Federal Court of Appeal  Cour d'appel fédérale

Date: 20150519

Docket: A-337-13

Citation: 2015 FCA 126

CORAM: **NOËL C.J.**
PELLETIER J.A.
SCOTT J.A.

BETWEEN:

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

Appellants

and

AMTELECOM LIMITED PARTNERSHIP, BRAGG COMMUNICATIONS INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC., GLOBALIVE WIRELESS MANAGEMENT CORP., HAY COMMUNICATIONS CO-OPERATIVE LIMITED, HURON TELECOMMUNICATIONS CO-OPERATIVE LIMITED, MORNINGTON COMMUNICATIONS CO-OPERATIVE LIMITED, NEXICOM MOBILITY INC., NORTHWESTEL INC., PEOPLE'S TEL LIMITED PARTNERSHIP, PUBLIC MOBILE INC., QUADRO COMMUNICATIONS CO-OPERATIVE INC., QUEBECOR MEDIA INC., SOGETEL MOBILITÉ INC., THUNDER BAY TELEPHONE, VAXINATION INFORMATIQUE, CONSUMERS' COUNCIL OF CANADA, DIVERSITYCANADA FOUNDATION, MEDIA ACCESS CANADA, MOUVEMENT PERSONNE D'ABORD DU QUÉBEC, PUBLIC INTEREST ADVOCACY CENTRE, CONSUMERS' ASSOCIATION OF CANADA, COUNCIL OF SENIOR CITIZENS' ORGANIZATIONS OF BRITISH COLUMBIA, OPENMEDIA.CA, SERVICE DE PROTECTION ET D'INFORMATION DU CONSOMMATEUR, UNION DES CONSOMMATEURS, CANADIAN WIRELESS TELECOMMUNICATIONS ASSOCIATION, COMMISSIONER FOR COMPLAINTS FOR

TELECOMMUNICATIONS SERVICES INC., COMPETITION BUREAU OF CANADA, GLENN THIBEAULT, HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, GOVERNMENT OF MANITOBA, GOVERNMENT OF THE NORTHWEST TERRITORIES, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, GOVERNMENT OF YUKON, OFFICE OF THE PRIVACY COMMISSIONER OF CANADA, CATHERINE MIDDLETON, TAMARA SHEPHERD, LESLIE REGAN SHADE, KIM SAWCHUK, BARBARA CROW, SHAW TELECOM INC., TERRY DUNCAN, GLENN FULLERTON, TANA GUINDEBA, NASIR KHAN, MICHAEL LANCIONE, ALLAN MUNRO, FREDERICK A. NAKOS, RAINER SCHOENEN and DANIEL SOKOLOV

Respondents

Heard at Ottawa, Ontario, on November 12, 2014.

Judgment delivered at Ottawa, Ontario, on May 19, 2015.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: NOEL.C.J.
SCOTT J.A.

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Respondents

REASONS FOR JUDGMENT

PELLETIER J.A.

[1] On June 3, 2013, the Canadian Radio-television and Telecommunications Commission (CRTC) issued Telecom Regulatory Policy CRTC 2013-271 (the Wireless Code or the Code) which it described as "a mandatory code of conduct for providers of retail wireless voice and data services". The Code dealt with a number of consumer concerns with respect to wireless services including the opacity of wireless service contracts, excessive charges for data overages and data roaming, and early cancellation charges. The Code imposes a number of mandatory terms in future contracts between consumers and the appellants.

[2] The aspect of the Code which gives rise to the present appeal is the coming into force of these provisions. The Code provides that it will take effect on December 2, 2013, and will apply to all new or amended wireless service contracts offered from that day forward. However, and

herein lies the rub, the Code goes on to stipulate that it will apply to all contracts, no matter when they were concluded, as of June 3, 2015 (the drop-dead date).

[3] The drop-dead date is a problem because there are a large number of three-year contracts which will not have matured by June 3, 2015. Should wireless customers take advantage of the Code by cancelling these contracts before their maturity date, the appellants (the wireless service providers) will be unable to collect early cancellation fees on those contracts even though they may not have fully recovered any incentives offered to consumers to enter into those contracts, incentives which usually took the form of discounted equipment prices.

[4] A number of the affected wireless service providers (i.e. cell phone companies) have challenged the CRTC's imposition of a drop-dead date on the ground that it is beyond the CRTC's jurisdiction to make retrospective rules or to interfere with vested rights.

[5] For the reasons that follow, I would dismiss the appeal with costs.

I. LEGAL AND FACTUAL MATRIX

[6] The CRTC is a creation of the *Canadian Radio-television and Telecommunications Commission Act*, R.S.C., 1985, c. C-22. The powers of the CRTC are set out in various pieces of legislation, including the *Telecommunications Act*, S.C. 1993, c. 38 (the Act). Broadly speaking, it is charged with the regulation of the telecommunications industry in Canada. Pursuant to section 34 of the Act, the CRTC has the power to refrain from the exercise of its regulatory mandate in relation to a telecommunications service or a class of service "where the Commission

finds as a question of fact that to refrain would be consistent with the Canadian telecommunications policy objectives." Historically, the CRTC has chosen not to regulate the wireless communications industry.

[7] In 2012, the CRTC undertook a public consultation to determine if conditions in the wireless industry had changed so that its policy of forbearance should be reviewed. Following that consultation, it concluded that it need not embark upon regulation of wireless rates but that, in response to broad consumer dissatisfaction with various terms of service, it should promulgate a code of conduct for wireless service providers. The CRTC found its power to do so in s. 24 of the *Act* and in the objectives of Canada's telecommunications policy, as articulated in paragraphs 7(*a*), (*b*), (*f*), and (*h*) of the Act: see *Telecom Decision CRTC 2012-556*, at paragraphs 22-27. The provisions relied upon by the CRTC are reproduced below for ease of reference:

24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.	24. L'offre et la fourniture des services de télécommunication par l'entreprise canadienne sont assujetties aux conditions fixées par le Conseil ou contenues dans une tarification approuvée par celui-ci.
7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives	7. La présente loi affirme le caractère essentiel des télécommunications pour l'identité et la souveraineté canadiennes; la politique canadienne de télécommunication vise à :
(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;	a) favoriser le développement ordonné des télécommunications partout au Canada en un système qui contribue à sauvegarder, enrichir et renforcer la structure sociale et économique du Canada et de ses régions;
(b) to render reliable and affordable	b) permettre l'accès aux Canadiens

telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;	dans toutes les régions — rurales ou urbaines — du Canada à des services de télécommunication sûrs, abordables et de qualité;
(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;	f) favoriser le libre jeu du marché en ce qui concerne la fourniture de services de télécommunication et assurer l'efficacité de la réglementation, dans le cas où celle-ci est nécessaire;
(h) to respond to the economic and social requirements of users of telecommunications services; and	h) satisfaire les exigences économiques et sociales des usagers des services de télécommunication;

[8] Following extensive consultations with the public and the industry, the CRTC developed the Wireless Code. It addresses a number of issues but the relevant ones, for our purposes, are early cancellation charges and the coming into force of the Code itself.

[9] The CRTC noted in the Code that consumers considered that three year contracts combined with early cancellation charges made it difficult for them to change wireless service providers and to keep up with technological change. The CRTC concluded that consumers should be able to switch wireless service providers, upgrade devices and take advantage of competitive offers every two years "in order to contribute to a more dynamic marketplace and to enable consumers to take advantage of technological advances": Wireless Code at paragraph 216.

[10] The CRTC went on to conclude that the fundamental barrier to consumers taking advantage of competitive offers every two years was not the use of three year contracts but the

high early cancellation fees: Wireless Code at paragraph 217. This led it to conclude that "early cancellation fees must be significantly limited to empower consumers to take advantage of competitive offers and technological advances at least every two years": Wireless Code at paragraph 218. The CRTC went on to find that it was appropriate to limit the period over which early cancellation fees would be payable to 24 months which, in the CRTC's view, would minimize the costs of switching wireless service providers and ultimately result in a more competitive marketplace.

[11] Insofar as the calculation of early cancellation fees is concerned, the CRTC found that the relevant factors were (1) whether a mobile device is offered at a reduced price as part of the contract ("a subsidized device") and (2) whether the contract is for a fixed term or an indefinite term. When the CRTC's conclusions with respect to early cancellation fees are applied to various combinations of factors (1) and (2), the result is the formula for calculation for early cancellation fees set out at paragraph 234 of the Code, reproduced below for ease of reference:

> 234. If a customer cancels a contract before the end of the commitment period, a WSP [wireless service provider] must not charge the customer any fee or penalty other than the early cancellation fee, which must be calculated in the manner set out below:
>
> **(i) When a subsidized device is provided as part of the contract**
>
> **a) for fixed-term contracts**: The early cancellation fee must not exceed the value of the device subsidy. The early cancellation fee must be reduced by an equal amount each month, for the lesser of 24 months or the total number of months in the contract term, such that the early cancellation fee is reduced to $0 by the end of the period.
>
> **b) for indeterminate contracts**: The early cancellation fee must not exceed the value of the device subsidy. The early cancellation fee must be reduced by an equal amount each month, over a maximum of 24 months, such that the early cancellation fee is reduced to $0 by the end of the period.
>
> **(ii) When the contract does not include a subsidized device**

> **a) for fixed-term contracts**: The early cancellation fee must not exceed the lesser of $50 or 10 percent of the minimum monthly charge for the remaining months of the contract, up to a maximum of 24 months. The early cancellation fee must be reduced to $0 by the end of that period.
>
> **b) for indeterminate contracts**: A WSP must not charge an early cancellation fee.

[12] Had the Code provided that these conditions would apply going forward as of a given date, this appeal would not have been taken. But the Code provided that it would apply to all new and amended contracts beginning December 2, 2013, until June 3, 2015, at which point the Code would apply to all contracts, no matter when they were concluded.

[13] The CRTC set out its rationale for its conclusions on this point at paragraphs 360-367 of the Code. As this rationale will be examined in detail later in these reasons, it is sufficient, at this point, to summarize its reasoning. The purpose of the Code is to ensure that consumers can make informed choices and thereby make the market more dynamic. The CRTC considered that it was in the best interests of consumers that the Code be implemented as soon as possible and that it was essential that the transition period to full implementation of the Code be as short as possible, having regard to the practical constraints faced by the wireless service providers. The optimum time to make the Code applicable to all contracts is June 3, 2015, which balanced the need for speedy implementation and the costs imposed on the wireless service providers.

[14] The CRTC's determination on the issue of implementation date is found in paragraphs 368-369 of the Code:

> 368. In light of the above, the Commission determines that all aspects of the Wireless Code will take effect on 2 December 2013.

> 369. The Commission finds 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. *In addition, in order to ensure that all consumers are covered by the Wireless Code within a reasonable time frame, the Wireless Code should apply to all contracts, no matter when they were entered into, by no later than 3 June 2015.*
>
> (my emphasis)

[15] Further on in the Code, at paragraph 394, the CRTC specifically directs that wireless service providers provide services to consumers and small businesses according to the terms of the Code, as a condition of providing these services pursuant to section 24 of the Act.

[16] The relief sought in this appeal is that the second sentence of paragraph 369, italicized above, be struck out.

II. ISSUES

1. Does paragraph 369 of the Code, in particular the second sentence thereof, operate retrospectively or affect vested rights?
2. If so, what is the standard of review of the CRTC's decision to make such an order?
3. Having regard to the standard of review, and if it is the case that the second sentence of paragraph 369 gives the Code retrospective effect, was the CRTC's decision to give it that effect reasonable?

1. Does paragraph 369 of the Code, in particular the second sentence thereof, operate retrospectively or affect vested rights?

[17] The wireless service providers' case turns on two related questions which are essentially two aspects of the same question. The two questions are whether the CRTC has jurisdiction to make retrospective orders and to make orders which interfere with vested rights. It appears to me

that orders which interfere with vested rights must necessarily have retrospective (if not retroactive) effect since the rights were acquired before the orders were made. The question arises because it is alleged that the second sentence of paragraph 369 either has retrospective application or that it interferes with vested rights. The first point which must be addressed is whether this premise is correct, in the sense that the wireless service providers' characterization of the issue is legally sound.

[18] The *locus classicus* of the explanation of the difference between retroactive and retrospective legislation is found in E. A. Driedger, "Statutes: Retroactive Retrospective Reflections" (1978), 56 *Can. Bar Rev*. 264, at pp. 268-69, quoted with approval in *Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin*, 2004 SCC 59, [2004] 3 S.C.R. 257 at paragraph 46:

> A **retroactive** statute is one that operates as of a time prior to its enactment. A **retrospective** statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A **retroactive** statute *operates backwards*. A **retrospective** statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A **retroactive** statute changes the law from what it was; a **retrospective** statute changes the law from what it otherwise would be with respect to a prior event [Emphasis in original].

[19] In the present case, the question is whether the second sentence of paragraph 369 operates retrospectively by attaching new consequences to an event that took place before the Code was enacted. Prior to the enactment of the Code, a consumer who sought early termination of a service contract which provided for the payment of early cancellation fees would be liable to pay those fees. After the enactment of the Code, the same consumer, subject to the same contract, could, after June 3, 2015, terminate that contract without being liable for early

cancellation fees. Thus, with the passage of the Code, the consequences of early termination after June 3, 2015, have been changed for both the consumer and the wireless service provider. The consumer is relieved from an obligation which he would otherwise have had in the event of early cancellation and the wireless service provider is deprived of a remedy he would otherwise have had in the event of early cancellation. The present consequences of a past act are changed by the application of the Code to contracts concluded before the Code came into force.

[20] As for the question of interference with vested rights, the respondents' argument is that payment of early cancellation fees is contingent upon early cancellation and therefore is not a vested right. That argument ignores the reality of the transaction between the consumer and the wireless service provider. Where a wireless service provider offers the consumer a device at a discounted price in return for the consumer entering into a contract of a given length, it has a vested right to the revenue stream provided in the contract, including the portion attributable to repayment of the device subsidy. It is true that there is an element of contingency in the payment of early cancellation charges since these do not become payable except in the event of early cancellation. But to the extent that early cancellation charges are simply the accelerated repayment of a portion of the contract amount, they are simply a different mode of discharging a present obligation.

[21] The same argument can be made in the case where a consumer receives a lower rate in return for entering into a fixed term contract. The wireless service provider has a vested right to the revenue stream fixed by the contract. To the extent that the early cancellation charge is the

accelerated payment of a portion of that revenue stream, it too is a simply a different mode of payment of an existing obligation.

[22] As result, I am of the view that the application of the Code to contracts concluded before the Code came into effect is an interference with vested rights and gives the Code retrospective application.

2. If so, what is the standard of review of the CRTC's decision to make such an order?

[23] The question in issue is whether the Act authorizes the CRTC to make rulings with retrospective effect or which interfere with vested rights?

[24] It is important to note that the CRTC did not explicitly address this issue even though the matter was argued before it and it was provided with a legal opinion which said it did not have the power to make such an order: A.B. pp. 2342-2349. As a result, this is similar to *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 (*Alberta Teachers*), where the issue was an implied decision on a point which had not been argued before the tribunal. This is a case where the tribunal implicitly decided an issue which was argued before it by making the order it did.

[25] If the standard of review is correctness, the absence of reasons is not an issue because the reviewing court simply provides its own view of the correct decision. That said, the absence of reasons does not allow the reviewing court to default to a correctness standard of review: see

Alberta Teachers at paragraph 50. On the other hand, if the standard of review is reasonableness, the question of how reasonableness is to be assessed in the absence of reasons arises.

[26] The Supreme Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*), at paragraphs 47-48, made the tribunal's reasons the centerpiece of the reasonableness analysis. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at paragraphs 14, the Supreme Court nuanced this position when it held that adequacy of reasons was not a stand-alone ground of review and that "reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." In *Alberta Teachers*, the Supreme Court, drawing on *Dunsmuir,* held that while reasonableness could be assessed by reference to the reasons "which could be offered in support of a decision" there were limits to this power to supplement a tribunal's reasons: see *Alberta Teachers* at paragraph 53. Quoting from the British Columbia Court of Appeal's decision in *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 276 B.C.A.C. 135 at paragraphs 53 and 56, the Supreme Court found that a court could not "reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result": *Alberta Teachers* at paragraph 54.

[27] How then is a reviewing Court to proceed in circumstances such as this? Generally speaking, the matter should be remitted to the tribunal to allow it to give reasons which can then form the basis of a reasonableness analysis. However, given the fact that June 3, 2015, is rapidly approaching, that is not an option here. Where a reasonable basis for the decision is apparent to

the reviewing court, the decision should simply be upheld as reasonable. However, it will generally be inappropriate to find that there is no reasonable basis for the tribunal's decision without giving it an opportunity to provide one: see *Alberta Teachers* at paragraph 55. While this is very respectful of a tribunal's jurisdiction, it is cold comfort indeed to the parties, particularly in a case such as this where the point in issue was argued before the tribunal. In such a case, fairness to the parties requires that the reviewing court undertake its own standard of review analysis and, if it concludes that the applicable standard is reasonableness, assess the reasonableness of the decision. This is what I propose to do.

[28] The question then is whether the standard of review of the CRTC's interpretation of section 24 of the Act, as implemented in the second sentence of paragraph 365, is correctness or reasonableness.

[29] The wireless service providers argue that this is either a question of jurisdiction or a question of general importance to the legal system which is outside the CRTC's special expertise. They rely on the authority of this Court's decision in *MTS Allstream Inc. v. Edmonton (City of)*, 2007 FCA 106, [2007] 4 F.C.R. 747 (*MTS Allstream*). In that case, this court, citing *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, held that the question of whether the CRTC had the legal authority to hear an application about fees to be paid for use of municipal lands was reviewable on the standard of correctness because the question was one of statutory interpretation in relation to a question which was of general importance to the legal system and did not engage the CRTC's specialized expertise. The

appellants argue the CRTC has no special expertise in the interpretation of the Act to determine if it has the legal authority to promulgate a Code with retrospective effect.

[30] I note that in *Wheatland County v. Shaw Cablesystems Limited*, 2009 FCA 291, [2009] F.C.J. No. 1264 (*Wheatland*), this Court resiled from the position taken in *MTS Allstream* in light of the later jurisprudence of the Supreme Court in *Dunsmuir* and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339: see *Wheatland*, at paragraphs 52-54.

[31] The current state of the law on this question was recently summarized by the Supreme Court in *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] S.C.J. No. 3 at paragraph 35:

> The questions at issue are questions of law arising under the Tribunal's home statute and therefore a standard of reasonableness presumptively applies (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, per Fish J.; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 30).

[32] Since the interpretation of the Act, and in particular section 24 is a question of law, the reasonableness standard presumptively applies. That presumption can be rebutted in a limited number of ways:

> One case in which it can be rebutted is where a contextual analysis reveals that the legislature clearly intended not to protect the tribunal's jurisdiction in relation to certain matters; the existence of concurrent and non‑exclusive jurisdiction on a given point of law is an important factor in this regard (*Tervita*, at paras. 35‑36 and 38‑39; *McLean*, at para. 22; *Rogers*, at para. 15).
>
> Another such case is where general questions of law are raised that are of importance to the legal system and fall outside the specialized administrative tribunal's area of expertise (*Dunsmuir*, at paras. 55 and 60).

Mouvement laïque québécois and Alain Simoneau v. City of Saguenay and Jean Tremblay, 2015 SCC 16, at paragraphs 46-47

[33] In this case, there is no issue of concurrent and non-exclusive jurisdiction in relation to the interpretation of those provisions of the Act which confer jurisdiction on the CRTC. The only time a court might be called upon to interpret those provisions is in the course of a judicial review of the CRTC's interpretation of those provisions. This is not a case like *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283 (*Rogers*), where the Copyright Board and a superior court "may each have to consider the same legal question at first instance" which leads to the inference that Parliament "was not to recognize superior expertise of the Board relative to the court with respect to such legal questions": *Rogers*, at paragraph 15.

[34] This leaves the issue of whether the question before the CRTC is one of general importance to the legal system which falls outside the CRTC's special expertise. The wireless service providers' position is that "whether a rule-making body has jurisdiction to make rules that interfere with vested rights or that have retrospective effect is of fundamental importance to the legal system": Appellant's Memorandum of Fact and Law at paragraph 46. I think it is more correct to say that the principle of law is that "The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act": *Gustavson Drilling (1964) Ltd v. M.N.R.*, [1977] 1 S.C.R. 271 at page 282. When the principle is stated in terms of vested rights, it is formulated as follows: "…the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all

events, that intention is plainly manifested by unavoidable inference": *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629, at p. 638, quoted with approval in *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530 at paragraph 33.

[35] In my view, these two principles are simply the same principle expressed in two different ways: once from the point of view of temporal application and once from the point of view of consequential effects. In both cases, the principle is, by its very terms, a rebuttable presumption applicable to the interpretation of laws: see R. Sullivan, *Sullivan on the Construction of Statutes, Sixth Edition*, Markham, LexisNexis, 2014, at page 761. The issue in the appeal is not the principle itself but rather its application to the facts of this case.

[36] To the extent that a tribunal is entitled to deference in the interpretation of its home statute, it must equally be entitled to deference in the use which it makes of the tools of statutory interpretation. It would be illogical to find that while a tribunal's interpretation of its home statute was presumptively entitled to deference, its use of the rules of interpretation, or its treatment of rebuttable presumptions, was to be assessed on the standard of correctness. This would simply be a back door application of the correctness standard.

[37] Even if one assumes that the presumption against retrospective legislation is a law of general application, that question calls for review on the correctness standard only if the question is outside the tribunal's specialized expertise. The question of what is outside the tribunals specialized expertise was also considered in *McLean v. British Columbia (Securities Commission),* 2013 SCC 67, [2013] 3 S.C.R. 895 where the Court wrote:

> Third, and most significantly, the problem with the appellant's argument is her narrow view of the Commission's expertise. In particular, the appellant argues that limitation periods "are not in themselves part of substantive securities regulation, the area of the [Commission's] specialised expertise"…
>
> The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired the administrative decision maker - not the courts - to make. Indeed, the exercise of that interpretative discretion is part of an administrative decision maker's "expertise".
>
> *McLean*, cited above, at paragraphs 30, 33

[38] The notion of a tribunal's specialized expertise has evolved to include the exercise of "interpretative discretion" so that the CRTC is presumed to have the required expertise to resolve the question of whether section 24 authorizes it to promulgate a Code with retrospective effect.

[39] The conclusion which flows from this is that presumption of review of the CRTC's interpretation of its home statute on the standard of reasonableness has not been rebutted by the wireless companies.

[40] That said, because the reasonableness analysis in a case such as this is based entirely on the tribunal's factual findings and policy statements, there is an opportunity to conflate the question of the tribunal's power to do a thing and the reasonableness of the tribunal's doing of the thing. The fact that a tribunal exercises a power reasonably does not mean that it has the jurisdiction (*vires*) to exercise that power in the first place. The question must be whether the tribunal's factual findings and policy findings point to the conclusion that without such a power the tribunal cannot fulfill its mandate.

3. Having regard to the standard of review, and if it is the case that the second sentence of paragraph 369 gives the Code retrospective effect, was the CRTC's decision to give it that effect reasonable?

[41] What rationale did the CRTC offer for its decision to make the Code apply to all contracts after June 3, 2015, regardless of when those contracts were concluded?

[42] At paragraphs 360-367 of the Code, the CRTC set out its analysis with respect to the implementation date for Code. It began by restating the purpose of the Code, namely that consumers be empowered to make informed choices in the competitive market so as to contribute to making that market more competitive. For that reason, the CRTC considered that it was in the best interests of consumers that the Wireless Code be implemented as soon as practicable.

[43] The CRTC went on to note that if the Wireless Code applied only to contracts entered into after December 2, 2013, ("new contracts"), many consumers who were locked into pre-existing contracts would not fully benefit from the Code until those contracts expired or were amended. The Commission was of the view that it was essential that the transition period for the implementation of the Wireless Code should be as short as possible so as to ensure that all consumers benefit from the Code in a reasonable period. The CRTC noted that unreasonable delays in the implementation of the Code for some customers "could be considered undue discrimination": Wireless Code at paragraph 365.

[44] The CRTC did recognize that there were practical reasons why immediate application of the Code to all existing contracts might not be proportionate, given that the costs and resources necessary to immediately implement the Code would outweigh the relative benefit to consumers.

[45] On the basis of the evidence filed in the hearings which it held, the CRTC was aware 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 date. Furthermore, the evidence before the CRTC showed that a large proportion of the consumers amend or extend their contracts prior to their expiry so that the Code would apply to most contracts in less than 2 years. The CRTC reasoned that at that point, the burden on wireless service providers to amend the remaining contracts would be substantially reduced.

[46] In a communication to the wireless service providers industry association dated June 18, 2013, the CRTC, drawing on information provided by the wireless service providers in the course of the hearing process, the CRTC advised that "the evidence suggests that approximately 80% of wireless customers, depending on the service provider, would be covered by the Code by 3 June 2015": A.B. at p. 2618.

[47] Before looking more closely at the CRTC's reasoning, one can eliminate from further consideration the question of "undue discrimination", which the CRTC raised a as a possible issue if implementation of the Code were "unreasonably delayed". Undue discrimination is a reference to section 27 of the Act which prohibits a carrier, in the provision of services, to unjustly discriminate or give an unjust preference to any person, including itself. Undue

discrimination and unjust discrimination appear to be used interchangeably: see *Broadcasting Regulatory Policy CRTC 2011-522* at paragraph 11, *General Authorizations for Broadcasting Distribution Undertakings*, at paragraph 3(c).

[48] Assuming for the sake of this argument that undue discrimination does not require a specific intention to discriminate, it must nonetheless result from a deliberate choice by a carrier. To suggest that wireless service providers would engage in undue discrimination as a result of phasing in the implementation of the Code according to the CRTC's direction is absurd.

[49] Does the CRTC's reasoning leading to the imposition of the June 3, 2015, drop-dead date satisfy the "necessary implication" test with respect to the implied interpretation of section 24 which its decision evidences? Since it is conceded by all that section 24 does not explicitly authorize the CRTC to make rules with retrospective application, it can only do so if that power must arise by necessary implication because without such a power, it could not fulfill its statutory mandate. : *see Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, [1977] 1 S.C.R. 271.

[50] The Code implements several of the policy objective of the Act, particularly paragraph 7(f) – fostering increased reliance on market forces for the provision of services- and paragraph 7(h) – responding to the social and economic requirements of users. To that extent, the CRTC's objectives are grounded in the Act and in the Canadian telecommunications policy. This is an important factor in ensuring that the CRTC's position is not simply "saying it's so makes it so."

As a result, the promulgation of the Code as a whole is a matter squarely within the CRTC's mandate and within the Act's policy objectives.

[51] The issue is the timing of that implementation. The CRTC found that it was in the best interests of consumers that the Code be implemented as soon as possible and that it was essential that the transition period be as short as possible. These are both question which are intimately tied to the objectives of the Code itself. They are also questions which depend on the exercise of the CRTC's intimate knowledge of the telecommunications industry and its regulatory environment. To that extent, they are determinations of fact made by the CRTC in the exercise of its mandate, or to put the matter another way, they are determinations which are permeated by the CRTC's factual expertise, both generally and specifically in the context of this proceeding.

[52] Because these conclusions are so heavily dependent upon the CRTC's factual assessments, it appears to me that they are beyond the scope of our review, which is limited to question of law and jurisdiction. Put another way, one could not question whether it really is essential that the Code be implemented as soon as practicable without engaging in a factual analysis designed to undermine the CRTC's own factual analysis. This is not our function in a statutory appeal from a specialized tribunal.

[53] Our role, in the circumstances of this case, is to examine the rationale given for the decision to see if there is a rational basis for it. Having set aside the question of undue discrimination, the remaining reason for the retrospective application of the Code is the CRTC's

finding that enabling consumers to make informed choices in the competitive market will contribute to making that market even more competitive.

[54] It is important to recall that while this dispute centers on the effect of the implementation of the Code on early cancellation charges, it is the Code as a whole which is being implemented. The Code contains a large number of other provisions dealing with consumer choice and consumer protection. It covers such topics as the use of plain language in contracts, specific terms to be included in post-paid and pre-paid service contracts, the provision of critical information, changes to contract terms, bill management, mobile device issues, security deposits and disconnection: see A. B. pp 76-83. It is therefore an error to assess the CTRC's decision solely through the lens of early cancellation fees.

[55] When one considers the Code as a whole, one can see that one of its effects will be to put more information in the hands of consumers. To the extent that the functioning of any market is dependent on the quality of the information available to market participants, the coming into force of the Code should make the market for wireless services more dynamic as consumers make better informed choices at more frequent intervals. It is not unreasonable to conclude that achieving this state of affairs is indeed in the best interests of consumers.

[56] Does it follow from this that the Code should therefore be implemented as soon as practicable? At paragraph 365 of the Code, the CRTC noted that if the Code only applies to new contracts, "many Canadians with pre-existing wireless contracts will not fully benefit from the Wireless Code until these pre-existing contracts expire or are amended." Given the CRTC's

intention to put more information into the hands of consumers so as to increase the dynamism of the market, it is reasonable to have all consumers on the same footing as soon as possible. It is perhaps this limited non-technical view of “undue discrimination” which the CRTC had in mind. From the point of view of the regulation of the retail market in voice and data wireless services, the CRTC could reasonably consider that section 24, by necessary implication, gives it the power to impose the Code retrospectively.

[57] As a result, on the basis of the record before this Court, I am of the view that the CRTC’s implicit interpretation of section 24 to the effect that it [the CRTC] has the right to make the Wireless Code applicable to contracts concluded before the Code came into effect is reasonable. I would add, however, that since the CRTC did not address the legal issue explicitly, and since the reasoning in this case is a function of its own facts, this decision is no wider than those facts. Whether the CRTC has the implied power to legislate retrospectively in any other case remains to be determined when it arises.

[58] For these reasons, I would dismiss the appeal with costs.

"J.D. Denis Pelletier"
J.A.

“I agree
Noel C.J.”
“I agree
Scott J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-337-13
STYLE OF CAUSE:	BELL CANADA, BELL MOBILITY INC., MTS INC., NORTHERNTEL, LIMITED PARTNERSHIP, ROGERS COMMUNICATIONS PARTNERSHIP, SASKATCHEWAN TELECOMMUNICATIONS, TÉLÉBEC, SOCIÉTÉ EN COMMANDITE and TELUS COMMUNICATIONS COMPANY v. 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

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DATED:	MAY 19, 2015

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