



SUPREME COURT OF CANADA

CITATION: Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68 **DATE:** 20121213
DOCKET: 34231

IN THE MATTER OF the *Broadcasting Act*, S.C. 1991, c. 11;

AND IN THE MATTER OF the Canadian Radio-television and Telecommunications Commission's Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168;

AND IN THE MATTER OF an application by way of a reference to the Federal Court of Appeal pursuant to ss. 18.3(1) and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

BETWEEN:

**Cogeco Cable Inc., Rogers Communications Inc.,
TELUS Communications Company and Shaw Communications Inc.**
Appellants
and

**Bell Media Inc. (formerly CTV Globemedia Inc.), V Interactions Inc.,
Newfoundland Broadcasting Co. Ltd. and Canwest Television Limited
Partnership**
Respondents
- and -

Canadian Radio-television and Telecommunications Commission
Intervener

CORAM: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell,
Moldaver and Karakatsanis JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 83)

Rothstein J. (McLachlin C.J. and LeBel, Fish and Moldaver
JJ. concurring)

JOINT DISSENTING REASONS:
(paras. 84 to 126)

Abella and Cromwell JJ. (Deschamps and Karakatsanis JJ.
concurring)

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REFERENCE RE BROADCASTING REGULATORY POLICY CRTC 2010-167 AND
BROADCASTING ORDER CRTC 2010-168, 2012 SCC 68

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**Indexed as: Reference re Broadcasting Regulatory Policy CRTC 2010-167 and
Broadcasting Order CRTC 2010-168**

2012 SCC 68

File No.: 34231.

2012: April 17; 2012: December 13.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Communications law — Broadcasting — Canadian Radio-television and Telecommunications Commission (“CRTC”) adopting policy establishing market-based, value for signal regulatory regime — Policy empowering private local television stations (“broadcasters”) to negotiate direct compensation for retransmission of signals by cable and satellite companies (“broadcasting distribution undertakings” or “BDUs”), as well as right to prohibit BDUs from retransmitting those signals if negotiations unsuccessful — Whether CRTC having jurisdiction under Broadcasting Act, to implement proposed regime — Broadcasting Act, S.C. 1991, c. 11, ss. 2, 3, 5, 9, 10.

Legislation — Conflicting legislation — CRTC adopting policy establishing market-based, value for signal regulatory regime — Policy empowering broadcasters to negotiate direct compensation for retransmission of signals by BDUs, as well as right to prohibit BDUs from retransmitting those signals if negotiations unsuccessful — Whether proposed regime conflicting with Copyright Act — Whether Copyright Act limiting discretion of CRTC in exercising regulatory and licensing

powers under Broadcasting Act — Broadcasting Act, S.C. 1991, c. 11, ss. 2, 3, 5, 9, 10 — Copyright Act, R.S.C. 1985, c. C-42, ss. 2, 21, 31, 89.

Responding to recent changes to the broadcasting business environment, in 2010 the CRTC sought to introduce a market-based value for signal regulatory regime, whereby private local television stations could choose to negotiate direct compensation for the retransmission of their signals by BDUs, such as cable and satellite companies. The new regime would empower broadcasters to authorize or prohibit BDUs from retransmitting their programming services. The BDUs disputed the jurisdiction of the CRTC to implement such a regime on the basis that it conflicts with specific provisions in the *Copyright Act*. As a result, the CRTC referred the question of its jurisdiction to the Federal Court of Appeal, which held the proposed regime was within the statutory authority of the CRTC pursuant to its broad mandate under the *Broadcasting Act* to regulate and supervise all aspects of the Canadian broadcasting system, and that no conflict existed between the regime and the *Copyright Act*.

Held (Abella, Deschamps, Cromwell and Karakatsanis JJ. dissenting): The appeal should be allowed. The proposed regulatory regime is *ultra vires* the CRTC.

Per McLachlin C.J. and LeBel, Fish, **Rothstein** and Moldaver JJ.: The provisions of the *Broadcasting Act*, considered in their entire context, may not be

interpreted as authorizing the CRTC to implement the proposed value for signal regime.

No provision of the *Broadcasting Act* expressly grants jurisdiction to the CRTC to implement the proposed regime, and it was not sufficient for the CRTC to find jurisdiction by referring in isolation to policy objectives in s. 3 and deem that the proposed value for signal regime would be beneficial for the achievement of those objectives. Establishing any link, however tenuous, between a proposed regulation and a policy objective in s. 3 of the Act cannot be a sufficient test for conferring jurisdiction on the CRTC. Policy statements are not jurisdiction-conferring provisions and cannot serve to extend the powers of the subordinate body to spheres not granted by Parliament. Similarly, a broadly drafted basket clause in respect of regulation making authority (s. 10(1)(k)), or an open-ended power to insert “such terms and conditions as the regulatory body deems appropriate” when issuing licences (s. 9(1)(h)) cannot be read in isolation, but rather must be taken in context with the rest of the section in which it is found. Here, none of the specific fields for regulation set out in s. 10(1) pertain to the creation of exclusive rights for broadcasters to authorize or prohibit the distribution of signals or programs or the direct economic relationship between BDUs and broadcasters. Reading the *Broadcasting Act* in its entire context reveals that the creation of such rights is too far removed from the core purposes intended by Parliament and from the powers granted to the CRTC under that Act.

Even if jurisdiction for the proposed value for signal regime could be found within the text of the *Broadcasting Act*, the proposed regime would conflict with specific provisions enacted by Parliament in the *Copyright Act*. First, the value for signal regime conflicts with s. 21(1) because it would grant broadcasters a retransmission authorization right against BDUs that was withheld by the scheme of the *Copyright Act*. A broadcaster's s. 21(1)(c) exclusive right to authorize, or not authorize, another broadcaster to simultaneously retransmit its signals does not include a right to authorize or prohibit a BDU from retransmitting those communication signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in s. 21(1), specifically excluding BDUs from the scope of the broadcasters' exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime. The value for signal regime would upset the aim of the *Copyright Act* to effect an appropriate balance between authors' and users' rights as expressed by Parliament in s. 21(1).

Second, further conflict arises between the value for signal regime and the retransmission rights in s. 31, which creates an exception to copyright infringement for the simultaneous retransmission by a BDU of a "work" carried in local signals. The value for signal regime envisions giving broadcasters deletion rights, whereby the broadcaster unable to agree with a BDU about the compensation for the distribution of its programming services would be entitled to require any program to which it has exclusive exhibition rights to be deleted from the signals of

any broadcaster distributed by the BDU. The value for signal regime would effectively overturn the s. 31 exception, entitling broadcasters to control the simultaneous retransmission of works while the *Copyright Act* specifically excludes retransmission from the control of copyright owners, including broadcasters. In doing so, it would rewrite the balance between the owners' and users' interests as set out by Parliament in the *Copyright Act*. Because the CRTC's value for signal regime is inconsistent with the purpose of the *Copyright Act*, it falls outside of the scope of the CRTC's licensing and regulatory jurisdiction under the *Broadcasting Act*.

Section 31(2)(b), which provides that in order for the exception to copyright to apply the retransmission must be "lawful under the *Broadcasting Act*", is also not sufficient to ground the CRTC's jurisdiction to implement the value for signal regulatory regime. A general reference to "lawful under the *Broadcasting Act*" cannot authorize the CRTC, acting under open-ended jurisdiction-conferring provisions, to displace the specific direction of Parliament in the *Copyright Act*. Finally, the value for signal regime would create a new right to authorize and prevent retransmission, in effect, amending the copyright conferred by s. 21. Thus the value for signal regime would create a new type of copyright and would do so without the required Act of Parliament, contrary to s. 89.

Per Abella, Deschamps, Cromwell and Karakatsanis JJ. (dissenting):
The CRTC determined that the proposed regime was necessary to preserve the viability of local television stations and ensure the fulfillment of the broadcasting

policy objectives set out in s. 3(1) of the *Broadcasting Act*. Courts have consistently determined the validity of the CRTC's exercises of power under the *Broadcasting Act* by asking whether the power was exercised in connection with a policy objective in s. 3(1). This broad jurisdiction flows from the fact that the Act contains generally-worded powers for the CRTC to regulate and supervise all aspects of the Canadian broadcasting system, to impose licensing conditions, and to make regulations as the CRTC deems appropriate to implement the objects set out in s. 3(1).

The proposed regime is within the CRTC's regulatory jurisdiction since it is demonstrably linked to several of the basic operative broadcasting policies in s. 3. The regime is merely an extension of the current regime, which places conditions, including financial ones, on BDUs for the licence to retransmit local stations' signals. This broad mandate to set licensing conditions in furtherance of Canada's broadcasting policy is analogous to the CRTC's broad mandate to set rates, recently upheld by this Court in *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764.

The proposed regime does not create a conflict with the *Copyright Act*. It does not give local stations a copyright in the retransmission of their television signals. BDUs derive their right to retransmit signals only from licences granted pursuant to s. 9 of the *Broadcasting Act*, and must meet the conditions imposed by the CRTC on their retransmission licences, including those set out in the proposed

regime. Nothing in either the definition of “broadcaster” or in s. 21(1)(c) of the *Copyright Act* immunizes BDUs from licensing requirements put in place by the CRTC in accordance with its broadcasting mandate.

The BDUs’ argument that the proposed regime creates royalties for local signals contrary to s. 31(2)(d) of the *Copyright Act*, turns s. 31(2)(d) on its head. Section 31(2)(d) simply requires that BDUs pay a royalty to copyright owners for retransmitting “distant signals”. This provision has nothing to do with whether the BDUs can be required to compensate local stations for a different purpose, namely, to fulfill the conditions of their retransmission license under the *Broadcasting Act*.

Cases Cited

By Rothstein J.

Referred to: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Reference re Broadcasting Act*, 2012 SCC 4, [2012] 1 S.C.R. 142; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476; *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336; *Mattel, Inc. v. 3894207 Canada*

Inc., 2006 SCC 22, [2006] 1 S.C.R. 772; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35.

By Abella and Cromwell JJ. (dissenting)

Lévis (City) v. Fraternité des policiers de Lévis Inc., 2007 SCC 14, [2007] 1 S.C.R. 591; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867; *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2, aff'g (1976), 13 O.R. (2d) 156; *Canadian Radio-Television Telecommunications Commission v. CTV Television Network Ltd.*, [1982] 1 S.C.R. 530; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141; *Telecommunications Workers Union v. Canadian Radio-Television and Telecommunications Commission*, 2003 FCA 381, [2004] 2 F.C.R. 3; *Assn. for Public Broadcasting in British Columbia v.*

Canadian Radio-television and Telecommunications Commission, [1981] 1 F.C. 524, leave to appeal refused, [1981] 1 S.C.R. v; *Société Radio-Canada v. Métromédia CMR Montréal Inc.* (1999), 254 N.R. 266; *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182, aff'd [1985] 1 S.C.R. 174; *Canadian Motion Picture Distributors Assn. v. Partners of Viewer's Choice Canada* (1996), 137 D.L.R. (4th) 561; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339; *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336.

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Broadcasting Act, S.C. 1991, c. 11, ss. 2 “broadcasting”, “broadcasting undertaking”, “distribution undertaking”, “program”, “programming undertaking”, 3, 5, 9(1), 10(1).

Canada -United States Free Trade Agreement Implementation Act, S.C. 1988, c. 65, ss. 61, 62.

Copyright Act, R.S.C. 1985, c. C-42, ss. 2 “broadcaster”, “communication signal”, “compilation”, “copyright”, “dramatic work”, “telecommunication”, 2.4(1)(b), 3(1), (1.1.), 21(1), 23(1)(c), 31, 71 to 74, 76(1), (3), 89.

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Local Signal and Distant Signal Regulations, SOR/89-254, ss. 1, 2.

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APPEAL from a judgment of the Federal Court of Appeal (Nadon, Sharlow and Layden-Stevenson JJ.A.), 2011 FCA 64, 413 N.R. 312, 91 C.P.R. (4th)

389, [2011] F.C.J. No. 197 (QL), 2011 CarswellNat 398. Appeal allowed, Deschamps, Abella, Cromwell and Karakatsanis dissenting.

Neil Finkelstein, Steven G. Mason and Daniel G. C. Glover, for the appellant Cogeco Cable Inc.

Gerald L. Kerr-Wilson and Ariel Thomas, for the appellants Rogers Communications Inc. and TELUS Communications Company.

Kent E. Thomson, James Doris and Sarah Weingarten, for the appellant Shaw Communications Inc.

Benjamin Zarnett, Robert Malcomson, Peter Ruby and Julie Rosenthal, for the respondents Bell Media Inc. (formerly CTV Globemedia Inc.), Newfoundland Broadcasting Co. Ltd. and V Interactions Inc.

No one appeared for the respondent Canwest Television Limited Partnership.

No one appeared for the intervener.

The judgment of McLachlin C.J. and LeBel, Fish, Rothstein and Moldaver JJ. was delivered by

I. Introduction

[1] The Canadian Radio-television and Telecommunications Commission (“CRTC”) has authority under the *Broadcasting Act*, S.C. 1991, c. 11, to regulate and supervise the Canadian broadcasting system. In 2010, the CRTC sought to introduce a market-based value for signal regulatory regime, whereby private local television stations (referred to as such or as “broadcasters”) could choose to negotiate direct compensation for the retransmission of their signals by broadcasting distribution undertakings (“BDUs”), such as cable and satellite companies. The new regime would empower broadcasters to authorize or prohibit BDUs from retransmitting their programming services. The reference question in this appeal is whether the CRTC has jurisdiction to implement the proposed regime.

[2] The *Broadcasting Act* grants the CRTC wide discretion to implement regulations and issue licences with a view to furthering Canadian broadcasting policy as set out in the *Broadcasting Act*. However, these powers must be exercised within the statutory framework of the *Broadcasting Act*, and also the larger framework including interrelated statutes. This scheme includes the *Copyright Act*, R.S.C. 1985, c. C-42: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paras. 44-52. As such, the CRTC, as a subordinate legislative body, cannot

enact a regulation or attach conditions to licences under the *Broadcasting Act* that conflict with provisions of another related statute.

[3] In my opinion, the value for signal regime does just that and is therefore *ultra vires*.

II. Facts and Procedural History

[4] Broadcasters acquire, create and produce television programming, and are licensed by the CRTC to serve a certain geographic area within the reach of their respective signal transmitters. BDUs, such as cable or satellite television service providers, pick up the over-the-air signals of broadcasters and distribute them to the BDUs' subscribers for a fee. Even though broadcasters' signals are free to anyone equipped with a television and an antenna, more than 90 percent of Canadians receive these signals as part of their cable service (transcript, at p. 2).

[5] BDUs must be licensed by the CRTC pursuant to s. 9 of the *Broadcasting Act*. Under the current regulatory model, the CRTC requires BDUs to provide certain benefits to broadcasters, in the nature of mandatory carriage and contributions to a local programming improvement fund accessible by certain local television stations. However, the broadcasters do not receive fees directly from the BDUs for the carriage of their signals.

[6] As noted by the Federal Court of Appeal (“FCA”), 2011 FCA 64, 413 N.R. 312, at para. 6, the CRTC has concluded that the existing model does not adequately deal with recent changes to the broadcasting business environment, which have caused advertising revenues for broadcasters to fall, while the revenues of BDUs have increased. As the FCA observed, the CRTC has concluded that this has resulted in a significant shift in their relative market positions and a financial crisis for broadcasters.

[7] As a solution, the CRTC seeks to implement what it terms a “value for signal regime”. This regime would permit broadcasters to negotiate with BDUs the terms upon which the BDUs may redistribute their signals. These are its main features:

- Broadcasters would have the right, every three years, to choose either to negotiate with BDUs for compensation for the right to retransmit the broadcaster’s programming services, or to continue to operate under the existing regulatory regime;
- A broadcaster who participates in the value for signal regime would forego all existing regulatory protections, including, for example, mandatory distribution of its signals as part of the basic package of BDU television services, and the right to require a BDU to delete a non-Canadian program and substitute it with the comparable program of the broadcaster, where the two programs are simultaneously broadcast and retransmitted by the BDU;

- The CRTC would only involve itself in the negotiations for the value for signal regime if the parties do not negotiate in good faith or if they request the CRTC to arbitrate;
- If no agreement is reached between the broadcaster and the BDU on the value of the distribution of the local television's programming services, the broadcaster could require the BDU to delete any program owned by the broadcaster or for which it has acquired exclusive contractual exhibition rights from all signals distributed by the BDU in the broadcaster's market.

The proposed regime is fully described in *Broadcasting Regulatory Policy CRTC 2010-167* (2010) ("2010 Policy") (A.R., vol. II, at p. 1).

[8] The BDUs disputed the jurisdiction of the CRTC to implement such a regime on the basis that it conflicts with specific provisions in the *Copyright Act*. As a result, the CRTC referred the following question to the FCA:

Is the Commission empowered, pursuant to its mandate under the *Broadcasting Act*, to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations?

A. *Federal Court of Appeal — Sharlow J.A. (Layden-Stevenson J.A. Concurring)*

[9] Sharlow J.A., writing for the majority, found the proposed regime to be within the statutory authority of the CRTC. She found that the *Broadcasting Act*

confers a broad mandate on the CRTC to regulate and supervise all aspects of the Canadian broadcasting system. Sharlow J.A. rejected the BDUs' argument that the proposed regime conflicts with the *Copyright Act*. She found that s. 21(1) of the *Copyright Act* gives a broadcaster a copyright in the signals it broadcasts, including the sole right to authorize a BDU to retransmit those signals (para. 33). In her opinion, while s. 31(2) provides that the s. 21 copyright is not infringed by a BDU when it retransmits a station's local signal, s. 31(2)(b) provides that the retransmission must be "lawful under the *Broadcasting Act*" (para. 38). She concluded that "the BDUs' statutory retransmission rights in subsection 31(2) of the *Copyright Act* [are] subject to paragraph 31(2)(b), [and that] Parliament has ranked the objectives of Canada's broadcasting policy ahead of those statutory retransmission rights" (para. 40).

B. Federal Court of Appeal — Nadon J.A. (Dissenting):

[10] In Nadon J.A.'s view, the proposed value for signal regime is *ultra vires* the powers of the CRTC because it conflicts with Parliament's "clear statement in paragraph 31(2)(d) of the *Copyright Act* that royalties must be paid only for the retransmission of distant signals and not for the retransmission of local signals" (para. 49). In his view, Parliament's expressed intention to treat local and distant signals differently is a limit on the CRTC's jurisdiction to impose conditions under the *Broadcasting Act* (para. 73). Given the exhaustiveness of the statutory copyright law, in Nadon J.A.'s opinion, the CRTC's regime must be *ultra vires* (para. 85).

III. Analysis

[11] The scope of the CRTC's jurisdiction under the *Broadcasting Act* must be interpreted according to the modern approach to statutory interpretation. *Per* Elmer A. Driedger's formulation, adopted multiple times by this Court,

. . . the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(See, e.g., *Bell ExpressVu*, at para. 26 *per* Iacobucci J., citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.)

[12] In addition,

. . . where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive.

(*Bell ExpressVu*, at para. 27)

The entire context of the provision thus includes not only its immediate context but also other legislation that may inform its meaning (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 411).

[13] In my respectful opinion, for two reasons, the provisions of the *Broadcasting Act*, considered in their entire context, may not be interpreted as

authorizing the CRTC to implement the proposed value for signal regime. First, a contextual reading of the provisions of the *Broadcasting Act* themselves reveals that they were not meant to authorize the CRTC to create exclusive rights for broadcasters to control the exploitation of their signals or works by retransmission. Second, the proposed regime would conflict with specific provisions enacted by Parliament in the *Copyright Act*.

A. The CRTC's Jurisdiction Under the Broadcasting Act

[14] The reference question asks whether the CRTC has the jurisdiction to implement the proposed value for signal regime. Answering the question requires interpreting the powers granted to the CRTC under the *Broadcasting Act* and establishing whether the *Copyright Act* limits the discretion of the CRTC in the exercise of its regulatory and licensing powers. The relevant sections of the *Broadcasting Act* and of the *Copyright Act* are annexed to these reasons (see Appendix).

[15] There is no doubt that the licensing and the regulation-making powers granted to the CRTC are broad. The *Broadcasting Act* describes the mission of the CRTC as regulating and supervising “all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)” (s. 5(1)).

[16] The powers granted to the CRTC are found in ss. 9 and 10 of the *Broadcasting Act*. Section 9 grounds the CRTC's licensing power. Among other things, it gives the CRTC the authority to establish classes of licences, issue licences and require licensees to perform certain acts "in furtherance of its objects". Under s. 9(1)(b)(i), the issuance of the licences may be subject to such terms and conditions "as the Commission deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1)".

[17] Section 10 confers on the CRTC the power to make regulations. It allows the CRTC to make regulations "in furtherance of its objects" and enumerates 10 specific areas for regulations. On their face, these pertain mainly to such matters as setting the standards for programs, the allocation of broadcasting time for different types of content and the carriage of certain programming services by distribution undertakings. However, s. 10(1)(k) is a basket clause granting the CRTC the residual authority to make regulations "respecting such other matters as it deems necessary for the furtherance of its objects".

[18] Section 3(1) of the *Broadcasting Act* declares at length the broadcasting policy for Canada, which this Court summarized in *Reference re Broadcasting Act*, 2012 SCC 4, [2012] 1 S.C.R. 142 ("*ISP Reference*"), at para. 4, as:

[T]he policy objectives listed under s. 3(1) of the Act focus on content, such as the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse.

[19] In substance, the value for signal regime would regulate the economic relationships between BDUs and broadcasters. The salient feature is that the CRTC would grant individual broadcasters an exclusive right to require deletion of the programming to which they hold exhibition rights from all signals transmitted by the BDU. This program deletion right is intended to give the broadcasters the necessary leverage to require compensation from the BDUs.

[20] No provision of the *Broadcasting Act* expressly grants jurisdiction to the CRTC to implement the proposed regime. However, the broadcasters submit that ss. 9(1)(b)(i) and 9(1)(h) empower the CRTC to dictate the terms of the carriage relationship between broadcasters and BDUs, in furtherance of Canadian broadcasting policy (R.F., at para. 65). The broadcasters submit that the power to do this also exists under s. 10(1)(g), which empowers the CRTC to make regulations “respecting the carriage of any foreign or other programming services by distribution undertakings” and s. 10(1)(k) which allows regulations to be made “respecting such other matters as [the CRTC] deems necessary for the furtherance of its objects”.

[21] In its 2010 Policy, the CRTC determined:

[I]n order to fulfill the policy objectives set out in section 3(1) of the Act, the system needs revision so as to permit privately-owned television broadcasters to negotiate with BDUs to establish the fair value of the product provided by those broadcasters to BDUs. [para. 163]

The CRTC referred specifically only to ss. 3(1)(e) and (f) of the *Broadcasting Act* (see para. 152 of the 2010 Policy). In their factum, the broadcasters add ss. 3(1)(g), (s) and (t), 9 and 10 (R.F., at paras. 63-65, 69, 74-79 and 87). The CRTC did not refer to the jurisdiction-conferring provisions in ss. 9 and 10.

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

[23] In my opinion, to find jurisdiction, it was not sufficient for the CRTC to refer in isolation to policy objectives in s. 3 and deem that the proposed value for signal regime would be beneficial for the achievement of those objectives. As stated by Gonthier J., writing for the majority of this Court in *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476,

“ . . . courts and tribunals must invoke statements of legislative purpose to elucidate, not to frustrate, legislative intent. In my view, the CRTC relied on policy objectives to set aside Parliament’s discernable intent as revealed by the plain meaning of s. 43(5), s. 43 generally and the Act as a whole. [para. 42]

It is therefore necessary to consider the jurisdiction granted to the CRTC under ss. 9 and 10 of the Act to attach conditions to licences and to make regulations.

[24] The broadcasters argue that the test for the CRTC's jurisdiction in enacting regulations under s. 10 of the *Broadcasting Act* is whether the regulation objectively refers to one of the objectives in s. 3. They rely on this Court's decision in *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2, where the majority of the Court, *per* Spence J., stated, at p. 11:

[T]he validity of any regulation enacted in reliance upon s. 16 [now s. 10] must be tested by determining whether the regulation deals with a class of subject referred to in s. 3 of the statute and that in doing so the Court looks at the regulation objectively.

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

[26] The difference between general regulation making or licensing provisions and true jurisdiction-conferring provisions is evident when this case is compared with *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764. In *Bell Aliant*, this Court was asked to determine whether the creation and use of certain deferral accounts lay within the scope of the CRTC's express power to

determine whether rates set by telecommunication companies are just and reasonable. The CRTC's jurisdiction over the setting of rates under s. 27 of the *Telecommunications Act*, S.C. 1993, c. 38, provides that rates must be just and reasonable. Under that section, the CRTC is specifically empowered to determine compliance with that requirement and is conferred the express authority to "adopt any method or technique that it considers appropriate" for that purpose (s. 27(5)).

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

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

. . . discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation. (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 50, *per* Bastarache J.)

[29] A broadly drafted basket clause, such as s. 10(1)(k), or an open-ended power to insert “such terms and conditions as the [regulatory body] deems appropriate” (s. 9(1)(h)) cannot be read in isolation: *ATCO*, at para. 46. Rather, “[t]he content of a provision ‘is enriched by the rest of the section in which it is found . . .’” (*Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 64, *per* Gonthier J., citing *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 647-48; see also Sullivan, at pp. 228-29). In my opinion, none of the specific fields for regulation set out in s. 10(1) pertain to the creation of exclusive rights for broadcasters to authorize or prohibit the distribution of signals or programs, or to control the direct economic relationship between the BDUs and the broadcasters.

[30] However, the broadcasters submit that s. 10(1)(g), which enables the CRTC to make regulations “respecting the carriage of any foreign or other programming services”, and s. 9(1)(h), which empowers the CRTC to require a licensed BDU “to carry . . . programming services specified by the Commission”, together with the broad wording of ss. 10(1)(k) and 9(1)(b)(i), empower the CRTC to “dictate the terms of the carriage relationship between broadcasters and BDUs” (R.F., at para. 65). Thus, the CRTC would, in their opinion, have jurisdiction to implement the proposed regime.

[31] I cannot agree. On their face, ss. 9(1)(h) and 10(1)(g) could, for example, allow the CRTC to require the BDUs to distribute to Canadians certain types of programs, arguably, because they are deemed to be important for the country's cultural fabric. However, it is a far cry from concluding that, coupled with ss. 10(1)(k) and 9(1)(b)(i), they entitle the CRTC to create exclusive control rights for broadcasters.

[32] This interpretation is consistent with a reading of the Act in its entire context. The *Broadcasting Act* has a primarily cultural aim. The other powers enumerated in s. 10(1) deal with such matters as the allocation of broadcasting time and the setting of standards for programs. In addition, the objectives of the *Broadcasting Act*, declared in s. 3(1), when read together, target "the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse" (*ISP Reference*, at para. 4). While such declarations of policy may not be invoked as independent grants of power, they should be given due weight in interpreting specific provisions of an Act: Sullivan, at pp. 388 and 390-91. Parliament must be presumed to have empowered the CRTC to work towards implementing these cultural objectives; however, the regulatory means granted to the CRTC to achieve these objectives fall short of creating exclusive control rights.

[33] In sum, nowhere in the Act is there a reference to the creation of exclusive control rights over signals or programs. Reading the *Broadcasting Act* in

its entire context reveals that the creation of such rights is too great a stretch from the core purposes intended by Parliament and from the powers granted to the CRTC under the *Broadcasting Act*.

B. *The Larger Statutory Scheme — Conflict with the Copyright Act*

(1) Connection Between the *Broadcasting Act* and the *Copyright Act*

[34] Even if jurisdiction for the proposed value for signal regime could be found within the text of the *Broadcasting Act*, that would not resolve the question in this reference as the *Broadcasting Act* is part of a larger statutory scheme that includes the *Copyright Act* and the *Telecommunications Act*. As Sunny Handa et al. explain, the *Telecommunications Act* and the *Radiocommunication Act*, R.S.C. 1985, c. R-2, are the main statutes governing carriage, and the *Broadcasting Act* deals with content, which is “the object of ‘carriage’” (S. Handa et al., *Communications Law in Canada* (loose-leaf), at §3.21). In *Bell ExpressVu*, at para. 52, Justice Iacobucci also considered the *Copyright Act* when interpreting a provision of the *Radiocommunication Act*, saying that “there is a connection between these two statutes”. Considering that the *Broadcasting Act* and the *Radiocommunication Act* are clearly part of the same interconnected statutory scheme, it follows, in my view, that there is a connection between the *Broadcasting Act* and the *Copyright Act* as well. The three Acts (plus the *Telecommunications Act*) are part of an interrelated scheme.

[35] Indeed, the *Broadcasting Act* regulates “program[s]” that are “broadcast” for reception by the Canadian public (see s. 2(1), definitions of “broadcasting” and of “program”), with a view to implementing the Canadian broadcasting policy described in s. 3(1) of the Act. Generally speaking, “[t]he *Broadcasting Act* is primarily concerned with the programmed content delivered by means of radio waves or other means of telecommunication to the public” (Handa at al., at §5.5).

[36] The *Copyright Act* is concerned both with encouraging creativity and providing reasonable access to the fruits of creative endeavour. These objectives are furthered by a carefully balanced scheme that creates exclusive economic rights for different categories of copyright owners in works or other protected subject matter, typically in the nature of a statutory monopoly to prevent anyone from exploiting the work in specified ways without the copyright owner’s consent. It also provides user rights such as fair dealing and specific exemptions that enable the general public or specific classes of users to access protected material under certain conditions. (See, e.g., *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at paras. 11-12 and 30; *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772, at para. 21; D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at pp. 34 and 56.) Among the categories of subject matter protected by copyright are the rights of broadcasters in communication signals (see ss. 2 “copyright” and 21 of the *Copyright Act*). In addition, “program[s]” within the meaning of the *Broadcasting Act*, are often pre-recorded original content which may constitute protected works, namely “dramatic work[s]” or

“compilation[s]” thereof, under the *Copyright Act*: see, e.g., discussion in J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (4th ed. loose-leaf), at para. 15:3(a).

[37] Although the Acts have different aims, their subject matters will clearly overlap in places. As Parliament is presumed to intend “harmony, coherence, and consistency between statutes dealing with the same subject matter” (*R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 52; Sullivan, at pp. 325-26), two provisions applying to the same facts will be given effect in accordance with their terms so long as they do not conflict.

[38] Accordingly, where multiple interpretations of a provision are possible, the presumption of coherence requires that the two statutes be read together so as to avoid conflict. Lamer C.J. wrote in *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61:

There is no doubt that the principle that statutes dealing with similar subjects must be presumed to be coherent means that interpretations favouring harmony among those statutes should prevail over discordant ones.

[39] In addition, “[o]rdinarily, . . . an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation” (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 38). Consequently, as it would be impermissible for the CRTC, a subordinate legislative

body, to implement subordinate legislation in conflict with another Act of Parliament, the open-ended jurisdiction-conferring provisions of the *Broadcasting Act* cannot be interpreted as allowing the CRTC to create conflicts with the *Copyright Act*.

[40] It is therefore necessary to first determine if a conflict arises.

(2) Types of Conflict

[41] For the purposes of statutory interpretation, conflict is defined narrowly. It has been said that overlapping provisions will be given effect according to their terms, unless they “cannot stand together” (*Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488, at p. 499 *per* Anglin J.).

[42] In *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, the Court was concerned with incoherence between provisions of two statutes emanating from the same legislature. Bastarache J., writing for the majority, defined conflict, at para. 47:

The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:

According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other.

(P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350)

Thus, a law which provides for the expulsion of a train passenger who fails to pay the fare is not in conflict with another law that only provides for a fine because the application of one law did not exclude the application of the other (*Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488). Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results. A law, for example, which allows for the extension of a time limit for filing an appeal only before it expires is in direct conflict with another law which allows for an extension to be granted after the time limit has expired (*Massicotte v. Boutin*, [1969] S.C.R. 818). [Emphasis added.]

[43] Absurdity also refers to situations where the practical effect of one piece of legislation would be to frustrate the *purpose* of the other (*Lévis*, at para. 54; *Sullivan*, at p. 330).

[44] This view is not inconsistent with the approach to conflict adopted in federalism jurisprudence. For the purposes of the doctrine of paramountcy, this Court has recognized two types of conflict. Operational conflict arises when there is an *impossibility of compliance* with both provisions. The other type of conflict is incompatibility of purpose. In the latter type, there is no impossibility of dual compliance with the letter of both laws; rather, the conflict arises because applying one provision would frustrate the *purpose* intended by Parliament in another. See, e.g., *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at paras. 77 and 84.

[45] Cases applying the doctrine of federal paramountcy present some similarities in defining conflict as either operational conflict or conflict of purpose (*Friends of the Oldman River Society*, at p. 38). These definitions of legislative

conflict are therefore helpful in interpreting two statutes emanating from the same legislature. The CRTC's powers to impose licensing conditions and make regulations should be understood as constrained by each type of conflict. Namely, in seeking to achieve its objects, the CRTC may not choose means that either operationally conflict with specific provisions of the *Broadcasting Act*, the *Radiocommunication Act*, the *Telecommunications Act*, or the *Copyright Act*; or which would be incompatible with the purposes of those Acts.

(3) The Allocation of Rights Under the *Copyright Act*

(a) *Section 21*

[46] The BDUs contend that the CRTC's proposed value for signal regime conflicts with the retransmission regimes specifically established in ss. 21(1)(c) and 31(2) of the *Copyright Act*.

[47] It is necessary to describe the *Copyright Act*'s regimes at some length. It will become apparent from this description that, in my respectful view, the analysis of the *Copyright Act* conducted by the majority of the FCA is problematic.

[48] The BDUs first submit that s. 21(1) of the *Copyright Act* conflicts with the value for signal regime. Section 21(1) grants broadcasters a limited copyright in the over-the-air signals they broadcast. This copyright gives the broadcaster the sole

right to authorize or to do four acts in relation to a communication signal or any substantial part of it:

- (a) to fix it;
- (b) to reproduce any fixation of it that was made without the broadcaster's consent;
- (c) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast; and
- (d) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee, and to authorize any act described in paragraph (a), (b) or (d).

[49] The aspect relevant for this appeal is in para. (c). Under this paragraph, a broadcaster has the sole right to authorize another *broadcaster* to retransmit simultaneously a communication signal. Section 2 of the *Copyright Act* defines “broadcaster” as

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

[50] The underlined portion of the definition refers to BDUs. BDUs are not a “broadcaster” within the meaning of the *Copyright Act* because their primary activity in relation communication signals is their retransmission. Thus, the broadcaster’s s. 21(1)(c) right to authorize, or not authorize, another broadcaster to simultaneously retransmit its signals does not apply against BDUs. In other words, under s. 21 of the

Copyright Act, a broadcaster's exclusive right does not include a right to authorize or prohibit a *BDU* from retransmitting its communication signals.

(b) *Section 31*

[51] In addition to their s. 21 rights in communication signals, broadcasters may hold other retransmission rights under the *Copyright Act*. As mentioned, a pre-recorded television *program* is often copyright subject matter that can be protected as an original "dramatic work" or a "compilation" thereof (s. 2 of the *Copyright Act*). The broadcaster, as a corporation, may hold copyright in the pre-recorded program or compilation of programs carried in its signals, either as the employer of the author of such a work or as an assignee of copyright from the original author.

[52] The *Copyright Act* seeks to regulate the economic rights in communication signals, as well as the retransmission of works by BDUs. The BDUs contend that the value for signal regime would conflict with the retransmission regime for works set out in s. 31 of the *Copyright Act*. The proposed regime would enable broadcasters to control the simultaneous retransmission of *programs*, by granting them the right to require deletion of any *program* in which they own or control the copyright from all signals distributed by the BDU, if no agreement is reached on compensation for the simultaneous retransmission of the broadcaster's programming services.

[53] The *Copyright Act* in s. 3(1)(f) confers on the owner of copyright in a work the exclusive right to communicate it to the public by telecommunication. Section 3(1)(f) provides:

3. (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right . . .

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

. . .

“Telecommunication”, in s. 2 of the Act, is broadly defined to include

any transmission of . . . intelligence of any nature by wire, radio, visual, optical or other electromagnetic system.

[54] These general words would at first blush confer on the copyright owner, including a broadcaster in that capacity, the right to control the retransmission of the works in which it holds copyright. However, s. 31(2) of the *Copyright Act* proceeds in detailed fashion to circumscribe the right of copyright owners to control the *retransmission* of literary, dramatic, musical or artistic works carried in signals. “Signal” is defined for the purposes of s. 31(2) to mean “a signal that carries a literary, dramatic, musical or artistic work and is transmitted for free reception by the public by a terrestrial radio or terrestrial television station” (see s. 31(1)). Section 31(1) defines “retransmitter” as “a person who performs a function comparable to that of a cable retransmission system . . .”.

[55] Section 31(2) provides:

It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

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

[56] Read together, ss. 31(1) and 31(2) create an *exception* to the exclusive right of the copyright owners of literary, dramatic, musical or artistic works to control the communication of their works to the public by telecommunication. The exception, or user's right, in effect, entitles BDUs to retransmit those works without the copyright owners' consent, where the conditions set out in paras. (a) through (e) are met. Paragraph (b) provides that the retransmission must be lawful under the *Broadcasting Act*. I will come back to the meaning of this particular condition.

[57] In the case of works carried in distant signals only, the section provides copyright owners with a right to receive royalties as payment for the simultaneous retransmission of those works by a BDU. The royalties are determined by the Copyright Board, on the basis of tariffs filed by collective societies, pursuant to the regime detailed in ss. 71 to 74 of the *Copyright Act*. Under s. 31(2), works carried in

local signals attract no royalty when retransmitted in accordance with all conditions of that section. The Governor in Council has defined “local signal” as the signal of a terrestrial station reaching all or a portion of the service area of a retransmitter. A “distant signal” is a signal that is not a local signal. See ss. 1 and 2 of *Local Signal and Distant Signal Regulations*, SOR/89-254.

[58] It bears underlining that, in the case of works carried in both local and distant signals, the copyright owner has *no right to prohibit* the simultaneous retransmission of the work; recourse is limited to receiving through a collective society the prescribed royalty, but only for the simultaneous retransmission of works carried in distant signals (ss. 76(1) and 76(3) of the *Copyright Act*). On the one hand, the copyright owner is granted a general right to retransmit the work. This retransmission right is part of the right, under s. (3)(1)(f), to communicate the work by telecommunication to the public. On the other hand, the owner’s general right to retransmit is restricted by a carve-out in s. 31(2) of the *Copyright Act*, which effectively grants to a specific class of retransmitters two retransmission rights. The first right lets these users simultaneously retransmit without a royalty payment, works carried in a local signal. The second right lets them simultaneously retransmit works carried in distant signals, but only subject to the payment of royalties under a form of compulsory licence regime (*Copyright Act*, s. 31(2)(a) and (d)). Both user rights are, subject to s. 31(2), beyond the owner’s control.

[59] In sum, under the *Copyright Act*'s retransmission regimes for communication signals and for works:

- Broadcasters have a limited exclusive right in their *signals* (s. 21);
- Broadcasters do not have an exclusive right in *signals* against BDUs;
- BDUs have the right to simultaneously retransmit *works* carried in local signals without authorization and without payment to the copyright owner;
- Owners of copyright in those works, including broadcasters in that capacity, do not have the right to block retransmission of local or distant signals carrying their works;
- The Copyright Board has jurisdiction to value the compulsory licence royalty for the simultaneous retransmission of works carried in distant signals;

(4) Finding Conflict

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

the CRTC would grant individual broadcasters, should they elect to be governed by this regime, the *right to prohibit* the simultaneous retransmission of their programs.

[61] As mentioned, the presumption of coherence between related Acts of Parliament requires avoiding an interpretation of a provision that would introduce conflict into the statutory scheme. In this case, the presumption of coherence requires that if the CRTC's proposed regulatory regime would create such conflict with the specific expressions of Parliament's intent under the *Copyright Act*, it must be *ultra vires*. Sections 21 and 31(2) of the *Copyright Act* are relevant.

[62] First, the value for signal regime conflicts with s. 21(1) of the *Copyright Act* because it would *grant* broadcasters a retransmission authorization right against BDUs that was *withheld* by the scheme of the *Copyright Act*.

[63] Looking only at the letter of the provision, s. 21 expressly speaks only to the relationship between a broadcaster and another broadcaster and not the relationship between a broadcaster and a retransmitter. As such, it is arguable that nothing in s. 21 purports to prevent another regulator from regulating the terms for carriage of a broadcaster's television signal by the BDUs, leaving it open to the CRTC, provided it is authorized to do so under the *Broadcasting Act*, to establish a value for signal regime without conflicting with s. 21.

[64] However, s. 21 cannot be considered devoid of its purpose. This Court has characterized the purpose of the *Copyright Act* as a balance between authors' and

users' rights. The same balance applies to broadcasters and users. In *Théberge*, Binnie J. recognized that the *Copyright Act*

. . . is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated). [para. 30]

(See also *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, at paras. 10 and 23.)

[65] This point was reiterated in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427. In that case, the Court considered whether, for the purposes of the *Copyright Act*, Internet Service Providers “communicate [works] to the public” when such works are requested by their subscribers — thereby infringing copyright in such works. The Court was required to interpret s. 2.4(1)(b) of the *Copyright Act*, which provides that

a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public.

[66] In rejecting the argument that s. 2.4(1)(b), as an exemption, should be read narrowly, the majority, *per* Binnie J., held that

. . . under the *Copyright Act*, the rights of the copyright owner and the limitations on those rights should be read together to give “the fair and balanced reading that befits remedial legislation”. [para. 88]

The Court recognized that “[s]ection 2.4(1)(b) is not a loophole but an important element of the balance struck by the statutory copyright scheme” (para. 89). The Court therefore confirmed its earlier teaching in *Théberge* that the policy balance established by the *Copyright Act* is maintained *also* by “giving due weight to [the] limited nature” of the rights of creators (*Théberge*, at para. 31).

[67] In my view, s. 21(1) represents the expression by Parliament of the appropriate balance to be struck between broadcasters’ rights in their communication signals and the rights of the users, including BDUs, to those signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in the *Copyright Act*, specifically excluding BDUs from the scope of the broadcasters’ exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime. The value for signal regime would upset the aim of the *Copyright Act* to effect an appropriate “balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator” (*Théberge*, at para. 30).

[68] Second, while the conflict of the proposed regime with s. 21 is sufficient to render the regime *ultra vires*, further conflict arises in my opinion between the

value for signal regime and the retransmission rights in *works* set out in s. 31 of the *Copyright Act*.

[69] As discussed above, s. 31 creates an exception to copyright infringement for the simultaneous retransmission by a BDU of a *work* carried in local signals. However, the value for signal regime envisions giving broadcasters deletion rights, whereby the broadcaster unable to agree with a BDU about the compensation for the distribution of its programming services would be entitled to require any program to which it has exclusive exhibition rights to be deleted from the signals of any broadcaster distributed by the BDU. As noted above, “program[s]” are often “work[s]” within the meaning of the *Copyright Act*. The value for signal regime would entitle broadcasters to control the simultaneous retransmission of works, while the *Copyright Act* specifically excludes it from the control of copyright owners, including broadcasters.

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

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

[72] Leading up to the 1997 amendment to the *Copyright Act* (Bill C-32), under which s. 21 was introduced, broadcasters made submissions to the Standing Committee on Canadian Heritage seeking *signal* rights. They contended that they should be granted the right to authorize, or refuse to authorize, the retransmission of their signals by others, including BDUs. The broadcasters, in fact, argued expressly against the narrow right that Parliament eventually adopted as s. 21(1)(c). See, for example, submissions of CTV to Standing Committee on Canadian Heritage, "Re: Bill C-32" (August 30, 1996) (A.R., vol. VII, at p. 68); submissions of WIC Western International Communications Ltd. (1996) (A.R., vol. VII, at p. 15); submissions of the British Columbia Association of Broadcasters, "Bill C-32, the Copyright Reform Legislation" (August 28, 1996) (A.R., vol. VII, at p. 20); submissions of the Canadian Association of Broadcasters, "Clause by Clause Recommendations for Amendments to Bill C-32" (November 27, 1996) (A.R., vol. VII, at p. 77). In addition, although this section has not been amended since 1997, ongoing consultations between Parliament and the broadcasters show continued requests from the latter to include the right to authorize BDU retransmissions. See, for example, submissions of CTVglobemedia, "Re: Government's 2009 Copyright Consultations" (September 11, 2009) (A.R., vol. IX, at pp. 35-37); Canadian Association of Broadcasters, "A

Submission to the House of Commons Standing Committee on Canadian Heritage
With Respect to A Statutory Review of the *Copyright Act*” (September 15, 2003)
(A.R., vol. IX, at p. 28).

[73] Notwithstanding successive amendments to the *Copyright Act*, Parliament has not amended s. 21 in the fashion requested by the broadcasters. Parliament’s silence is not necessarily determinative of legislative intention. However, in the context of repeated urging from the broadcasters, Parliament’s silence strongly suggests that it is Parliament’s intention to maintain the balance struck by s. 21 (see *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, at para. 42, *per* Abella J.).

[74] The same purposeful balancing is evidenced in the legislative history of the s. 31 regime for the retransmission of *works*. The predecessor to the current s. 3(1)(f) guaranteed copyright holders an exclusive right to communicate works by *radio communication*. Jurisprudence interpreted the radio communication right as excluding transmissions by *cable*: *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382. Section 3(1)(f) was amended in 1988 to confer the exclusive right to “communicate the work to the public by telecommunication” to reflect the obligations entered into by Canada under the *Free Trade Agreement between the Government of Canada and the Government of the United States of America*, Can. T.S. 1989 No. 3 (see *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, ss. 61 and 62; see also *Rogers Communications Inc. v. Society*

of *Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, at paras. 36-37 and McKeown, at para. 3:2(b)). The change from radio communication to telecommunication meant that cable companies were now liable for copyright infringement when they communicate copyright-protected works to the public.

[75] However, at the same time, Parliament specifically addressed the question of whether the simultaneous retransmission of works carried in local and distant television signals should require the consent of the copyright owner: it adopted the compulsory licence and exception regime by way of ss. 31 and 71 to 76 of the *Copyright Act (Canada-United States Free Trade Agreement Implementation Act*, s. 62). Studies on the same question had preceded this enactment; there, too, a major concern was that copyright owners “should not be permitted to stop retransmission because this activity is too important to Canada’s communications system” (Standing Committee on Communications and Culture. *A Charter of Rights for Creators: Report of the Sub-Committee on the Revision of Copyright* (1985), at p. 80 (A.R., vol. III, at p. 118); Government Response to A Charter of Rights for Creators (February 1986) (A.R., vol. III, at p. 127)).

[76] The value for signal regime would rewrite the balance between the owners’ and users’ interests as set out by Parliament in the *Copyright Act*. Because the CRTC’s value for signal regime is inconsistent with the purpose of the *Copyright Act*, it falls outside of the scope of the CRTC’s licensing and regulatory jurisdiction under the *Broadcasting Act*.

[77] I said earlier that I would come back to s. 31(2)(b) of the *Copyright Act*. The majority of the FCA concluded that there is no incoherence between the value for signal regime and the *Copyright Act* because of s. 31(2)(b) of the *Copyright Act*. This section provides that in order for the exception to copyright to apply, the retransmission must be “lawful under the *Broadcasting Act*”. The majority appears to have thought this was sufficient to ground the CRTC’s jurisdiction to implement the value for signal regulatory regime.

[78] In my respectful opinion, this provision cannot serve to authorize the CRTC acting under the *Broadcasting Act* to effectively amend the very heart of the balance of the retransmission regime set out in s. 31(2). Section 31(2)(b) is not a so-called Henry VIII clause that confers jurisdiction on the CRTC to promulgate, through regulation or licensing conditions, subordinate legislative provisions that are to prevail over primary legislation (see Sullivan, at pp. 342-43). Absent specific indication, Parliament cannot have intended by s. 31(2)(b) to empower a subordinate regulatory body to disturb the balance struck following years of studies. The legislative history does not lend support to this argument; indeed, the history confirms Parliament’s deliberate policy choice in enacting the compulsory licence and exception, or user’s rights, regime under s. 31(2). A general reference to “lawful under the *Broadcasting Act*” cannot authorize the CRTC, acting under open-ended jurisdiction-conferring provisions, to displace the specific direction of Parliament in the *Copyright Act*.

[79] In any case, the conflict found between the value for signal regime and s. 21 is sufficient. It could not be overcome even on a different reading of s. 31(2)(b) of the *Copyright Act*.

[80] There is one final point to be made. Section 89 of the *Copyright Act* provides:

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

The deliberate use of the words “this Act or any other Act of Parliament” rather than “this Act or any other enactment” means that the right to copyright must be found in an Act of Parliament and not in subordinate legislation promulgated by a regulatory body. “Act” and “enactment” are defined in s. 2 of the *Interpretation Act*, R.S.C. 1985, c. I-21, where

“Act” means an Act of Parliament;

and

“enactment” means an Act or regulation or any portion of an Act or regulation.

The definitions confirm that Parliament did not intend that a subordinate regulatory body could create copyright by means of regulation or licensing conditions.

[81] Contrary to s. 89, the value for signal regime would create a new type of copyright by regulation or licensing condition. Sections 2 and 21 of the *Copyright Act* define copyright in a communication signal to include the sole right to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast. Authorizing simultaneous retransmission is then an aspect of copyright, although the right under the *Copyright Act* is limited to authorizing only specific defined entities, other broadcasters. In light of the legislative history discussed above, this limitation on copyright appears to be the result of a specific Parliamentary choice not to change the balance struck in the *Copyright Act* between broadcasters and BDUs. The value for signal regime would create a new right to authorize retransmission (and correspondingly prevent retransmission if agreement as to compensation is not achieved), in effect, amending the copyright conferred by s. 21. Thus the value for signal regime would create a new type of copyright and would do so without the required Act of Parliament, contrary to s. 89.

[82] My colleagues assert that there are functional differences between copyright and the proposed regulatory scheme. With respect, the differences that they point to do not alter the fundamental functional equivalence between the proposed regime and a copyright. Section 21 of the *Copyright Act* empowers broadcasters to prohibit the retransmission of their signals if certain conditions are met; the value for

signal regime does exactly the same thing. My colleagues are correct that the CRTC cannot, through the value for signal regime, amend s. 21 of the *Copyright Act*. However that is precisely what the proposed regime does. Parliament could have imposed conditions that are the same, or similar to the value for signal regime in s. 21 in the same way it imposed limits in s. 31 on the copyright it granted in respect of retransmission of works, had it intended broadcasters to have such a right. Describing this new right granted to broadcasters under the value for signal regime as a series of regulatory changes does not alter the true character of the right being created. Not calling it copyright does not remove it from the scope of s. 89. If that type of repacking was all that was required, s. 89 would not serve its intended purpose of restricting the entitlement to copyright to grants under and in accordance with Acts of Parliament.

IV. Conclusion

[83] The reference question should be answered in the negative. The appeal should be allowed with costs throughout.

The reasons of Deschamps, Abella, Cromwell and Karakatsanis were delivered by

ABELLA and CROMWELL JJ. —

[84] We have had the benefit of reading the reasons of Rothstein J. but, with respect, do not agree.

[85] Private local stations are licensed by the CRTC to acquire, create and produce television programming. They serve small geographic areas defined by the reach of their signals. According to the CRTC, local stations are key contributors to attaining the objectives for the Canadian broadcasting system.

[86] Local stations have recently experienced a financial crisis. The stations rely on advertising revenue to fund the cost of creating, acquiring and broadcasting high quality Canadian programming. Changes in the broadcasting business environment, however, have caused advertising revenues to rapidly decline. These changes include the development of direct-to-home satellite TV services and speciality television channels, and the widespread adoption of alternative media platforms.

[87] Currently, the local stations' over-the-air signals are picked up and retransmitted to a wider audience by cable service providers (known as broadcasting distribution undertakings, or "BDUs"). The BDUs retransmit these signals to their own subscribers for a fee. Under the current broadcasting regime, BDUs are not required to negotiate compensation with the local stations for retransmitting their signals to a local market. Instead, the CRTC requires the BDUs to provide local stations with various benefits, including mandatory carriage to the station's local market, preferential channel placement, and substitution of the local stations'

advertisements in place of those appearing on American stations transmitting the same program. The current regime also requires the BDUs to make financial contributions to the local stations; specifically, 1.5 percent of the BDUs' gross revenues must go to a local programming improvement fund.

[88] In 2010, the CRTC issued the *Broadcasting Regulatory Policy CRTC 2010-167* (the "2010 Policy"), concluding that local stations' potential revenue streams under the existing regime needed to be expanded in order to ensure the viability of local programming. The new regime would supply local stations with funds beyond advertising revenues, by giving them the option to negotiate with the BDUs for compensation for all retransmissions of their signals. Where no agreement is reached, the local station would be entitled to prevent retransmission of its signal by the BDU. The BDUs already negotiate compensation with local stations for retransmitting their signals *outside* the station's local market, known as a "distant signal".

[89] The proposed regime is consistent with the market-based negotiations that increasingly prevail on other platforms, including discretionary pay and specialty services, video-on-demand and online and mobile streaming platforms. According to the CRTC, it is also consistent with its own approach of using market-based solutions when appropriate. Significantly, the CRTC has determined that the new regime is necessary to preserve local stations and ensure the fulfillment of the broadcasting policy objectives set out in s. 3(1) of the *Broadcasting Act*, S.C. 1991, c. 11.

[90] While the CRTC concluded that the new regime was necessary to ensure the viability of local stations, it acknowledged concern in the 2010 Policy itself that the *Copyright Act*, R.S.C. 1985, c. C-42, might create a “potential impediment” to its jurisdiction to implement the regime (para. 165). Under ss. 18.3 and 28(2) of the *Federal Courts Act*, R.S.C.1985, c. F-7, it therefore brought the following reference question to the Federal Court of Appeal:

Is the Commission empowered, pursuant to its mandate under the *Broadcasting Act*, to establish a regime to enable private local television stations to choose to negotiate with broadcasting distribution undertakings a fair value in exchange for the distribution of the programming services broadcast by those local television stations?

[91] We agree with the majority of the Federal Court of Appeal that this question should be answered in the affirmative, and would therefore dismiss the appeal (2011 FCA 64, 413 N.R. 312). In our view, the new regime is merely an extension of the current regime, which places several conditions — including financial ones — on BDUs for the licence to retransmit local stations’ signals. We also conclude that nothing in the *Copyright Act* creates a barrier to the CRTC’s authority to implement the new regime.

Analysis

[92] The narrow reference question requires us to determine whether the CRTC has jurisdiction under the *Broadcasting Act* to implement the new regime. Read on its own, the *Broadcasting Act* appears to grant this jurisdiction, which raises

the question of whether something in the *Copyright Act* demonstrates Parliament's intent to derogate from or attenuate this jurisdiction in order to satisfy another public interest. In other words, we must determine whether there would be an unavoidable conflict if the *Broadcasting Act* were read to confer on the CRTC the jurisdiction to implement the regime. If so, this would suggest a less expansive reading of the CRTC's jurisdiction. An unavoidable conflict only occurs when two statutes directly contradict one another, in a way that applying one excludes the application of the other, or where their concurrent application could lead to unreasonable or absurd results: *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 47. Generally, the Court will favour an interpretation that avoids such a conflict: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 30. However, in our view, there is no conflict between the *Broadcasting Act* and the *Copyright Act* that would prevent reading the former as conferring on the CRTC the jurisdiction to implement the new regime.

[93] Analytically, the first question is whether the CRTC has jurisdiction to implement the proposed regime under the *Broadcasting Act*. The CRTC is granted a broad, flexible mandate to implement measures that further the broadcasting policy of Canada. Section 3(1) of the *Broadcasting Act* sets out the basic operative broadcasting policies. They primarily address the need to support local content in television and other programs in order to enrich Canada's cultural, political, social and economic environments. The provisions that confer powers on the CRTC — what Rothstein J. refers to as “jurisdiction-conferring” provisions — explicitly incorporate

these policy objectives. Under s. 5(1) of the Act, the CRTC “shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)”. The CRTC possesses the jurisdiction to issue licences to participants in the Canadian broadcasting system. It can impose any conditions on these licences that it “deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1)”: s. 9(1)(b)(i); *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2; see also *Canadian Radio-Television and Telecommunications Commission v. CTV Television Network Ltd.*, [1982] 1 S.C.R. 530, at p. 545. The CRTC may also make regulations under s. 10(1)(k) of the Act “respecting such other matters as it deems necessary for the furtherance of its objects”. Section 3(2) of the Act states that the Canadian broadcasting system is a single system, and that the objectives in s. 3(1) can best be achieved by regulation and supervision through “a single independent public authority”: the CRTC.

[94] As “broadcasting undertaking[s]” under s. 2(1) of the Act, BDUs are part of the single broadcasting system that the CRTC must regulate and supervise pursuant to s. 5(1). BDUs do not have a freestanding right to retransmit local stations’ programs: BDUs derive that right *only* from licences granted pursuant to s. 9 of the *Broadcasting Act*, subject to any conditions imposed under s. 9(1)(b)(i). The current conditions of the BDUs’ licences to retransmit local stations’ signals require them to provide the benefits noted earlier, which include payments to a fund for the local stations. The proposed regime would involve an extension or alteration of the

conditions on BDUs' licences, requiring them to negotiate compensation directly with the local stations.

[95] The breadth of the CRTC's discretion to determine what measures are necessary to further Canada's broadcasting policy was acknowledged by this Court in *CKOY*. The issue was whether the CRTC had jurisdiction under the *Broadcasting Act* to enact a regulation which prohibited stations or networks from broadcasting telephone interviews without the participant's consent. Spence J., writing for the majority, observed that "Parliament intended to give to the Commission a wide latitude with respect to the making of regulations to implement the policies and objects for which the Commission was created" (at p. 12, quoting with approval the Court of Appeal: (1976), 13 O.R. (2d) 156, at p. 162). He set out the test for determining the validity of the CRTC's regulations as follows:

[T]he validity of any regulation enacted in reliance upon [the predecessor section to s. 10] must be tested by determining whether the regulation *deals with a class of subject referred to in s. 3* of the statute and ... in doing so the Court looks at the regulation objectively. [Emphasis added; p. 11]

[96] Spence J. concluded that because the particular regulation had a basis in several of the policies enumerated in s. 3 of the Act, including the need to provide a reasonably balanced opportunity for the expression of differing views, and to provide programming of a high standard, the regulation was authorized by the *Broadcasting Act*: pp. 12-14.

[97] In accordance with this approach, the proposed regime is within the CRTC's regulatory jurisdiction under the *Broadcasting Act*, since it is demonstrably linked to several of the policies in s. 3. In its 2010 Policy, the CRTC determined that the new regime was necessary to ensure the fulfillment of the broadcasting policy objectives set out in s. 3(1) of the *Broadcasting Act*. In particular, the CRTC concluded that the regime was necessary to fulfill the policies stated in s. 3(1)(e) and 3(1)(f):

(e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;

(f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming. . . .

[98] Because the proposed regime was intended to save the financially troubled local stations, it is also linked to the policy set out in s. 3(1)(s):

(s) private networks and programming undertakings should, *to an extent consistent with the financial and other resources available to them*,

(i) contribute significantly to the creation and presentation of Canadian programming, and

(ii) be responsive to the evolving demands of the public. . . .

[99] Modern statutory interpretation looks to the objectives of the statute to construe the meaning of the words and the mandate. This had led to a long and accepted line of jurisprudence which has consistently interpreted the CRTC's

jurisdiction to regulate and supervise Canadian broadcasting broadly. Reference has been made to the “very broad words” of the jurisdiction-conferring provisions in the *Broadcasting Act*, as well as the “embrasive objects committed to the Commission under [the predecessor to s. 5(1)], objects which extend to the supervision of ‘all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act’”: *CKOY* at pp. 13-14, quoting Laskin C.J. in *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141.

[100] The Federal Court of Appeal has similarly and repeatedly indicated that the CRTC “has a very broad mandate under the *Broadcasting Act*”, and “has been endowed with powers couched in the broadest of terms for ‘the supervision and regulation of the Canadian broadcasting system’. . . with a view to implementing the broadcasting policy enunciated in section 3 of the Act”: *Telecommunications Workers Union v. Canadian Radio-Television and Telecommunications Commission*, 2003 FCA 381, [2004] 2 F.C.R. 3 (“T.W.U.”), at para. 40; *Assn. for Public Broadcasting in British Columbia v. Canadian Radio-television and Telecommunications Commission*, [1981] 1 F.C. 524 (C.A.), at p. 530, leave to appeal refused, [1981] 1 S.C.R. v. Because of the CRTC’s specialization and expertise, “Parliament has granted extensive powers for the supervision and regulation of the Canadian broadcasting system to allow [the CRTC] to implement the broadcasting policy set out in s. 3 of the *Broadcasting Act* It is settled that the CRTC has

broad discretion in exercising its powers to issue or revoke licences”: *Société Radio-Canada v. Métromédia CMR Montréal Inc.* (1999), 254 N.R. 266 (F.C.A.), at para. 2.

[101] The CRTC’s broad jurisdiction derives from the fact that each of ss. 5(1), 9(1)(b)(i) and 10(1)(k) confer generally-worded powers, along with a discretion to use them as the CRTC deems appropriate to implement the objects set out in s. 3(1). Courts have consistently determined the validity of the CRTC’s exercises of power under any of these provisions by applying the *CKOY* test: was the power used in connection with a policy objective in s. 3(1)? In *CKOY*, Spence J. dealt with the use of the regulation-making power, and noted that the section’s “very broad words ... authorize one enactment of regulations to further any policy outlined in the whole of s. 3” (p. 13). In *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A), aff’d [1985] 1 S.C.R. 174, Le Dain J.A., when he was in the Federal Court of Appeal, held that the same principle applies to the power to attach conditions to licences:

What was said concerning the validity of a regulation under [the predecessor to s. 10(1)] applies equally in my opinion to the validity of a condition attached to a licence under [the predecessor to s. 9(1)]. That section begins, like [the predecessor to s. 10(1)], with the words “In furtherance of the objects of the Commission”, and *empowers the Executive Committee to subject a broadcasting licence to such conditions related to the circumstances of the licensee as it “deems appropriate for the implementation of the broadcasting policy enunciated in section 3”, an authority that is, if anything, even broader than that which is conferred by [the predecessor to s. 10(1)(k)].*” [Emphasis added; p. 192]

In *T.W.U.*, Sexton J.A. reiterated that the *CKOY* test applies to the exercise of both the regulation-making and licence-condition powers. He held that

the CRTC has broad power to impose conditions of license. *The only limitation on the conditions that the CRTC may impose is that it must deem the conditions “appropriate for the implementation of the broadcasting policy set out in subsection 3(1).”* [Emphasis added; para. 48.]

[102] Moreover, courts have thus far recognized that the mandate granted to the CRTC under the *Broadcasting Act* is both economic and cultural (*T.W.U.*, at para. 28), not “primarily cultural”, as asserted by Justice Rothstein (at para. 32), and have upheld regulations and licensing conditions imposed by the CRTC in furtherance of economic objectives listed in the *Broadcasting Act*, but absent any specific grant of power.

[103] In *Canadian Broadcasting League*, as in the present case, at issue was the CRTC’s power to direct the economic relationship between participants in the broadcasting system and, specifically, whether the CRTC could fix the installation fees and maximum monthly fees that a BDU could charge to its subscribers. Le Dain J. A. held that the CRTC could do so under *either* its licensing power or its regulation-making power, rejecting the argument that the CRTC lacked the power to regulate rates and fees because it was not expressly granted in the *Broadcasting Act*.

[104] The CRTC’s jurisdiction to impose financial conditions on broadcast system participants was also upheld by the Federal Court of Appeal in *Canadian*

Motion Picture Distributors Assn. v. Partners of Viewer's Choice Canada (1996), 137 D.L.R. (4th) 561. The court held that the CRTC did not exceed its statutory mandate by requiring a pay-per-view licensee to share the revenues it earned from the distribution of feature films in equal parts with the copyright holder and the licensed programming undertaking that assembled the pay-per-view content. According to the court:

The reference to the film distribution industry as “an important element of the broadcasting system” *provides a clear link* to the Commission's objects in subsection 5(1) of the *Act* and the broadcasting policy in subsection 3(1). [Emphasis added; p. 565.]

A similar “clear link” exists in this case.

[105] And in *T.W.U.*, Sexton J.A. found that the CRTC could enact a regulation that essentially deregulated basic cable service rates in areas where there was sufficient competition to let market forces take over. He found that the CRTC had an obligation, based on the policy objectives in s. 3(1), to ensure that programming was provided at affordable rates, and could rely on market forces to fulfill that objective. Similarly, in this case, the CRTC seeks to implement a market-based negotiation scheme consistent with the policy objectives in s. 3(1).

[106] In each of these cases, the CRTC regulated an economic aspect of the Canadian broadcasting system by requiring revenue splitting, by setting rates for services, or by deregulating them. None of these forms of regulation was tied to a

specific and express grant of power in the *Broadcasting Act*. In each case, the CRTC was found to have jurisdiction under either or both of its general powers to make regulations and impose conditions on licences.

[107] The conclusion that the proposed regime is within CRTC jurisdiction is consistent with this broad mandate, most recently upheld by this Court in *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764. The issue was whether the CRTC could exercise the rate-setting authority it had under the *Telecommunications Act*, S.C. 1993, c. 38, to require local carriers to spend their deferral accounts by expanding broadband services and giving credits to consumers. This Court confirmed that the decision was entirely within the CRTC's mandate:

[T]he issues raised in these appeals go to the very heart of the CRTC's specialized expertise. In the appeals before us, the core of the quarrel in effect is with the methodology for setting rates and the allocation of certain proceeds derived from those rates, *a polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake. . . .*

. . .

[I]t follows from the CRTC's broad discretion to determine just and reasonable rates under s. 27, its power to order a carrier to adopt any accounting method under s. 37, and its statutory mandate under s. 47 to implement the wide-ranging Canadian telecommunications policy objectives set out in s. 7, that the *Telecommunications Act* provides the CRTC with *considerable scope in establishing and approving the use to be made of deferral accounts*. [Emphasis added; paras. 38 and 55.]

[108] This broad mandate to set rates in furtherance of Canada's telecommunications policy is analogous to the CRTC's broad mandate to set licensing conditions in furtherance of Canada's broadcasting policy as it has purported to do in the 2010 Policy. Both mandates involve "a polycentric exercise", necessitating a "considerable scope" of jurisdiction.

[109] Having determined that the *Broadcasting Act* would grant authority to the CRTC to implement the new regime, the question then is whether the regime creates an "unavoidable conflict" with the *Copyright Act* in a way that would invalidate this preliminary interpretive conclusion.

[110] The BDUs point to two unavoidable conflicts between the proposed regime and the provisions of the *Copyright Act*. First, they argue that the regime conflicts with s. 21(1)(c). This provision states that a "broadcaster" — which includes a local station — has the sole right "to authorize another broadcaster to retransmit [its signals] to the public". The definition of "broadcaster" in s. 2 of the *Copyright Act*, however, *excludes* BDUs, as entities whose "primary activity in relation to communication signals is their retransmission". Since BDUs are excluded from the definition, they argue that they need not be "authorize[d]" under s. 21(1)(c) at all. This provision therefore conflicts with the proposed regime, which not only gives local stations the right to authorize BDUs to retransmit their signals, but also gives them the right to block BDUs from retransmitting those signals altogether.

[111] In our view, there is no unavoidable conflict with s. 21(1)(c). There is nothing in either the definition of “broadcaster” or in s. 21(1)(c) of the *Copyright Act* that purports to immunize BDUs from licensing requirements put in place by the CRTC in accordance with its broadcasting mandate. BDUs derive their right to retransmit signals only from licences granted pursuant to s. 9 of the *Broadcasting Act*, and must meet the conditions imposed by the CRTC on their retransmission licences, including those set out in the proposed regime.

[112] Section 21(1)(c) deals only with the extent to which local stations, as “broadcasters”, have a copyright in their communication signals. It does not affect the licensing requirements under the *Broadcasting Act*. While BDUs do not need permission to retransmit signals under the *Copyright Act*, that does not mean they are free to retransmit signals without permission under the *Broadcasting Act*.

[113] The second conflict alleged by the BDUs is with s. 31(2)(d) of the *Copyright Act*. The full provision states:

31. . . .

(2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

(a) the communication is a retransmission of a local or distant signal;

(b) the retransmission is lawful under the *Broadcasting Act*;

(c) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;

(d) in the case of the retransmission of a *distant signal*, the *retransmitter has paid any royalties*, and complied with any terms and conditions, fixed under this Act; and

(e) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(b).

[114] This section means that it is not an infringement of copyright if a retransmitter, like a BDU, is retransmitting local or distant signals, is retransmitting lawfully under the *Broadcasting Act*, and, if it is retransmitting a distant signal, has paid copyright royalties. The BDUs' main argument under this provision is that even though s. 31(2)(a) refers to *both* "local" and "distant" signals, s. 31(2)(d) limits royalty payments to distant signals only. This reference to *distant* signals in s. 31(2)(d), they say, conflicts with the proposed regime, which effectively creates royalties for local signals, which are generally the type of signals emitted by local stations.

[115] This argument turns s. 31(2)(d) on its head. Even within the context of the *Copyright Act* alone, s. 31(2)(d) simply requires that BDUs pay a copyright royalty to copyright owners for retransmitting "distant signal[s]". Nothing in the plain meaning of this provision actually *prevents* a copyright royalty for retransmitting "local signal[s]". If Parliament had intended to prevent such royalties for local signals under any circumstances, it would have expressly said so.

[116] But, despite the plain wording of s. 31(2)(d), the BDUs argue that it was Parliament's implicit intention to prevent royalties for the retransmission of local

signals. They point to a number of reports, committee transcripts and submissions relating to the legislative history of the *Copyright Act*, which they claim demonstrate Parliament's consistent refusal to grant such royalties. With respect, these materials are of limited assistance. The fact that Parliament may have decided not to impose royalties on the retransmission of local signals for the benefit of copyright owners has nothing to do with whether the BDUs can be required to compensate local stations for a different purpose, namely, to fulfill the conditions of their retransmission licence under the *Broadcasting Act*. We therefore do not accept that s. 31(2)(d) of the *Copyright Act* creates an unavoidable conflict with the proposed regime.

[117] The lack of a conflict between the proposed regime and s. 31(2)(d) is highlighted by s. 31(2)(b), which states that BDUs are only entitled to avoid copyright infringement for retransmitting signals where "the retransmission is lawful under the *Broadcasting Act*". We agree with the majority of the Federal Court of Appeal that s. 31(2)(b) demonstrates Parliament's clear intention that the conditions placed on BDUs under the *Broadcasting Act* in furtherance of Canada's broadcasting policy are ranked ahead of the BDUs' statutory right to retransmit signals under s. 31(2) of the *Copyright Act*.

[118] The BDUs argue, however, that the language in s. 31(2)(b) is too broad to override the specific language in s. 31(2)(d) limiting royalties to those for "distant signals". They cite two cases to support their argument: *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, and *ATCO Gas*

and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140. Neither of these two cases deals with a conflict between statutes, and neither stands for the proposition that a single word in a provision — such as “distant” signal — can defeat an otherwise express and clear legislative intention. *Barrie Public Utilities* dealt only with whether the CRTC had jurisdiction to grant a right of access to a utility’s power poles under s. 43(5) of the *Telecommunications Act*, and *ATCO* dealt with whether the Alberta Energy and Utilities Board had jurisdiction to order that proceeds from an asset sale be allocated to a utility’s customers under s. 15(3) of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17.

[119] At the end of the day, the BDUs’ argument is that the proposed regime somehow creates a new copyright. They argue that the exclusive right to authorize or block retransmission by BDUs, and the requirement that BDUs compensate local stations for retransmitting their signals, creates a copyright for local stations in the retransmission of their signals. According to the BDUs, this violates s. 89 of the *Copyright Act*, which states that “[n]o person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament”. It also violates this Court’s statement in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 that “copyright is a creature of statute and the rights and remedies provided by the *Copyright Act* are exhaustive” (para. 9).

[120] We do not see the proposed regime as giving local stations a copyright in the retransmission of their television signals. Section 2 of the *Copyright Act* defines “copyright” in the case of a communication signal as “the rights described in . . . section 21”. The exhaustive definition of copyright in s. 21 leaves out the right to authorize retransmission by BDUs. We do not see the proposed regime as *amending* this definition, something it cannot in any event do, given s. 89, but as instituting a different type of regulation with respect to an aspect of broadcasting that is simply not included in the exhaustive statutory scheme of copyright.

[121] There are significant functional differences, as well. The copyright owner does not need to forego any other entitlements to claim a copyright. Instead, copyright automatically attaches to a communication signal, lasting for 50 years after the end of the calendar year in which it was broadcast: *Copyright Act*, s. 23(1)(c). The proposed regime, in contrast, gives local stations a limited power, and only *vis-à-vis* BDUs. The local stations have to forego their existing entitlements under the current regime in order to participate in the new regime. Moreover, the local stations’ power to prevent BDUs from retransmitting their signals is conditional on a complete breakdown of negotiations and a resulting lack of agreement with the BDUs. There are additional conditions under the proposed regime that are not placed on copyright owners: for example, local stations must spend approximately 30 percent of any negotiated compensation they receive on Canadian programming, with 5 percent dedicated to “programs of national interest”. Finally, unlike copyright, the new regime is renewable every three years and subject to ongoing regulatory oversight by

the CRTC: 2010 Policy, paras. 51, 74-75 and 155-164. The proposed regime, therefore, is far from “functionally equivalent”, as stated by the dissent in the Federal Court of Appeal (at para. 84), to giving local stations a full copyright in the retransmission of their signals.

[122] The regime aims to further the objectives found in ss. 3(1)(e)(f) and (s), which call for each element of the Canadian broadcasting system to contribute to the creation and presentation of Canadian programming; call for broadcasting undertakings to make maximum use of Canadian creative and other resources in the creation and presentation of programming; and call for private networks, to the extent consistent with the resources available to them, to contribute to the creation and presentation of Canadian programming. The CRTC has every right to turn to market-based means of fulfilling these specific objectives of Canadian broadcasting policy. These objectives differ from the more general copyright objectives of “promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”: *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336, at para. 30. Indeed, as discussed above, BDUs are already required to make financial contributions under the current regime, and they are already required to negotiate compensation with local stations for the retransmission of distant signals.

[123] In our view, therefore, there is no unavoidable conflict with the *Copyright Act* that would eliminate the CRTC's jurisdiction to implement the proposed regime.

[124] The BDUs also make policy arguments, submitting that giving local stations the ability to block their signals, as well as the extra compensation to local stations, will increase costs and signal interruptions, ultimately hurting end consumers. We do not find this argument persuasive. First, retransmitting local signals is currently the *only* instance where a BDU can distribute signals without the broadcaster's prior consent. The CRTC has implemented mandatory negotiation-based schemes for other services, including specialty channels, pay-per-view and video-on-demand.

[125] More importantly, however, the new regime's potential success in achieving the broadcasting policy objectives is completely irrelevant to determining whether the CRTC has jurisdiction to implement it. Any question as to the wisdom of the regime is a question solely for the CRTC as the single broadcasting authority in s. 3(2) of the *Broadcasting Act*. As an expert body, the CRTC, not the courts, is in the best position to decide what measures are necessary to save local stations from going bankrupt. In any event, if for any reason the proposed regime proves unworkable in the future, the CRTC has both the authority and the necessary expertise to make the appropriate changes.

[126] We would therefore dismiss the appeal with costs.

APPENDIX

Broadcasting Act, S.C. 1991, c. 11

2. (1) In this Act,

...

“broadcasting undertaking” includes a distribution undertaking, a programming undertaking and a network;

...

“distribution undertaking” means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking;

...

“program” means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text;

“programming undertaking” means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus;

...

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

...

(e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;

(f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming ...;

(g) the programming originated by broadcasting undertakings should be of high standard;

...

(s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,

(i) contribute significantly to the creation and presentation of Canadian programming, and

(ii) be responsive to the evolving demands of the public; and

(t) distribution undertakings

(i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,

...

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

...

(2) It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

...

5. (1) Subject to this Act and the Radiocommunication Act and to any directions to the Commission issued by the Governor in Council under this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1) and, in so doing, shall have regard to the regulatory policy set out in subsection (2).

(2) The Canadian broadcasting system should be regulated and supervised in a flexible manner that

(a) is readily adaptable to the different characteristics of English and French language broadcasting and to the different conditions under which broadcasting undertakings that provide English or French language programming operate;

(b) takes into account regional needs and concerns;

(c) is readily adaptable to scientific and technological change;

(d) facilitates the provision of broadcasting to Canadians;

(e) facilitates the provision of Canadian programs to Canadians;

- (f) does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians; and
- (g) is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings.

(3) The Commission shall give primary consideration to the objectives of the broadcasting policy set out in subsection 3(1) if, in any particular matter before the Commission, a conflict arises between those objectives and the objectives of the regulatory policy set out in subsection (2).

...

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

(a) establish classes of licences;

(b) issue licences for such terms not exceeding seven years and subject to such conditions related to the circumstances of the licensee

(i) as the Commission deems appropriate for the implementation of the broadcasting policy set out in subsection 3(1), and

(ii) in the case of licences issued to the Corporation, as the Commission deems consistent with the provision, through the Corporation, of the programming contemplated by paragraphs 3(1)(l) and (m);

(c) amend any condition of a licence on application of the licensee or, where five years have expired since the issuance or renewal of the licence, on the Commission's own motion;

(d) issue renewals of licences for such terms not exceeding seven years and subject to such conditions as comply with paragraph (b);

(e) suspend or revoke any licence;

(f) require any licensee to obtain the approval of the Commission before entering into any contract with a telecommunications common carrier for the distribution of programming directly to the public using the facilities of that common carrier;

(g) require any licensee who is authorized to carry on a distribution undertaking to give priority to the carriage of broadcasting; and

(h) require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission deems appropriate, programming services specified by the Commission.

...

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

(a) respecting the proportion of time that shall be devoted to the broadcasting of Canadian programs;

(b) prescribing what constitutes a Canadian program for the purposes of this Act;

(c) respecting standards of programs and the allocation of broadcasting time for the purpose of giving effect to the broadcasting policy set out in subsection 3(1);

(d) respecting the character of advertising and the amount of broadcasting time that may be devoted to advertising;

(e) respecting the proportion of time that may be devoted to the broadcasting of programs, including advertisements or announcements, of a partisan political character and the assignment of that time on an equitable basis to political parties and candidates;

(f) prescribing the conditions for the operation of programming undertakings as part of a network and for the broadcasting of network programs, and respecting the broadcasting times to be reserved for network programs by any such undertakings;

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

(h) for resolving, by way of mediation or otherwise, any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertakings;

(i) requiring licensees to submit to the Commission such information regarding their programs and financial affairs or otherwise relating to the conduct and management of their affairs as the regulations may specify;

(j) respecting the audit or examination of the records and books of account of licensees by the Commission or persons acting on behalf of the Commission; and

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

Copyright Act, R.S.C., 1985, c. C-42

2. In this Act,

...

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

...

“communication signal” means radio waves transmitted through space without any artificial guide, for reception by the public;

...

“copyright” means the rights described in

- (a) section 3, in the case of a work,
- (b) sections 15 and 26, in the case of a performer’s performance,
- (c) section 18, in the case of a sound recording, or
- (d) section 21, in the case of a communication signal;

...

3. (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

...

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

...

and to authorize any such acts.

(1.1) A work that is communicated in the manner described in paragraph (1)(f) is fixed even if it is fixed simultaneously with its communication.

...

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

- (a) to fix it,
- (b) to reproduce any fixation of it that was made without the broadcaster's consent,
- (c) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast, and
- (d) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee,

and to authorize any act described in paragraph (a), (b) or (d).

...

31. (1) In this section,

“new media retransmitter” means a person whose retransmission is lawful under the *Broadcasting Act* only by reason of the *Exemption Order for New Media Broadcasting Undertakings* issued by the Canadian Radio-television and Telecommunications Commission as Appendix A to Public Notice CRTC 1999-197, as amended from time to time;

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

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

(2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

- (a) the communication is a retransmission of a local or distant signal;
- (b) the retransmission is lawful under the *Broadcasting Act*;
- (c) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;

(d) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act; and

(e) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(b).

(3) The Governor in Council may make regulations

(a) defining “local signal” and “distant signal” for the purposes of subsection (2); and

(b) prescribing conditions for the purposes of paragraph (2)(e), and specifying whether any such condition applies to all retransmitters or only to a class of retransmitter.

Appeal allowed with costs throughout, DESCHAMPS, ABELLA, CROMWELL and KARAKATSANIS JJ. dissenting.

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