceeding, Volume 1, 11 February 2013* at paras. 1028-1032 (CWTA), AB, Tab 32 at 1311; and *Transcript of Proceeding, Volume 2, 12 February 2013* at paras. 3967 - 68 (Rogers), AB, Tab 35 at 1508.

<sup>57</sup> Wireless Code Decision, *supra* note 19, at para. 361, AB, Tab 2 at 66.

<sup>58</sup> *Ibid* at paras. 360 and 365, AB, Tab 2 at 65 and 66.

necessary to immediately implement the Code would outweigh the relative benefit to consumers.<sup>59</sup>

64. Based on the evidence filed on the record of the proceeding, the CRTC noted that “if the Code applied to new and amended contracts only, approximately half of all wireless service customers would be covered by the Code within one year of its implementation [...]” and that “it is clear that a large proportion of consumers amend or extend their contracts before the end of their contract term, and that, therefore, the Wireless Code would apply to most contracts in less than 2 years.” The CRTC concluded that, “the Wireless Code should apply to the vast majority of contracts and the burden on the WSPs to amend the remaining contracts would be substantially reduced”.<sup>60</sup>

65. As a result, the CRTC determined that all aspects of the Wireless Code would take effect on 2 December 2013; six months after the issuance of Telecom Decision 2013-271. It also determined that “where an obligation relates to a specific contractual relationship between a WSP and a customer, the Wireless Code should apply if the contract is entered into, amended, renewed, or extended on or after 2 December 2013.” Finally, “in order to ensure that all consumers are covered by the Wireless Code within a reasonable time frame, the CRTC determined that the Wireless Code should apply to all contracts, no matter when they were entered into, by no later than 3 June 2015”.<sup>61</sup>

#### **E. Implementation and Interpretation of the Wireless Code**

66. After publication of the Wireless Code in Regulatory Policy 2013-271, the CWTA wrote to CRTC staff asking for clarification as to whether the CRTC intended the final implementation date to be mandatory. CRTC staff responded to the CWTA letter on 18 June 2013 to confirm that the final implementation date is in fact mandatory, and the

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<sup>59</sup> *Ibid* at paras. 360, 365 and 366, AB, Tab 2 at 65-66.

<sup>60</sup> *Ibid* at para. 367, AB, Tab 2 at 66.

<sup>61</sup> *Ibid* at paras. 368-369, AB, Tab 2 at 67.

Wireless Code will apply to all contracts, regardless of when they were signed, as of 3 June 2015.<sup>62</sup>

67. In late October and early November 2013, the CRTC issued three decisions with respect to the Wireless Code in response to applications from WSPs.<sup>63</sup> These decisions are not at issue in this appeal.

## **II. POINTS IN ISSUE**

68. The CRTC's submissions will address the following issues:

- (a) The role of the CRTC before this Court;
- (b) The appropriate standard of review;
- (c) Exercise of the CRTC's jurisdiction.

## **III. SUBMISSIONS**

### **A. The CRTC's Role Before the Court**

69. Where a tribunal has standing (whether by leave or under a statute, as in the present case) to participate in an appeal or review of its decision, its role is customarily to explain the record before it and to make representations relating to jurisdiction.<sup>64</sup>

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<sup>62</sup> *Letter from CWTB to CRTC dated 12 June 2013*, AB, Tab 66 at 2616-7; and *Letter from CRTC staff to CWTB dated 18 June 2013*, AB, Tab 67 at 2618-2619. See also *Politique réglementaire de télécom CRTC 2013-271, Le Code sur les services sans fil* at para. 369, AB, Tab 3 at 151, which states that : « le Code doit s'appliquer à tous les contrats peu importe leur date de signature au plus tard le 3 juin 2015 »

<sup>63</sup> *Telecom Decision CRTC 2013-581, Wireless Code – Request by Saskatchewan Telecommunications for an extension to the deadline to implement data caps*, 31 October 2013; *Telecom Regulatory Policy CRTC 2013-586, Requests for clarification on how the Wireless Code applies to tab contracts*, 31 October 2013; and *Telecom Regulatory Policy CRTC 2013-598, Wireless Code – Request by Quebecor Media Inc. to review and vary Telecom Regulatory Policy 2013-271 regarding the definition of “indeterminate contracts”*, 8 November 2013.

<sup>64</sup> *Northwestern Utilities Ltd et al. v Edmonton*, [1979] 1 SCR 684; *Canada (Attorney General) v. Quandrini*, 2010 FCA 246, [2012] 2 FCR 3; *Telecommunications Act*, s. 64(6).

## **B. The Standard of Review is Reasonableness**

70. The CRTC submits that the appropriate standard of review with respect to the issue on appeal is reasonableness.

71. Since *Dunsmuir v. New Brunswick*, the Supreme Court has applied the reasonableness standard to the review of a tribunal's interpretation of its home statute in almost all cases. The correctness standard is applied only in exceptional circumstances.<sup>65</sup> For example, neither the existence of a privative clause nor jurisprudence that applied a correctness test under the previous standard of review test in a similar situation is reason on its own to apply the correctness standard.<sup>66</sup>

72. In this case, the appellants do not dispute that the CRTC had the authority to impose the Wireless Code as a condition of offering or providing wireless services pursuant to section 24 of the Act. The appellants question the manner in which the CRTC implemented the Code with respect to existing contracts. This question involves the CRTC's interpretation of the Act in respect of a matter within its statutory responsibility.

73. Such questions, related to the imposition of conditions through a polycentric exercise with which the CRTC is statutorily charged and for which it is uniquely qualified to undertake, suggests a more deferential standard of review.<sup>67</sup> Such questions attract a reasonableness standard of review since those that work "day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the

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<sup>65</sup> *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9, ("Dunsmuir") *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 34, *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, 452 NR 340 at para 26.

<sup>66</sup> *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 at paras. 17 and 21 - 23.

<sup>67</sup> *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764 ("Bell v. Bell Aliant") at paragraph 38. *A contrario*, see *Edmonton v. 360Networks Canada Ltd.*, 2007 FCA 106. [2007] 4 FCR 747 ("Edmonton v. 360Networks") at paragraph 71. See also *Société Radio-Canada v. Métromédia Cmr Montréal Inc.*, [1999] FCJ No. 1637 (FCA), 254 NR 266 ("Société Radio-Canada v. Cmr") at para. 3.



legislative regime.”<sup>68</sup> The court may draw inferences but it must not be inconsistent with these findings of fact.<sup>69</sup>

### **C. The CRTC Properly Exercised its Jurisdiction**

74. This Court has made clear that “[i]n order to attain the statutory objects, the Act should be interpreted as creating a comprehensive regulatory scheme.”<sup>70</sup> As the Supreme Court wrote:

The [Act] sets out certain broad telecommunications policy objectives. It directs the [CRTC] to implement them in the exercise of its statutory authority, balancing the interests of consumers, carriers and competitors in the context of the Canadian telecommunications industry.<sup>71</sup>

75. It is submitted that, in determining that the Wireless Code would apply to all contracts by 3 June 2015, the CRTC did not interfere with the vested rights of the appellants. In the alternative, to the extent that the CRTC did affect vested rights or apply its rules retrospectively, it did so in the proper exercise of its powers under the Act.

#### **a. The CRTC did not Interfere with Vested Rights**

76. The appellants submit that the Wireless Code interferes with their vested rights and renders unenforceable significant terms of their contracts, notably the early cancellation fees, if a contract is cancelled before its term ends.<sup>72</sup> The CRTC submits that any right to an early cancellation fee does not vest until the customer cancels the contract. Therefore, the Code does not interfere with a vested right to an early cancellation fee, but is prospective in nature.

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<sup>68</sup> *Dunsmuir*, *supra* note 65, at para. 49; *Genex Communications Inc. v. Canada (Attorney General)*, 2005 FCA 283, [2006] 2 FCR 199 (“Genex”) at paras. 48 and 49; *Bell Canada v. Bragg Communications Inc.*, (June 20, 2008), Ottawa 08-A-33 (FCA) (“Bell Canada v. Bragg”).

<sup>69</sup> The Act, *supra* note 2, ss. 2(1), 52(1) and 64(1), (5), and (6).

<sup>70</sup> *Edmonton v. 360Networks*, *supra* note 67, at para. 46.

<sup>71</sup> *Bell Canada v. Bell Aliant*, *supra* note 67, at para. 1.

<sup>72</sup> Appellants’ Memorandum of Fact and Law at paras. 51 and 65.

77. The Supreme Court has endorsed the characterization of a “vested right” as existing when the right is “tangible and concrete” and has “been sufficiently constituted at the time of the new statute’s commencement”.<sup>73</sup> While the Court stated that “rights and obligations resulting from a contract are usually created at the same time as the contract itself”, it also stated that the time when a right becomes sufficiently concrete “will vary depending on the juridical situation in question”.<sup>74</sup> The Supreme Court has also acknowledged that no one has a vested right in the law remaining the same over time.<sup>75</sup>

78. While the Supreme Court has found that a right to interest repayment set out in a student loan agreement crystallizes when the contract is signed, it has also found that some rights set out in contracts are conditional and do not vest until a later date, requiring an event to crystallize the contractual right.

79. In *Dell Computer Corp. v. Union des consommateurs*, the Supreme Court of Canada considered whether Dell Computer had a vested right to enforce a mandatory arbitration clause found in its standard contract despite the fact that consumer protection legislation prohibiting such clauses had been passed after the contract was entered into. The Court found that the right to enforce the arbitration clause did not vest on the day the contract was signed. Instead, the clause was conditional on a dispute arising, and the right to enforce the provision did not vest until a dispute had arisen.<sup>76</sup>

80. On the facts of that case, the Court found that Quebec amendments to consumer protection legislation did not apply to the situation, as they came into force both after the contract was entered into, and also after the dispute triggering the arbitration clause had occurred. However, if the legislative amendments had come into force before the relevant dispute-triggering event, these amendments would have applied to the arbitration clauses without affecting vested rights. In such a case, the effect of this legislation would have

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<sup>73</sup> *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530 (“*Dikranian*”) at para. 37, citing P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000) at p. 160-61.

<sup>74</sup> *Ibid* at para. 40.

<sup>75</sup> *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 SCR 271 at pages 282 - 283.

<sup>76</sup> *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801 (*Dell Computer*).

been prospective, as it would only have applied in the future (*i.e.* when the triggering event occurs).<sup>77</sup>

81. Another situation where a right does not vest when a contract is signed is described in *Dell Computer*. The Court compared the situation to contracts that include a warranty clause, noting that while the warranty obligation comes into existence at the time of the contract, the clause does not represent a vested right until the vendor is in default or a claim is made.<sup>78</sup> Similarly, in the matter of insurance contracts, the Supreme Court has stated that, in the context of deciding whether to grant relief against forfeiture, “clearly the holder of a term life policy has no vested right to the benefits until the loss insured against—death of the insured— has occurred.”<sup>79</sup>

82. In the case of contracts for wireless services between consumers and the appellants,<sup>80</sup> as argued by the appellants before the CRTC, early cancellation fees are not loans.<sup>81</sup> The record demonstrates that the price paid by consumers for wireless services does not automatically decrease at the end of three-year contracts, when the device subsidy could be considered to be repaid.<sup>82</sup> Instead, early cancellation fees simply represent a formula by which the parties have agreed to calculate an amount to be paid should the customer cancel the contract early.

83. Based on the submissions of the parties, including the appellants, the CRTC found as a finding of fact, that early cancellation fees were “the mechanism by which WSPs

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<sup>77</sup> *Ibid* at paras. 113-117. See also *Griffin v. Dell Canada Inc.*, 2010 ONCA 29, 98 OR (3d) 481 at paras. 41 - 42, leave to appeal to the SCC refused; *Dell Canada Inc. v. Thaddeus Griffin*, 2010 CanLII 27725 (SCC).

<sup>78</sup> *Dell Computer*, *supra* note 76, at para. 114.

<sup>79</sup> *Saskatchewan River Bungalow Ltd. v. Maritime Life Insurance Co.*, [1994] 2 SCR 490 at 506.

<sup>80</sup> As noted above, the appellants’ wireless service contracts containing early cancellation fees are set out at AB, Tabs 20 - 24 and Supp AB, Tabs 73 and 74.

<sup>81</sup> *Transcript of Proceeding, Volume 4, 14 February 2013* at paras. 7053, 7064 - 7067 and 7302 (Bell), AB, Tab 39 at 1740, 1741 and 1754; *Final Written Comments of Rogers dated 1 March 2013* at paras. 93-96, AB, Tab 53 at 2155 and 2156.

<sup>82</sup> *Transcript of Proceeding, Volume 1, 11 February 2013* at paras. 2138 - 2145 (TELUS), AB, Tab 32 at 1370; *Transcript of Proceeding, Volume 2, 12 February 2013* at paras. 4278 - 81 (Rogers), AB, Tab 35 at 1524; *Transcript of Proceeding, Volume 4, 14 February 2013* at paras. 7298 - 7304 (Bell Canada), AB, Tab 39 at 1754-1755; *Transcript of Proceeding, Volume 5, 15 February 2013* at paras. 9382 - 9385 (MTS), AB, Tab 40 at 1872.

enforce wireless contracts.”<sup>83</sup> The CRTC found that using the amount of the device subsidy as the basis for the formula, as occurs in most provincial legislation, was reasonable “given that it ties the incentive that a customer received to enter a contract to the fee they must pay if they cancel their contract before the end of the commitment period.”<sup>84</sup> It did not find that the appellants had a right to a repayment of the retail price of the subsidized device.

84. It is therefore submitted that early cancellation fees are akin in character to a warranty or arbitration clause, as addressed in *Dell Computer*. The appellants do not have a vested right on the day the contract is signed to a specific repayment by their customers. Instead, their contracts set out an agreement to provide services for a certain price for a set term, with a secondary commitment that should a customer breach the contract or terminate it earlier, the carrier will have a right to a cancellation fee. The right to this fee only crystallizes on the date the contract is cancelled and not on the date the contract was signed.

85. Consequently, application of the Wireless Code early cancellation fee formula to contracts cancelled after 3 June 2015 is prospective and does not affect a right that vested before that date.

**b. The CRTC has Properly Exercised its Statutory Powers within its  
Legislative Framework**

86. Even if the final implementation date affected vested rights or constituted a retrospective application of its rules, the CRTC submits that section 24 and subsections 27(2) - (4) of the Act provide the CRTC with the power to do so by necessary implication. To interpret the Act otherwise would permit wireless carriers to use long-term contracts as a way to shield their activities from regulatory oversight. It would prevent the CRTC from fulfilling its duties to prevent undue preference and unjust

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<sup>83</sup> Wireless Code Decision, *supra* note 19, para. 218, AB, Tab 2 at 44.

<sup>84</sup> *Ibid* at para. 226, AB, Tab 2 at 45.

discrimination in the face of the fast-paced and constantly evolving nature of the telecommunications market.

87. The appellants rely on a number of cases to establish the presumptions against interference with vested rights and retrospective rule-making.<sup>85</sup> However, these presumptions form part of the statutory interpretation exercise in determining the CRTC's powers as set out in the Act. They are not determinative, but rather, can be rebutted by either explicit language or necessary implication (i.e. where the powers are "practically necessary for the accomplishment of the object intended to be secured by the statutory regime").<sup>86</sup>

88. There are a number of cases where the courts have reviewed the specific legislative and purposive context of a statutory provision and determined that the administrative tribunal has, by necessary implication, the power to affect vested rights or make rules retrospectively.<sup>87</sup>

89. The appellants rely on *Bell Canada v. Canada (CRTC)* in which the court found that the CRTC had the power to revise an interim rate retroactively.<sup>88</sup> However, this case was decided using rationale specific to the CRTC's rate making power and is therefore not determinative with respect to the CRTC's powers to address unjust discrimination and undue preference in a forborne environment.<sup>89</sup> In addition, this case was decided under the predecessor to the Act, the *Railway Act*<sup>90</sup>, which the Supreme Court has described as creating a much narrower regulatory scheme than that of the Act. For example, the *Railway Act* did not include the duty of the CRTC to make its decisions in

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<sup>85</sup> Appellants' Memorandum of Fact and Law at para. 51.

<sup>86</sup> *ATCO Gas & Pipeline Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 SCR 140 at para. 51. See also *Bell Canada v. Canada (CRTC)*, [1989] 1 S.C.R. 1722 ("*Bell Canada v. Canada (CRTC)*") at page 1741.

<sup>87</sup> *Nova v. Amoco Canada et al.*, [1981] 2 S.C.R. 437; *Brosseau v. Alberta Securities Commission*, [1989] 1 SCR 301.

<sup>88</sup> *Supra* note 86, at page 1752, paragraphs 44 - 46; Appellants' Memorandum of Facts and Law at para. 61.

<sup>89</sup> *Bell Canada v. Canada (C.R.T.C.)*, *supra* note 86, at para. 58.

<sup>90</sup> R.S.C., 1985, c. R-3.

light of the policy objectives and the Policy Direction, nor did it include the CRTC's broad power to forbear from certain powers.<sup>91</sup>

90. The appellants also rely on *Bell Canada v. Canadian Telephone Employees Association* for the proposition that the CRTC does not have the power to apply its guidelines in a retroactive manner. It should be noted that in this case the court was reviewing the powers of the Canadian Human Rights Commission under the *Canadian Human Rights Act*<sup>92</sup> not those of the CRTC under the Act or any other act, and thus this case has no application to the issues in this appeal.<sup>93</sup>

91. The courts have consistently held that the Act creates a comprehensive regulatory scheme, granting the CRTC broad powers to undertake the polycentric exercise of regulating the fast-changing Canadian telecommunications system in an efficient manner.<sup>94</sup> Many of the CRTC's powers are expressed in broad and general terms, such as the ability to impose "any" condition, rule or regulation or to use "any" method. The courts, often looking at these powers as cumulative, have found that the CRTC has extensive powers to intervene in the business and contractual relationships of Canadian carriers for the purpose of fulfilling its core duties set out in section 47 of the Act. These duties are to ensure just and reasonable rates at all times, prohibit undue preference and unjust discrimination, and fulfill the policy objectives set out in section 7 of the Act.<sup>95</sup>

92. The Supreme Court has emphasized the broad power of the CRTC to prevent unjust discrimination and undue preference. In *British Columbia Telephone Co. v. Shaw Cable System (BC) Ltd.*<sup>96</sup>, the Supreme Court found that the CRTC had the ability under the *Railway Act* to determine who should be allowed to install equipment on poles even

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<sup>91</sup> *Bell Canada v. Bell Aliant*, *supra* note 67, at para. 62.

<sup>92</sup> R.S.C., 1985, c. H-6.

<sup>93</sup> *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, [2003] 1 SCR 884.

<sup>94</sup> *Bell Canada v. Bell Aliant*, *supra* note 67, at para. 38; *Edmonton v. 360Networks*, *supra* note 67, at para. 71; *Genex*, *supra* note 68, at paras. 48 and 49; *Bell Canada v. Bragg*, *supra*, note 68, at page 3.

<sup>95</sup> *Bell Canada v. Challenge Communications Ltd.*, (1979) 1 FCR 857 (CA); *Bell Canada v. Bell Aliant* *supra* note 67, at para. 36.

<sup>96</sup> [1995] 2 SCR 739 ("B.C. Tel v. Shaw").

where this would contradict an existing collective agreement. In doing so, the Court noted that “a private party such as BC Tel should not be permitted, whether intentionally or unintentionally, to bypass, by means of a contract or collective agreement, regulatory requirements imposed on it in the public interest.”<sup>97</sup>

*Application of the CRTC’s powers in the context of the Wireless Code Decision*

93. The appellants entered into their wireless service contracts within a forbore environment with the knowledge that these services were provided subject to the existing and future conditions imposed by the CRTC pursuant to section 24, which permits the CRTC to impose “any condition” on the offering and provision of telecommunications services. The appellants’ contracts are also subject to review by the CRTC to ensure that they do not unjustly discriminate or provide an undue preference contrary to subsections 27(2) - (4) of the Act. Otherwise, long-term contracts would be immunized from CRTC oversight.

94. Indeed, the contracts filed by the appellants with the CRTC, to a greater or lesser extent, contemplate that they are subject to future legislative or regulatory changes. For example, clause 25 of Bell’s contract reads as follows:

**General.** Bell is a federally-regulated undertaking and as such, this Agreement, including all matters relating to its validity, construction, performance and enforcement, shall be governed by applicable federal laws and regulations of Canada. [...] These terms and conditions are subject to amendment, modification or termination if required by such laws or regulations.<sup>98</sup>

95. In its decision, the CRTC required all wireless carriers to abide by the Wireless Code by no later than 3 June 2015, even where the carrier has an existing contractual relationship with its customer. In doing so, the CRTC was exercising its powers under section 24 and subsections 27 (2) - (4) of the Act, expressly reserved as a condition of forbearance. As noted above, the CRTC stated that “unreasonable delays in the

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<sup>97</sup> *Ibid* at para. 60.

<sup>98</sup> *Responses to Interrogatories of Bell dated 10 December 2012*, Undertaking #3, Attachment 1, Service Agreement, section 25, AB, Tab 20 at 770. See also *Response Interrogatories of MTS dated 14 December 2012*, Undertaking #3, Appendix 1, Wireless Service Agreement, clause G-19, AB, Tab 21 at 780.

implementation of the Code for some customers could be considered undue discrimination.”<sup>99</sup>

96. Moreover, the CRTC was exercising these powers, as required by section 47 of the Act, with the express purpose of advancing the policy objectives set out section 7 of the Act, and particularly the objectives to “facilitate orderly development” of the telecommunications system; to “render reliable and affordable telecommunications services of high quality accessible to Canadians”; to “foster increased reliance on market forces”; to “ensure that regulation, where required, is efficient and effective”; and to “respond to the economic and social requirements of users.”<sup>100</sup>

97. It is clear from the Wireless Code Decision that the wireless carriers’ actions regarding locking of devices, long-term contracts, unilateral amendments, etc., not only failed to respond to the requirements of users, but also conferred an undue preference upon the wireless carriers. An implicit finding of undue preference is sufficient to sustain such a conclusion.<sup>101</sup> The regulatory tools to achieve the policy objectives and requisite balance between wireless carriers and users are those from which the CRTC has not forborne—namely, section 24 (ability to impose conditions), subsections 27(2) – (4) (prohibition of undue preferences) of the Act, in conjunction with subsection 32(g), which allows the CRTC to make orders regarding telecommunications services.

98. Consequently, presumptions against interference with vested rights and applying rules in a retrospective manner are necessarily rebutted in the facts and circumstances of the present case. The establishment of a final implementation date for the Wireless Code is a proper exercise of the CRTC’s powers in the Act, as it represents a polycentric finding that provides certainty to all parties and balances the interests of both customers and wireless carriers. Establishing this date takes into account the impact of the Code on

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<sup>99</sup> Wireless Code Decision, *supra* note 19, at para. 365, AB, Tab 2 at 66. See also para. 24, AB, Tab 2 at 14.

<sup>100</sup> *Ibid* at para. 400, AB, Tab 2 at 73; the Act, *supra* note 2, subsections 7(a), (b), (f) and (h).

<sup>101</sup> *B.C. Tel v. Shaw*, *supra* note 96, at para. 40; and *Société Radio-Canada v. Cmr*, *supra* note 67, at para. 11.



the industry by allowing for a significant transition period and ensures that all Canadians benefit from the Code within a reasonable time period.

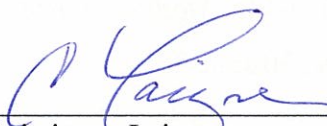
#### **IV. ORDER SOUGHT**

99. The CRTC respectfully requests that the appellants' appeal be dismissed.

100. No costs may be awarded against the CRTC.<sup>102</sup>

February 19, 2014

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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Christianne Laizner  
Senior General Counsel and Executive Director, Legal  
Sector

Solicitor for the Canadian Radio-television and  
Telecommunications Commission

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<sup>102</sup> The Act, *supra* note 2, subsection 64(6).

## **PART V LIST OF AUTHORITIES**

### **CRTC Decisions**

1. Telecom Decision CRTC 2005-61, *Follow-up to Emergency service obligations*, 20 October 2005.
2. Telecom Decision CRTC 2007-44, *Routing of fixed/non-native and nomadic VoIP 9-1-1 calls to public safety answering points*, 15 June 2007.
3. Telecom Decision CRTC 2007-130, *Establishment of an independent telecommunications consumer agency*, 20 December 2007.
4. Telecom Decision CRTC 2010-445, *Modifications to forbearance framework for mobile wireless data services*, 30 June 2010.
5. Telecom Decision CRTC 2011-46, *Review of the Commissioner for Complaints for Telecommunications Services*, 26 January 2011.
6. Telecom Decision CRTC 2012-137, *VoIP 9-1-1 service - Modified contractual condition*, 7 March 2012.
7. Telecom Notice of Consultation CRTC 2012-206, *Proceeding to consider whether the conditions in the Canadian wireless market have changed sufficiently to warrant Commission intervention with respect to retail wireless services*, 4 April 2012.
8. Telecom Decision CRTC 2012-556, *Decision on whether the conditions in the mobile wireless market have changed sufficiently to warrant Commission intervention with respect to mobile wireless services*, 11 October 2012.
9. Telecom Notice of Consultation CRTC 2012-557, *Proceeding to establish a mandatory code for mobile wireless services*, 11 October 2012.
10. Telecom Notice of Consultation CRTC 2012-557-3, *Proceeding to establish a mandatory code for mobile wireless services*, 28 January 2013.

11. Telecom Regulatory Policy CRTC 2013-271, *The Wireless Code*, Ottawa, 3 June 2013.
12. Telecom Decision CRTC 2013-581, *Wireless Code – Request by Saskatchewan Telecommunications for an extension to the deadline to implement data caps*, 31 October 2013.
13. Telecom Regulatory Policy CRTC 2013-586, *Requests for clarification on how the Wireless Code applies to tab contracts*, 31 October 2013.
14. Telecom Regulatory Policy CRTC 2013-598, *Wireless Code – Request by Quebecor Media Inc. to review and vary Telecom Regulatory Policy 2013-271 regarding the definition of “indeterminate contracts”*, 8 November 2013.

#### **Cases**

15. *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654.
16. *ATCO Gas & Pipeline Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 SCR 140.
17. *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 SCR 764.
18. *Bell Canada v. Bragg Communications Inc.*, (June 20, 2008), Ottawa 08-A-33 (FCA).
19. *Bell Canada v. Canada (CRTC)*, [1989] 1 SCR 1722.
20. *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, [2003] 1 SCR 884.
21. *Bell Canada v. Challenge Communications Ltd.*, (1979) 1 FCR 857 (CA).
22. *British Columbia Telephone Co. v. Shaw Cable System (BC) Ltd.* [1995] 2 SCR 739.
23. *Brosseau v. Alberta Securities Commission*, [1989] 1 SCR 301.

24. *Canada (Attorney General) v. Quandrini*, 2010 FCA 246, [2012] 2 FCR 3.
25. *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 2 SCR 472.
26. *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007], 2 SCR 801.
27. *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 SCR 530.
28. *Dunsmuir v. New Brunswick*, 190, 2008 SCC 9, [2008] 1 SCR 190.
29. *Edmonton v. 360Networks Canada Ltd.*, 2007 FCA 106, [2007] 4 FCR 747.
30. *Genex Communications Inc. v. Canada (Attorney General)*, 2005 FCA 283, [2006] 2 FCR 199.
31. *Griffin v. Dell Canada Inc.*, 2010 ONCA 29 (CanLII), 98 OR (3d) 481.
32. *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 SCR 271.
33. *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, 452 NR 340.
34. *Northwestern Utilities Ltd et al. v Edmonton*, [1979] 1 SCR 684.
35. *Nova v. Amoco Canada et al.* [1981] 2 SCR 437.
36. *Saskatchewan River Bungalow Ltd. v. Maritime Life Insurance Co.*, [1994] 2 SCR 490.
37. *Société Radio-Canada v. Métromédia Cmr Montréal Inc.*, [1999] FCJ No. 1637 (FCA), 254 NR 266.

**APPENDIX A**  
**STATUTES AND REGULATIONS**

<p><b><i>Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives</i></b>, P.C. 2006-1534, 14 December 2006, <i>Canada Gazette</i>, v.140, No.26, December 27, 2006, SOR/2006-355.</p>	<p><b><i>Décret donnant au CRTC des instructions relativement à la mise en oeuvre de la politique canadienne de télécommunication</i></b>, C.P. 2006-1534, le 14 décembre 2006, <i>Gazette du Canada</i>, v. 140, no 26, le 27 décembre 2006, DORS/2006-355.</p>
<p>1. In exercising its powers and performing its duties under the <i>Telecommunications Act</i>, the Canadian Radio-television and Telecommunications Commission (the “Commission”) shall implement the Canadian telecommunications policy objectives set out in section 7 of that Act, in accordance with the following:</p> <p style="padding-left: 40px;">(a) the Commission should</p> <p style="padding-left: 80px;">(i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives, and</p> <p style="padding-left: 80px;">(ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives; [...]</p>	<p>1. Dans l’exercice des pouvoirs et fonctions qui lui confère la <i>Loi sur les télécommunications</i>, le Conseil de la radiodiffusion et des télécommunications canadiennes doit mettre en oeuvre la politique canadienne de télécommunication énoncée à l’article 7 de cette loi selon les principes suivants :</p> <p style="padding-left: 40px;">a) il devrait :</p> <p style="padding-left: 80px;">(i) se fier, dans la plus grande mesure du possible, au libre jeu du marché comme moyen d’atteindre les objectifs de la politique,</p> <p style="padding-left: 80px;">(ii) lorsqu’il a recours à la réglementation, prendre des mesures qui sont efficaces et proportionnelles aux buts visés et qui ne font obstacle au libre jeu d’un marché concurrentiel que dans la mesure minimale nécessaire pour atteindre les objectifs; [...]</p>
<p><b><i>Telecommunications Act</i></b>, S.C. 1993, c. 38</p>	<p><b><i>Loi sur les télécommunications</i></b>, L.C. 1993, ch. 38</p>
<p>2. (1) In this Act,</p> <p>[...]</p> <p>“Canadian carrier” means a telecommunications common carrier that is subject to the legislative authority of Parliament;</p>	<p>2. (1) Les définitions qui suivent s’appliquent à la présente loi.</p> <p>[...]</p> <p>« appareil de transmission exclu » Appareil effectuant une ou plusieurs des opérations suivantes :</p>

<p>[...]</p> <p>“exempt transmission apparatus” means any apparatus whose functions are limited to one or more of the following:</p> <p>(a) the switching of telecommunications,</p> <p>(b) the input, capture, storage, organization, modification, retrieval, output or other processing of intelligence, or</p> <p>(c) control of the speed, code, protocol, content, format, routing or similar aspects of the transmission of intelligence;</p> <p>“intelligence” means signs, signals, writing, images, sounds or intelligence of any nature;</p> <p>[...]</p> <p>“telecommunications” means the emission, transmission or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system;</p> <p>“telecommunications common carrier” means a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation;</p> <p>“telecommunications facility” means any facility, apparatus or other thing that is used or is capable of being used for telecommunications or for any operation directly connected with telecommunications, and includes a transmission facility;</p> <p>“telecommunications service” means a service provided by means of</p>	<p>a) commutation des télécommunications;</p> <p>b) saisie, réception, mise en mémoire, classement, modification, récupération, sortie ou tout autre traitement de l’information;</p> <p>c) commande de la vitesse, du code, du protocole, du contenu, de la forme, de l’acheminement ou d’autres aspects semblables de la transmission de l’information.</p> <p>[...]</p> <p>« entreprise canadienne » Entreprise de télécommunication qui relève de la compétence fédérale.</p> <p>[...]</p> <p>« entreprise de télécommunication » Propriétaire ou exploitant d’une installation de transmission grâce à laquelle sont fournis par lui-même ou une autre personne des services de télécommunication au public moyennant contrepartie.</p> <p>« fournisseur de services de télécommunication » La personne qui fournit des services de télécommunication de base, y compris au moyen d’un appareil de transmission exclu.</p> <p>« information » Signes, signaux, écrits, images, sons ou renseignements de toute nature.</p> <p>« installation de télécommunication » Installation, appareils ou toute autre chose servant ou pouvant servir à la télécommunication ou à toute opération qui y est directement liée, y compris les installations de transmission.</p>
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<p>telecommunications facilities and includes the provision in whole or in part of telecommunications facilities and any related equipment, whether by sale, lease or otherwise;</p> <p>“telecommunications service provider” means a person who provides basic telecommunications services, including by exempt transmission apparatus;</p> <p>“transmission facility” means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system, for the transmission of intelligence between network termination points, but does not include any exempt transmission apparatus.</p>	<p>« installation de transmission » Tout système électromagnétique — notamment fil, câble ou système radio ou optique — ou tout autre procédé technique pour la transmission d’information entre des points d’arrivée du réseau, à l’exception des appareils de transmission exclus.</p> <p>[...]</p> <p>« service de télécommunication » Service fourni au moyen d’installations de télécommunication, y compris la fourniture — notamment par vente ou location — , même partielle, de celles-ci ou de matériel connexe.</p> <p>[...]</p> <p>« télécommunication » La transmission, l’émission ou la réception d’information soit par système électromagnétique, notamment par fil, câble ou système radio ou optique, soit par tout autre procédé technique semblable.</p>
<p>8. The Governor in Council may, by order, issue to the Commission directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives.</p>	<p>8. Le gouverneur en conseil peut, par décret, donner au Conseil, au chapitre des grandes questions d’orientation en la matière, des instructions d’application générale relativement à la politique canadienne de télécommunication.</p>
<p>23. For the purposes of this Part and Part IV, “telecommunications service” has the same meaning as in section 2 and includes any service that is incidental to the business of providing telecommunications services.</p>	<p>23. Pour l’application de la présente partie et de la partie IV, « service de télécommunication » s’entend du service de télécommunication défini à l’article 2, ainsi que de tout service accessoire à la fourniture de services de télécommunication.</p>
<p>25. (1) No Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.</p>	<p>25. (1) L’entreprise canadienne doit fournir les services de télécommunication en conformité avec la tarification déposée auprès du Conseil et approuvée par celui-ci fixant — notamment sous forme de maximum, de minimum ou des deux — les tarifs à imposer ou à percevoir.</p>

<p>(2) A joint tariff agreed on by two or more Canadian carriers may be filed by any of the carriers with an attestation of the agreement of the other carriers.</p> <p>(3) A tariff shall be filed and published or otherwise made available for public inspection by a Canadian carrier in the form and manner specified by the Commission and shall include any information required by the Commission to be included.</p> <p>(4) Notwithstanding subsection (1), the Commission may ratify the charging of a rate by a Canadian carrier otherwise than in accordance with a tariff approved by the Commission if the Commission is satisfied that the rate</p> <p style="padding-left: 40px;">(a) was charged because of an error or other circumstance that warrants the ratification; or</p> <p style="padding-left: 40px;">(b) was imposed in conformity with the laws of a province before the operations of the carrier were regulated under any Act of Parliament.</p>	<p>(2) Toute tarification commune entérinée par plusieurs entreprises canadiennes peut être déposée auprès du Conseil par une seule d'entre elles avec attestation de l'accord des autres.</p> <p>(3) La tarification est déposée puis publiée ou autrement rendue accessible au public, selon les modalités de forme et autres fixées par le Conseil; celui-ci peut par ailleurs préciser les renseignements devant y figurer.</p> <p>(4) Le Conseil peut cependant entériner l'imposition ou la perception de tarifs qui ne figurent dans aucune tarification approuvée par lui s'il est convaincu soit qu'il s'agit là d'un cas particulier le justifiant, notamment d'erreur, soit qu'ils ont été imposés ou perçus par l'entreprise canadienne, en conformité avec le droit provincial, avant que les activités de celle-ci soient régies par une loi fédérale.</p>
<p><b>27. (1)</b> Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.</p> <p>(2) No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.</p> <p>(3) The Commission may determine in any case, as a question of fact, whether a Canadian carrier has complied with section 25, this section or section 29, or with any</p>	<p><b>27. (1)</b> Tous les tarifs doivent être justes et raisonnables.</p> <p>(2) Il est interdit à l'entreprise canadienne, en ce qui concerne soit la fourniture de services de télécommunication, soit l'imposition ou la perception des tarifs y afférents, d'établir une discrimination injuste, ou d'accorder — y compris envers elle-même — une préférence indue ou déraisonnable, ou encore de faire subir un désavantage de même nature.</p> <p>(3) Le Conseil peut déterminer, comme question de fait, si l'entreprise canadienne s'est ou non conformée aux dispositions du présent article ou des articles 25 ou 29 ou à</p>



<p>decision made under section 24, 25, 29, 34 or 40.</p> <p>(4) The burden of establishing before the Commission that any discrimination is not unjust or that any preference or disadvantage is not undue or unreasonable is on the Canadian carrier that discriminates, gives the preference or subjects the person to the disadvantage.</p> <p>(5) In determining whether a rate is just and reasonable, the Commission may adopt any method or technique that it considers appropriate, whether based on a carrier's return on its rate base or otherwise.</p> <p>(6) Notwithstanding subsections (1) and (2), a Canadian carrier may provide telecommunications services at no charge or at a reduced rate</p> <p style="padding-left: 40px;">(a) to the carrier's directors, officers, employees or former employees; or</p> <p style="padding-left: 40px;">(b) with the approval of the Commission, to any charitable organization or disadvantaged person or other person.</p>	<p>toute décision prise au titre des articles 24, 25, 29, 34 ou 40.</p> <p>(4) Il incombe à l'entreprise canadienne qui a fait preuve de discrimination, accordé une préférence ou fait subir un désavantage d'établir, devant le Conseil, qu'ils ne sont pas injustes, indus ou déraisonnables, selon le cas.</p> <p>(5) Pour déterminer si les tarifs de l'entreprise canadienne sont justes et raisonnables, le Conseil peut utiliser la méthode ou la technique qu'il estime appropriée, qu'elle soit ou non fondée sur le taux de rendement par rapport à la base tarifaire de l'entreprise.</p> <p>(6) Le présent article n'a pas pour effet d'empêcher l'entreprise canadienne de fournir, gratuitement ou moyennant un tarif réduit, des services de télécommunication soit à ses administrateurs, dirigeants, employés et anciens employés soit, avec l'agrément du Conseil, à des organismes de bienfaisance, à des personnes défavorisées ou à toute personne.</p>
<p><b>29.</b> No Canadian carrier shall, without the prior approval of the Commission, give effect to any agreement or arrangement, whether oral or written, with another telecommunications common carrier respecting</p> <p style="padding-left: 40px;">(a) the interchange of telecommunications by means of their telecommunications facilities;</p> <p style="padding-left: 40px;">(b) the management or operation of either or both of their facilities or any other facilities with which either or both are connected; or</p> <p style="padding-left: 40px;">(c) the apportionment of rates or revenues between the carriers.</p>	<p><b>29.</b> Est subordonnée à leur approbation par le Conseil la prise d'effet des accords et ententes — oraux ou écrits — conclus entre une entreprise canadienne et une autre entreprise de télécommunication sur soit l'acheminement de télécommunications par leurs installations de télécommunication respectives, soit la gestion ou l'exploitation de celles-ci, ou de l'une d'entre elles, ou d'autres installations qui y sont interconnectées, soit encore la répartition des tarifs et des autres recettes entre elles.</p>

<p><b>31.</b> No limitation of a Canadian carrier's liability in respect of a telecommunications service is effective unless it has been authorized or prescribed by the Commission.</p>	<p><b>31.</b> La limitation de la responsabilité d'une entreprise canadienne en matière de services de télécommunication n'a d'effet que si elle est prévue par règlement du Conseil ou si celui-ci l'a approuvée.</p>
<p><b>32.</b> The Commission may, for the purposes of this Part,</p> <p>(a) approve the establishment of classes of telecommunications services and permit different rates to be charged for different classes of service;</p> <p>....(b) determine standards in respect of the technical aspects of telecommunications applicable to telecommunications facilities operated by or connected to those of a Canadian carrier;</p> <p>(c) amend any tariff filed under section 25 or any agreement or arrangement submitted for approval under section 29;</p> <p>(d) suspend or disallow any portion of a tariff, agreement or arrangement that is in its opinion inconsistent with this Part;</p> <p>(e) substitute or require the Canadian carrier to substitute other provisions for those disallowed;</p> <p>(f) require the Canadian carrier to file another tariff, agreement or arrangement, or another portion of it, in substitution for a suspended or disallowed tariff, agreement, arrangement or portion; and</p> <p>(g) in the absence of any applicable provision in this Part, determine any matter and make any order relating to the rates, tariffs or telecommunications services of Canadian carriers.</p>	<p><b>32.</b> Le Conseil peut, pour l'application de la présente partie :</p> <p>a) approuver l'établissement de catégories de services de télécommunication et permettre que soient imposés ou perçus des tarifs différents pour chacune d'elles;</p> <p>b) définir des normes concernant l'aspect technique des télécommunications applicables aux installations de télécommunication fournies ou liées à une entreprise canadienne;</p> <p>c) modifier toute tarification déposée aux termes de l'article 25 ou tout accord ou entente visés à l'article 29;</p> <p>d) suspendre ou refuser l'application de tout ou partie d'une tarification, d'un accord ou d'une entente qu'il juge incompatible avec la présente partie;</p> <p>e) obliger l'entreprise en cause à remplacer les dispositions rejetées, ou y procéder lui-même;</p> <p>f) obliger l'entreprise en cause à déposer, en tout ou en partie, une tarification ou un accord ou une entente en remplacement de dispositions rejetées ou dont l'application est suspendue;</p> <p>g) en l'absence de disposition applicable dans la présente partie, trancher toute question touchant les tarifs et tarifications des entreprises canadiennes ou les services de télécommunication qu'elles fournissent.</p>
<p><b>47.</b> The Commission shall exercise its powers and perform its duties under this</p>	<p><b>47.</b> Le Conseil doit, en se conformant aux décrets que lui adresse le gouverneur en</p>

<p>Act and any special Act</p> <p>(a) with a view to implementing the Canadian telecommunications policy objectives and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with section 27; and</p> <p>(b) in accordance with any orders made by the Governor in Council under section 8 or any standards prescribed by the Minister under section 15.</p>	<p>conseil au titre de l'article 8 ou aux normes prescrites par arrêté du ministre au titre de l'article 15, exercer les pouvoirs et fonctions que lui confèrent la présente loi et toute loi spéciale de manière à réaliser les objectifs de la politique canadienne de télécommunication et à assurer la conformité des services et tarifs des entreprises canadiennes avec les dispositions de l'article 27.</p>
<p><b>52.</b> (1) The Commission may, in exercising its powers and performing its duties under this Act or any special Act, determine any question of law or of fact, and its determination on a question of fact is binding and conclusive.</p> <p>(2) In determining a question of fact, the Commission is not bound by the finding or judgment of any court, but the finding or judgment of a court is admissible in proceedings of the Commission.</p> <p>(3) The power of the Commission to hear and determine a question of fact is not affected by proceedings pending before any court in which the question is in issue.</p>	<p><b>52.</b> (1) Le Conseil connaît, dans l'exercice des pouvoirs et fonctions qui lui sont conférés au titre de la présente loi ou d'une loi spéciale, aussi bien des questions de droit que des questions de fait ; ses décisions sur ces dernières sont obligatoires et définitives.</p> <p>(2) Dans les décisions qu'il rend sur des questions de fait, le Conseil n'est pas lié par les conclusions ou jugements des tribunaux, lesquels sont cependant admissibles devant lui.</p> <p>(3) Le Conseil peut juger les questions de fait dont connaît déjà un tribunal.</p>
<p><b>64.</b> [...] (5) On an appeal, the Court may draw any inference that is not inconsistent with the findings of fact made by the Commission and that is necessary for determining a question of law or jurisdiction.</p> <p>(6) The Commission is entitled to be heard on an application for leave to appeal and at any stage of an appeal, but costs may not be awarded against it or any of its members.</p>	<p><b>64.</b> [...] (5) Lors de l'audition d'un appel, la Cour peut déduire toutes les conclusions qui ne sont pas incompatibles avec les faits établis devant le Conseil et qui sont nécessaires pour déterminer la question de compétence ou de droit.</p> <p>(6) Le Conseil a le droit de présenter des observations pendant l'instruction de la demande d'autorisation et ensuite à toute étape de la procédure d'appel; les frais ne peuvent cependant être mis à sa charge ou à celle des conseillers.</p>

