



**SUPREME COURT OF CANADA**

**CITATION:** Bell Canada v. Canada (Attorney General),  
2019 SCC 66

**APPEALS HEARD:** December 4, 5, 6,  
2018

**JUDGMENT RENDERED:** December 19,  
2019

**DOCKETS:** 37896, 37897

**BETWEEN:**

**Bell Canada and Bell Media Inc.**  
Appellants

and

**Attorney General of Canada**  
Respondent

- and -

**Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Saskatchewan, Canadian Radio-television and Telecommunications Commission, Telus Communications Inc., Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program, Ontario Securities Commission, British Columbia Securities Commission, Alberta Securities Commission, Ecojustice Canada Society, Workplace Safety and Insurance Appeals Tribunal (Ontario), Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), Workers' Compensation Appeals Tribunal (Nova Scotia), Appeals Commission for Alberta Workers' Compensation, Workers' Compensation Appeals Tribunal (New Brunswick), British Columbia International Commercial Arbitration Centre Foundation, Council of Canadian Administrative Tribunals, National Academy of Arbitrators, Ontario Labour-Management Arbitrators' Association, Conférence des arbitres du Québec, Canadian Labour Congress, National Association of Pharmacy Regulatory Authorities, Queen's Prison Law Clinic, Advocates for the Rule of Law, Cambridge Comparative Administrative Law Forum, Association of Canadian Advertisers, Alliance of Canadian Cinema, Television and Radio Artists, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Bar Association, Blue Ant Media Inc., Canadian Broadcasting Corporation, DHX Media Ltd., Groupe V Média inc., Independent Broadcast**

**Group, Aboriginal Peoples Television Network, Allarco Entertainment Inc.,  
BBC Kids, Channel Zero, Ethnic Channels Group Ltd., Hollywood Suite, OUTtv  
Network Inc., Stingray Digital Group Inc., TV5 Québec Canada, ZoomerMedia  
Ltd., Pelmorex Weather Networks (Television) Inc. and First Nations Child &  
Family Caring Society of Canada**  
Intervenors

**AND BETWEEN:**

**National Football League, NFL International LLC and NFL Productions LLC**  
Appellants

and

**Attorney General of Canada**  
Respondent

- and -

**Attorney General of Ontario, Attorney General of Quebec, Attorney General of  
British Columbia, Attorney General of Saskatchewan, Canadian Radio-  
television and Telecommunications Commission, Telus Communications Inc.,  
Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program, Ontario  
Securities Commission, British Columbia Securities Commission, Alberta  
Securities Commission, Ecojustice Canada Society, Workplace Safety and  
Insurance Appeals Tribunal (Ontario), Workers' Compensation Appeals  
Tribunal (Northwest Territories and Nunavut), Workers' Compensation  
Appeals Tribunal (Nova Scotia), Appeals Commission for Alberta Workers'  
Compensation, Workers' Compensation Appeals Tribunal (New Brunswick),  
British Columbia International Commercial Arbitration Centre Foundation,  
Council of Canadian Administrative Tribunals, National Academy of  
Arbitrators, Ontario Labour-Management Arbitrators' Association, Conférence  
des arbitres du Québec, Canadian Labour Congress, National Association of  
Pharmacy Regulatory Authorities, Queen's Prison Law Clinic, Advocates for the  
Rule of Law, Cambridge Comparative Administrative Law Forum, Association  
of Canadian Advertisers, Alliance of Canadian Cinema, Television and Radio  
Artists, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,  
Canadian Bar Association and First Nations Child & Family Caring Society of  
Canada**  
Intervenors

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown,  
Rowe and Martin JJ.

**JOINT REASONS FOR JUDGMENT:** Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe  
(paras. 1 to 59) and Martin JJ.

**JOINT DISSENTING REASONS:** Abella and Karakatsanis JJ.  
(paras. 60 to 97)

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BELL CANADA v. CANADA (A.G.)

**Bell Canada and  
Bell Media Inc.**

*Appellants*

v.

**Attorney General of Canada**

*Respondent*

and

**Attorney General of Ontario,  
Attorney General of Quebec,  
Attorney General of British Columbia,  
Attorney General of Saskatchewan,  
Canadian Radio-television and Telecommunications Commission,  
Telus Communications Inc.,  
Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program,  
Ontario Securities Commission,  
British Columbia Securities Commission,  
Alberta Securities Commission,  
Ecojustice Canada Society,  
Workplace Safety and Insurance Appeals Tribunal (Ontario),  
Workers' Compensation Appeals Tribunal (Northwest Territories and  
Nunavut), Workers' Compensation Appeals Tribunal (Nova Scotia),  
Appeals Commission for Alberta Workers' Compensation,  
Workers' Compensation Appeals Tribunal (New Brunswick),  
British Columbia International Commercial Arbitration Centre Foundation,  
Council of Canadian Administrative Tribunals,  
National Academy of Arbitrators,  
Ontario Labour-Management Arbitrators' Association,  
Conférence des arbitres du Québec,  
Canadian Labour Congress,  
National Association of Pharmacy Regulatory Authorities,  
Queen's Prison Law Clinic,  
Advocates for the Rule of Law,  
Cambridge Comparative Administrative Law Forum,  
Association of Canadian Advertisers,**

**Alliance of Canadian Cinema, Television and Radio Artists,  
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,  
Canadian Bar Association,  
Blue Ant Media Inc.,  
Canadian Broadcasting Corporation,  
DHX Media Ltd.,  
Groupe V Média inc.,  
Independent Broadcast Group,  
Aboriginal Peoples Television Network,  
Allarco Entertainment Inc.,  
BBC Kids,  
Channel Zero,  
Ethnic Channels Group Ltd.,  
Hollywood Suite,  
OUTtv Network Inc.,  
Stingray Digital Group Inc.,  
TV5 Québec Canada,  
ZoomerMedia Ltd.,  
Pelmorex Weather Networks (Television) Inc. and  
First Nations Child & Family Caring Society of Canada**

*Intervenors*

- and -

**National Football League,  
NFL International LLC and NFL Productions LLC**

*Appellants*

v.

**Attorney General of Canada**

*Respondent*

and

**Attorney General of Ontario,  
Attorney General of Quebec,  
Attorney General of British Columbia,  
Attorney General of Saskatchewan,**

**Canadian Radio-television and Telecommunications Commission,  
Telus Communications Inc.,  
Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program,  
Ontario Securities Commission,  
British Columbia Securities Commission,  
Alberta Securities Commission,  
Ecojustice Canada Society,  
Workplace Safety and Insurance Appeals Tribunal (Ontario),  
Workers' Compensation Appeals Tribunal (Northwest Territories and  
Nunavut),  
Workers' Compensation Appeals Tribunal (Nova Scotia),  
Appeals Commission for Alberta Workers' Compensation,  
Workers' Compensation Appeals Tribunal (New Brunswick),  
British Columbia International Commercial Arbitration Centre Foundation,  
Council of Canadian Administrative Tribunals,  
National Academy of Arbitrators,  
Ontario Labour-Management Arbitrators' Association,  
Conférence des arbitres du Québec,  
Canadian Labour Congress,  
National Association of Pharmacy Regulatory Authorities,  
Queen's Prison Law Clinic,  
Advocates for the Rule of Law,  
Cambridge Comparative Administrative Law Forum,  
Association of Canadian Advertisers,  
Alliance of Canadian Cinema, Television and Radio Artists,  
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,  
Canadian Bar Association and  
First Nations Child & Family Caring Society of Canada**

*Intervenors*

**Indexed as: Bell Canada v. Canada (Attorney General)**

**2019 SCC 66**

File Nos.: 37896, 37897.

2018: December 4, 5, 6; 2019: December 19.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Administrative law — Appeals — Boards and tribunals — Regulatory boards — Jurisdiction — CRTC deciding that simultaneous substitution regime does not apply to Super Bowl broadcast — Canadians therefore able to view American commercials aired during Super Bowl — Whether CRTC had authority to prohibit simultaneous substitution for Super Bowl — Framework for determining applicable standard of review set out in Vavilov applied — Broadcasting Act, S.C. 1991, c. 11, s. 9(1)(h).*

For more than 40 years, the NFL’s Super Bowl game, which is played in the United States, had been broadcast in Canada in accordance with the “simultaneous substitution” regime. This regime, set out in various regulations made under the *Broadcasting Act*, allows for a television service provider to temporarily delete and replace the entire signal of a distant (usually national or international) television station with the signal of another (usually local) television station that is airing the same program at the same time. Simultaneous substitution is permitted by the CRTC to allow Canadian broadcasters to realize greater advertising revenues; since simultaneous substitution allows local television stations to maximize their

audiences for specific programs, those stations are able to charge advertisers more for in-program commercials. Because the Canadian broadcast of the Super Bowl had been subject to the applicable simultaneous substitution regime, Canadians were prevented from viewing high-profile American commercials that were aired in the U.S. broadcast of the game.

In 2013, the CRTC initiated a broad public consultation for the purpose of reviewing the entire framework for the regulation of television in Canada. As part of this consultation, it held a public hearing seeking comments on simultaneous substitution, through which Canadians expressed frustration over their inability to see high-profile commercials aired on the U.S. broadcast of the Super Bowl. In August 2016, pursuant to s. 9(1)(h) of the *Broadcasting Act*, the CRTC issued an order (“Order”) prohibiting simultaneous substitution for the Super Bowl as of January 1, 2017, supported by reasons (“Decision”). This meant that Canadians would be free to view the U.S. broadcast that features American commercials. Bell and the NFL sought leave to appeal the Decision and Order to the Federal Court of Appeal pursuant to s. 31(2) of the *Broadcasting Act*. Leave was granted but their appeals were unanimously dismissed.

*Held* (Abella and Karakatsanis JJ. dissenting): The appeals should be allowed and the Decision and Order of the CRTC quashed.

*Per* **Wagner C.J.** and **Moldaver, Gascon, Côté, Brown, Rowe** and **Martin JJ.**: The Order was issued on the basis of an incorrect interpretation by the



CRTC of the scope of its authority under s. 9(1)(h) of the *Broadcasting Act*. Properly interpreted, this provision only authorizes the issuance of mandatory carriage orders — orders that require television service providers to carry specific channels as part of their cable or satellite offerings — that include specified terms and conditions. It does not empower the CRTC to impose terms and conditions on the distribution of programming services generally. Accordingly, because the Order does not actually mandate that television service providers distribute a channel that broadcasts the Super Bowl, but instead simply imposes a condition on those that already do, its issuance was not authorized by s. 9(1)(h) of the *Broadcasting Act*.

The applicable standard of review of the CRTC's Order and Decision must be determined in accordance with the framework set out in *Vavilov*. Given that the CRTC's Order and Decision have been challenged by way of the statutory appeal mechanism provided for in s. 31(2) of the *Broadcasting Act*, which allows for an appeal to be brought to the Federal Court of Appeal, with leave, on a question of law or a question of jurisdiction, the appellate standards of review apply in this case. And because the issues in these appeals raise legal questions that go directly to the limits of the CRTC's statutory grant of power, that is, that the CRTC lacked the authority under s. 9(1)(h) to issue the Order, and therefore plainly fall within the scope of the statutory appeal mechanism set out in s. 31(2), the applicable standard is correctness.

The scope of the CRTC's authority under s. 9(1)(h) of the *Broadcasting Act* is to be determined by interpreting that provision in accordance with the modern

approach to statutory interpretation. This approach requires the words of the statute be read in their entire context and in their grammatical and ordinary sense harmonious with the scheme of the Act, the object of the Act, and the intention of Parliament. Interpreted in accordance with text, context and purpose of s. 9(1)(h), the CRTC's authority is limited to issuing orders that require television service providers to carry specific channels as part of their service offerings, and attaching terms and conditions to such mandatory carriage orders. Section 9(1)(h) does not give the CRTC a broad power to impose conditions outside the context of a mandatory carriage order. The wording of the provision indicates that the primary power delegated to the CRTC is to mandate that television service providers carry specific programming services as part of their cable or satellite offerings, and that the secondary power relates to the imposition of terms and conditions on such mandatory carriage orders. The statutory context surrounding s. 9(1)(h), notably the powers under ss. 9(1)(b), 9(1)(g) and 10, supports this conclusion as to its scope; the existence of these specific powers weighs against reading s. 9(1)(h) as conferring a general power to impose terms and conditions on any carriage of programming services. This interpretation is also confirmed by the purpose for which s. 9(1)(h) was enacted, and by the legislative history of the provision.

Because the CRTC did not purport, in the Order, to mandate the carriage of any particular programming services, but instead sought to add a condition that must be fulfilled should a television service provider carry a Canadian station that broadcasts the Super Bowl, the issuance of that Order was not within the scope of its

delegated power under s. 9(1)(h) of the *Broadcasting Act*. The Order should therefore be quashed, as well as the Decision; however, no view is expressed as to whether the CRTC could do so pursuant to some other statutory power.

*Per Abella and Karakatsanis JJ.* (dissenting): The appeals should be dismissed. The CRTC reasonably interpreted s. 9(1)(h) of the *Broadcasting Act*, and its Super Bowl Order was reasonable and defensible in light of the facts and law.

As a general rule, administrative decisions are to be reviewed for reasonableness. When conducting reasonableness review, a court assesses whether the decision as a whole is reasonable, viewed in light of the reasons given, the decision-making context and the grounds on which it is challenged. Reviewing courts should pay particular attention to the consequences, operational implications and challenges identified by the decision-maker. Because judicial substitution is incompatible with reasonableness review, the reviewing court must not begin its analysis by asking how it would have decided the issue. Rather, the reviewing court defers to any reasonable interpretation adopted by an administrative decision-maker, even if other reasonable interpretations may exist.

The majority's framework disregards the significance of specialized expertise and results in a broad application of the standard of correctness. None of the correctness exceptions apply to the CRTC's decision and reasonableness review is consistent with the highly specialized expertise of the CRTC. As an archetype of an expert administrative body, the CRTC's specialized expertise is well-settled.

Extensive statutory powers have been granted to this regulatory body, and an exceptionally specialized mandate requires the CRTC to consider and balance complex public interest considerations in regulating an entire industry. The need for an expert body to balance sensitive public interest issues in a highly technical context is particularly evident in this case, with the record containing a series of public notices, consultations and policies spanning almost three years and leading to the decision at issue.

Under reasonableness review, Bell and the NFL bear the onus of demonstrating that the CRTC's decision, as a whole, is unreasonable. They have not met their burden. The reasons provided by the CRTC in the Order and accompanying regulatory policy set out a rational and persuasive line of reasoning which clearly outlines the consequences, operational implications and challenges that motivated its decision. While Bell and the NFL submit that the term "programming services" in s. 9(1)(h) cannot support the issuance of an order with terms and conditions that relate to a single program, it is agreed that "programming services" could relate to a single program in this context. In addition, the Order attached a condition to the carriage of Canadian television stations and was, by its own terms, structured to apply to programming services — a reflection of how simultaneous substitution is actually performed. The CRTC's reasoning engaged its specialized and technical knowledge, leading to an interpretation that was reasonable in this operational context. The CRTC also evidently considered s. 9(1)(h) in its context, including not only the objectives of the *Broadcasting Act* but also its broader statutory framework. The CRTC made clear

that its decision was weighed — and ultimately justified — in light of much broader policy determinations and the CRTC’s duty to regulate the system as a whole. It is not for a court to engage in weighing competing policy objectives and substituting its own view in deciding which policy objectives should be pursued in the public interest. Finally, the CRTC’s interpretation of s. 9(1)(h) of the *Broadcasting Act* does not conflict with the *Copyright Act* and Canada’s treaty obligations. The CRTC reasonably interpreted s. 9(1)(h) of the *Broadcasting Act* and its Super Bowl Order was reasonable.

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By Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ.

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By Abella and Karakatsanis JJ. (dissenting)

*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 S.C.R. 489; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895.

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*Canadian Radio-television and Telecommunications Commission Act*, R.S.C. 1985, c. C-22, s. 12(1).

*Copyright Act*, R.S.C. 1985, c. C-42, s. 31(2).

*Interpretation Act*, R.S.C. 1985, c. I-21, s. 33(2).

*Simultaneous Programming Service Deletion and Substitution Regulations*, SOR/2015-240, ss. 3, 4.

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*Steven G. Mason, Brandon Kain and Richard Lizius*, for the appellants.

*Michael H. Morris and Ian Demers*, for the respondent.

*Sara Blake and Judie Im*, for the intervener the Attorney General of Ontario.

*Stéphane Rochette*, for the intervener the Attorney General of Quebec.

*J. Gareth Morley and Katie Hamilton*, for the intervener the Attorney General of British Columbia.

*Kyle McCreary and Johnna Van Parys*, for the intervener the Attorney General of Saskatchewan.

No one appeared for the intervener the Canadian Radio-television and Telecommunications Commission.

*Christopher C. Rootham*, for the intervener Telus Communications Inc.

*Karen Andrews*, for the intervener the Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program.

*Matthew Britton and Jennifer M. Lynch*, for the interveners the Ontario Securities Commission, the British Columbia Securities Commission and the Alberta Securities Commission.

*Laura Bowman and Bronwyn Roe*, for the intervener Ecojustice Canada Society.

*David Corbett and Michelle Alton*, for the interveners the Workplace Safety and Insurance Appeals Tribunal (Ontario), the Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), the Workers' Compensation Appeals Tribunal (Nova Scotia), the Appeals Commission for Alberta Workers' Compensation and the Workers' Compensation Appeals Tribunal (New Brunswick).

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*Terrence J. O'Sullivan and Paul Michell*, for the intervener the Council of Canadian Administrative Tribunals.

Written submissions only by *Susan L. Stewart, Linda R. Rothstein, Michael Fenrick, Angela E. Rae and Anne Marie Heenan*, for the interveners the National Academy of Arbitrators, the Ontario Labour-Management Arbitrators' Association and Conférence des arbitres du Québec.

*Steven Barrett*, for the intervener the Canadian Labour Congress.

Written submissions only by *William W. Shores, Q.C.*, and *Kirk N. Lambrecht, Q.C.*, for the intervener the National Association of Pharmacy Regulatory Authorities.

*Brendan Van Niejenhuis* and *Andrea Gonsalves*, for the intervener Queen's Prison Law Clinic.

*Adam Goldenberg*, for the intervener Advocates for the Rule of Law.

*Paul Warchuk* and *Francis Lévesque*, for the intervener the Cambridge Comparative Administrative Law Forum.

Written submissions only by *J. Thomas Curry* and *Sam Johansen*, for the interveners the Association of Canadian Advertisers and the Alliance of Canadian Cinema, Television and Radio Artists.

*James Plotkin* and *Alyssa Tomkins*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

*Guy Régimbald*, for the intervener the Canadian Bar Association.

Written submissions only by *Christian Leblanc* and *Michael Shortt*, for the interveners Blue Ant Media Inc., the Canadian Broadcasting Corporation, DHX Media Ltd., Groupe V Média inc., the Independent Broadcast Group, the Aboriginal Peoples Television Network, Allarco Entertainment Inc., BBC Kids, Channel Zero, Ethnic Channels Group Ltd., Hollywood Suite, OUTtv Network Inc., Stingray Digital Group Inc., TV5 Québec Canada, ZoomerMedia Ltd. and Pelmorex Weather Networks (Television) Inc. (37896).

*Nicholas McHaffie*, for the intervener the First Nations Child & Family Caring Society of Canada.

*Daniel Jutras* and *Audrey Boctor*, as *amici curiae*, and *Olga Redko* and *Edward Béchard Torres*.

The following is the judgment delivered by

THE CHIEF JUSTICE, MOLDAVER, GASCON, CÔTÉ, BROWN, ROWE AND MARTIN JJ. —

[1] For more than 40 years, the Super Bowl game, which is played in the United States, had been broadcast in Canada in accordance with the “simultaneous substitution” regime, which was set out in various regulations made under the *Broadcasting Act*, S.C. 1991, c. 11. As a result, Canadians were prevented from

viewing high-profile commercials that were aired in the U.S. broadcast of the Super Bowl.

[2] After a lengthy consultation process, the Canadian Radio-television and Telecommunications Commission (“CRTC”) decided that the broadcast of the Super Bowl should be exempt from the simultaneous substitution regime as of January 1, 2017 (“Final Decision”), which meant that Canadians would be free to view the U.S. broadcast that features American commercials — which the CRTC described as being “an integral element of the event”. The CRTC implemented that decision by way of an order (“Final Order”) issued under s. 9(1)(h) of the *Broadcasting Act*, which provides that the CRTC can require that television service providers “carry, on such terms and conditions as the [CRTC] deems appropriate, programming services specified by the [CRTC]”.

[3] The main question in these statutory appeals is whether the CRTC had the authority under s. 9(1)(h) of the *Broadcasting Act* to issue the Final Order. The Federal Court of Appeal answered this question in the affirmative. Applying the standard of reasonableness, it held — on the basis of “the deference owed to the CRTC in its interpretation of its home statutes and the broad discretion conferred on the CRTC by paragraph 9(1)(h)” — that “the CRTC’s explanation of its jurisdiction to make the Final Order is justifiable, transparent, and intelligible and falls within the range of reasonable outcomes defensible in respect of the facts and the law” (2017 FCA 249, [2018] 4 F.C.R. 300, at para. 28).

[4] We arrive at a different conclusion. The applicable standard must be determined in accordance with the framework set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, a case this Court heard together with these statutory appeals in order to “consider the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir* and subsequent cases” (*Vavilov*, at para. 6). Given that the appellants have challenged the CRTC’s Final Decision and Final Order by way of the statutory appeal mechanism provided for in s. 31(2) of the *Broadcasting Act*, the appellate standards of review apply here (*Vavilov*, at paras. 36-52). And because the issues in these appeals raise legal questions that go directly to the limits of the CRTC’s statutory grant of power, and therefore plainly fall within the scope of the statutory appeal mechanism referred to above, the applicable standard is correctness.

[5] Applying this standard, we are of the view that the Final Order was issued on the basis of an incorrect interpretation of the scope of the authority conferred on the CRTC under s. 9(1)(h). Properly interpreted, s. 9(1)(h) only authorizes the issuance of mandatory carriage orders — orders that require television service providers to carry specific channels as part of their cable or satellite offerings — that include specified terms and conditions. It does not empower the CRTC to impose terms and conditions on the distribution of programming services *generally*. Accordingly, because the Final Order does not actually mandate that television service providers distribute a channel that broadcasts the Super Bowl, but

instead simply imposes a condition on those that already do, its issuance was not authorized by s. 9(1)(h) of the *Broadcasting Act*.

[6] We would allow the appeals and quash the Final Order and the Final Decision accordingly.

## I. Background

### A. *Overview of Simultaneous Substitution in Canada*

[7] The CRTC is an independent public authority that oversees broadcasting and telecommunications in Canada. Section 5(1) of the *Broadcasting Act* requires that the CRTC “regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in subsection 3(1)” of that Act.

[8] In regulating the Canadian broadcasting industry, the CRTC is required, for the most part, to ensure that all “programming undertakings” and “distribution undertakings” are licensed and that they comply with all conditions applicable to such licences (*Broadcasting Act*, ss. 32 and 33).

[9] Programming undertakings are broadcasters, or television stations, that “acquire, create and produce television programming, and are licensed by the CRTC to serve a certain geographic area within the reach of their signal transmitters”

*(Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68, [2012] 3 S.C.R. 489 (“Cogeco”), at para. 4).* Although the signals of local television stations can be received for free by anyone with the proper equipment, most Canadians receive them from “distribution undertakings” — which are essentially television service providers like Bell — as part of their cable, satellite or Internet TV subscriptions (Broadcasting Regulatory Policy CRTC 2015-24, January 29, 2015 (online), at para. 3). These distribution undertakings receive signals from television stations, and retransmit them to their subscribers for a fee (*Cogeco*, at para. 4).

[10] Given the technical nature of these terms, we will refer in these reasons to distribution undertakings as “television service providers”, and programming undertakings as “television stations”. Some of the authorities also refer to programming undertakings as “broadcasters”.

[11] Section 7 of the *Broadcasting Distribution Regulations*, SOR/97-555 (“*Distribution Regulations*”), provides that, as a general rule, television service providers cannot alter or delete the signals of television stations while retransmitting them. Section 7(a) of the *Distribution Regulations* provides for an exception to this rule that applies where simultaneous substitution of the signal is either required or authorized under the *Simultaneous Programming Service Deletion and Substitution Regulations*, SOR/2015-240 (“*Simultaneous Substitution Regulations*”). The



*Simultaneous Substitution Regulations* were made by the CRTC in November 2015 pursuant to its powers under s. 10(1) of the *Broadcasting Act*.

[12] Simultaneous substitution is a process by which a television service provider temporarily deletes and replaces the *entire* signal of a distant (usually national or international) television station with the signal of another (usually local) television station that is airing the same program at the same time. Requests for simultaneous substitution are most often made by Canadian television stations that hold exclusive broadcasting rights to a particular American program so as to require that television service providers in Canada replace the signal of an American station airing the same program with the Canadian station's signal. For example, if the Canadian Broadcasting Corporation ("CBC") owns the exclusive broadcasting rights for a specific event (e.g. the Academy Awards), it can request that the signal of an American station airing that event (e.g. a station of the American Broadcasting Company) be replaced with a CBC station's signal. The result is that local viewers will see the CBC's broadcast of that event — with the same content as the U.S. broadcast *but with different commercials* — when tuning in to either station.

[13] An important reason why simultaneous substitution is permitted by the CRTC as an exception to the general rule in s. 7 of the *Distribution Regulations* is to allow Canadian broadcasters to realize greater advertising revenues:

*The record of this proceeding indicates that simultaneous substitution is still of significant benefit to Canadian broadcasters since it allows them to fully exploit and monetize the programming rights they have acquired,*

*to the benefit of their overall investment in the production of Canadian programming. While the Commission recognizes the challenges of quantifying the actual financial benefits of simultaneous substitution for broadcasters, it generally agrees that the estimated value of advertising revenue attributable to substitution in the 2012-2013 broadcast year was approximately \$250 million.*

*(Broadcasting Regulatory Policy CRTC 2015-25, January 29, 2015 (online), at para. 14.)*

Put simply, because simultaneous substitution allows local television stations to maximize their audiences for specific programs, those stations will be able to charge advertisers more for in-program commercials.

[14] Section 3 of the *Simultaneous Substitution Regulations* authorizes an operator of a Canadian television station to ask a television service provider “to delete the programming service of another Canadian television station or a non-Canadian television station and substitute for it the programming service of a local television station or regional television station”. Section 4(1)(b) requires that the television service provider carry out the requested action if, among other things, “the programming service to be deleted and the programming service to be substituted are comparable and are to be broadcast simultaneously”. Pursuant to s. 4(3), however, a television service provider “must not delete a programming service and substitute another programming service for it if the [CRTC] decides under subsection 18(3) of the *Broadcasting Act* that the deletion and substitution are not in the public interest”. Section 18(3) of the *Broadcasting Act* reads as follows:

The [CRTC] may hold a public hearing, make a report, issue any decision and give any approval in connection with any complaint or representation made to the [CRTC] or in connection with any other matter within its jurisdiction under this Act if it is satisfied that it would be in the public interest to do so.

[15] The relevant provisions of the *Broadcasting Act*, the *Distribution Regulations*, and the *Simultaneous Substitution Regulations* are reproduced in full in Appendix A to these reasons.

B. *Simultaneous Substitution and the Super Bowl*

[16] Bell Media Inc. (“Bell”) is a Canadian broadcaster that owns and operates a number of television stations of the CTV network in large and small markets across the country.

[17] The National Football League (“NFL”) is an unincorporated association of 32 separately owned member clubs, each of which operates a professional football team. The NFL’s Super Bowl championship game is among the most widely viewed single television events in Canada each year.

[18] The NFL owns the copyright for the television production of the Super Bowl. In 2013, it granted Bell the exclusive right to broadcast that event in Canada on CTV until the 2018-2019 season.

[19] For over 40 years, the Canadian broadcast of the Super Bowl had been subject to the applicable simultaneous substitution regime, which meant that the U.S. broadcast of the event — featuring American commercials — was unavailable to Canadian viewers.

[20] In 2013, the CRTC initiated a broad public consultation, called “Let’s Talk TV: A Conversation with Canadians about the Future of Television”, for the purpose of reviewing the entire framework for the regulation of television in Canada. As part of this consultation, it held a public hearing seeking comments on simultaneous substitution, through which Canadians expressed frustration over their inability to see the high-profile commercials that are aired on the U.S. broadcast of the Super Bowl.

[21] On January 29, 2015, the CRTC released Broadcasting Regulatory Policy CRTC 2015-25, in which it announced its intention to continue to allow the practice of simultaneous substitution generally, but to disallow it for (among other things) broadcasts of the Super Bowl beginning in 2017. The CRTC based this decision on “the comments received from Canadians and the fact that the non-Canadian advertising produced for the Super Bowl is an integral part of this special event programming” (para. 22).

[22] On November 19, 2015, the CRTC announced the enactment of the *Simultaneous Substitution Regulations*, which would replace the previous regime set out in the *Distribution Regulations*. In the accompanying Broadcasting Regulatory

Policy CRTC 2015-513, November 19, 2015 (online), the CRTC indicated that it intended to prohibit simultaneous substitution for the Super Bowl by way of an order issued under s. 9(1)(h) of the *Broadcasting Act*.

[23] The Federal Court of Appeal unanimously dismissed statutory appeals brought by Bell and the NFL against the CRTC's broadcasting regulatory policies of January and November 2015 and the promulgation of the *Simultaneous Substitution Regulations* (*Bell Canada v. Canada (Attorney General)*, 2016 FCA 217, 402 D.L.R. (4th) 551). Writing for the court, de Montigny J.A. held that it was premature to assess the validity of a *proposed* distribution order or regulation prohibiting simultaneous substitution for the Super Bowl, as no such order or regulation had actually been made as of the time of the hearing (para. 34). He also held that "the remedial regime set out in the [*Simultaneous Substitution Regulations*] ha[d] been validly adopted" (para. 54).

[24] On February 3, 2016, the CRTC invited comments on its proposed order under s. 9(1)(h) to prohibit simultaneous substitution for the Super Bowl (Broadcasting Notice of Consultation CRTC 2016-37, February 3, 2016 (online)). It received submissions from a number of interested parties, including Bell and the NFL.

## II. Procedural History

A. *Decisions of the CRTC: Broadcasting Regulatory Policy CRTC 2016-334 and Broadcasting Order CRTC 2016-335, August 19, 2016 (online)*

[25] On August 19, 2016, pursuant to s. 9(1)(h) of the *Broadcasting Act*, the CRTC issued Broadcasting Order 2016-335 (“Final Order”), which prohibited simultaneous substitution for the Super Bowl as of January 1, 2017. The salient portion of the Final Order reads as follows:

A distribution undertaking subject to this order may only distribute the programming service of a Canadian television station that broadcasts the Super Bowl if that distribution undertaking does not carry out a request made by that Canadian television station pursuant to section 3 of the *Simultaneous Programming Service Deletion and Substitution Regulations* to delete the programming service of another Canadian television station or a non-Canadian television station and substitute for it the programming service of a local television station or regional television station during any period in which the Super Bowl is being broadcast on the requesting Canadian television station. [para. 3]

[26] The CRTC’s reasons for issuing the Final Order are set out in Broadcasting Regulatory Policy CRTC 2016-334 (“Final Decision”). In those reasons, the CRTC expressed the view that the decision to no longer authorize simultaneous substitution for the Super Bowl reflected a reasonable balance of the many policy objectives of the *Broadcasting Act*. The CRTC also held that its authority to implement that policy decision was rooted in s. 9(1)(h) of that Act, and that the Final Order issued pursuant to that authority satisfied the requirement of s. 4(3) of the *Simultaneous Substitution Regulations*. As we noted above, s. 4(3) prohibits television service providers from carrying out simultaneous substitution

where the CRTC has decided, under s. 18(3) of the *Broadcasting Act*, that doing so is not in the public interest.

[27] Among the legal submissions advanced during the consultation process, Bell and the NFL argued that the CRTC lacked jurisdiction to issue the Final Order under s. 9(1)(h) of the *Broadcasting Act*. They took the position that orders issued under s. 9(1)(h) “can only affect a programming service (that is, the entire output of a service), and not an individual program such as the Super Bowl” (Final Decision, at para. 52). The CRTC rejected this argument, finding that the provision in question confers on it the “broad power to regulate the cable industry and impose any conditions necessary to do so” (para. 21). It explained the relationship between s. 9(1)(h) and the Final Order specifically as follows:

The proposed distribution order relates to the distribution of a “Canadian television station that broadcasts the Super Bowl”, . . . and then imposes a condition on that distribution, specifically, that the simultaneous substitution shall not be performed during the Super Bowl. Further, the wording of the proposed order adequately responds to the contention that s. 9(1)(h) can only operate with respect to a programming service, as opposed to a particular program (such as the Super Bowl).

Moreover, the distribution order reflects the way simultaneous substitution is actually performed. The entire output of a programming service is, for a particular program, deleted and the entire output of another programming service is substituted, until that program ends. The distribution order reflects the notion that the entire output of the programming service of a television station will not be deleted and substituted for the Super Bowl, a particular program. [paras. 54-55]

[28] The Final Decision also addressed a submission from SaskTel that the wording of the Final Order could be interpreted as requiring a television service

provider to distribute a Canadian television station that broadcasts the Super Bowl, even if it does not otherwise distribute that station (para. 62). The CRTC clarified its position: the Final Order was not intended to mandate the distribution of a station that broadcasts the Super Bowl, “but simply to add a condition that must be fulfilled should a [television service provider] carry the station (whether it is being carried because it is mandated to be carried by regulation as a local television station, or whether it is simply authorized to be carried as a distant signal)” (para. 63 (emphasis added)).

B. *Decision of the Federal Court of Appeal: 2017 FCA 249, [2018] 4 F.C.R. 300*

[29] Bell and the NFL were granted leave to appeal the Final Decision and the Final Order to the Federal Court of Appeal pursuant to s. 31(2) of the *Broadcasting Act*. Their appeals were unanimously dismissed.

[30] Near J.A., writing for the court, began his analysis by considering the issue of whether the CRTC had jurisdiction to issue the Final Order pursuant to s. 9(1)(h) of the *Broadcasting Act*. After identifying reasonableness as the applicable standard of review, he found that it was reasonable for the CRTC to have interpreted that the term “programming services”, as it is used in s. 9(1)(h), includes an individual program like the Super Bowl. He also found that the CRTC’s policy determination that simultaneous substitution for the Super Bowl was not in the public interest was entitled to deference on appeal (para. 24), and that once it had made this determination under s. 18(3) of the *Broadcasting Act*, “it was entitled to exempt the



Super Bowl from the simultaneous substitution regime under [s.] 4(3) of the [*Simultaneous Substitution Regulations*]" (para. 25).

[31] In addition to challenging the reasonableness of the CRTC's Final Decision and Final Order, the NFL argued that the Final Order should be set aside on the basis that it conflicted with the *Copyright Act*, R.S.C. 1985, c. C-42, and with international trade law. Near J.A. agreed with the NFL that the standard of review for this issue was correctness, both because the *Copyright Act* is not the CRTC's "home statute" and because the CRTC shares concurrent jurisdiction over the application of that Act with the Copyright Board and courts at first instance (para. 38). On the merits, however, he found no conflict of purpose or operational conflict between the Final Order and the *Copyright Act*, and rejected the NFL's submission on this issue accordingly.

### III. Analysis

[32] Before this Court, the appellants, Bell and the NFL, submit that the Final Order and the Final Decision should be set aside on the basis that the CRTC lacked the statutory authority, pursuant to s. 9(1)(h) of the *Broadcasting Act*, to prohibit simultaneous substitution for the Super Bowl. They also submit that the Final Decision and the Final Order are invalid because they conflict with the operation and the purpose of s. 31(2) of the *Copyright Act*.

[33] Because we accept the appellants' primary jurisdictional argument and would allow the appeals on that basis alone, we find it unnecessary to address the purported conflict between the Final Decision and Order and the *Copyright Act*. The two issues that we will address in these reasons are therefore the following:

1. What standard should this Court apply in reviewing the CRTC's decision regarding the scope of its authority under s. 9(1)(h) of the *Broadcasting Act*?
2. Was the CRTC correct in deciding that it had the power under s. 9(1)(h) of the *Broadcasting Act* to implement its Final Decision to issue the Final Order prohibiting simultaneous substitution for the Super Bowl?

A. *Correctness as the Applicable Standard of Review*

[34] Bell and the NFL challenge the Final Decision and the Final Order by means of the statutory appeal mechanism provided for in s. 31(2) of the *Broadcasting Act*, which allows for an appeal to be brought to the Federal Court of Appeal, with leave, "on a question of law or a question of jurisdiction". The appellate standards of review therefore apply (see *Vavilov*, at paras. 36-52).

[35] Bell and the NFL do not dispute that the CRTC is the administrative body that is statutorily mandated with overseeing broadcasting and telecommunications in Canada in accordance with the policy objectives set out in the *Broadcasting Act* and

the *Telecommunications Act*, S.C. 1993, c. 38. Instead, the primary ground of appeal they advance in this case is that the CRTC lacked the authority to issue a specific order prohibiting simultaneous substitution for the Super Bowl under s. 9(1)(h) of the *Broadcasting Act*. This raises a question that goes directly to the limits of the CRTC's statutory grant of power, and therefore plainly falls within the scope of the statutory appeal mechanism of s. 31(2); the Attorney General of Canada conceded as much in oral argument (transcript, day 1, at p. 80).<sup>1</sup> The applicable standard is therefore correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8).

B. *CRTC's Authority Under Section 9(1)(h) of the Broadcasting Act*

[36] The main issue on the merits of the appeals is therefore whether the CRTC was correct in determining that it had the authority, pursuant to s. 9(1)(h) of the *Broadcasting Act*, to implement its Final Decision to issue the Final Order prohibiting simultaneous substitution for the Super Bowl. Before determining the scope of the CRTC's power under that provision, we will begin with an analysis of the nature and effect of the Final Order.

(1) Nature and Effect of the Final Order

[37] The Final Order permits television service providers to distribute “**the programming service** of a Canadian television station that broadcasts the Super

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<sup>1</sup> “**Mr. Morris:** I wouldn't dispute that in this case you are dealing with a question of jurisdiction within the sense of [s. 31(2) of the *Broadcasting Act*], there is no doubt about that, but it is absolutely is [sic] not a true question of jurisdiction.”

Bowl” (Final Decision, at para. 53), *on the condition that* they refrain from carrying out a request for simultaneous substitution from that station for the duration of the event. Its effect is therefore that a television service provider that distributes both American and Canadian television stations airing the Super Bowl must do so without altering their respective signals.

[38] It is important to recognize, however, that the Final Order does not require that television service providers distribute any programming services to their customers; this was made clear in the CRTC’s Final Decision. Responding to SaskTel’s concern that the wording of the Final Order “could be interpreted as requiring a [television service provider] to distribute a . . . station that broadcasts the Super Bowl, even if it does not already distribute that station” (para. 62), the CRTC gave the following explanation:

It was not the [CRTC’s] intent to mandate [television service providers] to distribute a station that broadcasts the Super Bowl, but simply to add a condition that must be fulfilled should a [television service provider] carry the station (whether it is being carried because it is mandated to be carried by regulation as a local television station, or whether it is simply authorized to be carried as a distant signal). Accordingly, SaskTel is correct as to the intent of the distribution order and how the [CRTC] will interpret it in the future. [para. 63]

[39] The result is therefore that the condition of carriage set out in the Final Order — prohibiting simultaneous substitution for the Super Bowl — applies only to those service providers that already distribute the programming services of a Canadian television station airing the Super Bowl, either because they are required to

do so in accordance with some other order or have chosen to do so on a discretionary basis. The Final Order does not *mandate* the distribution of any such station.

(2) Scope of the CRTC's Power Under Section 9(1)(h) of the *Broadcasting Act*

[40] The main thrust of the position advanced by Bell and the NFL is that the Final Order exceeds the authority delegated to the CRTC under s. 9(1)(h) of the *Broadcasting Act*. That provision reads as follows:

**9 (1)** Subject to this Part, the [CRTC] may, in furtherance of its objects,

...

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

[41] The scope of the CRTC's authority under s. 9(1)(h) is to be determined by interpreting that provision in accordance with the modern approach to statutory interpretation. As this Court has reiterated on numerous occasions, this approach requires that the words of the statute be read "in their entire context and in their grammatical and ordinary sense harmonious with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, as quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and most recently in *R. v. Barton*, 2019 SCC 33, at para. 71).

[42] Bell and the NFL submit that s. 9(1)(h) “does not allow the CRTC to require that [television service providers] carry a specific program, or set terms and conditions for the carriage of a single program like the Super Bowl” (A.F. (NFL), at para. 35). Rather, they say, the term “programming services” as used in that provision refers to the *entire aggregation of programs* broadcast by a television station. On this basis, they submit that the CRTC cannot issue a s. 9(1)(h) order that targets *individual programs*, like the Super Bowl.

[43] To begin, we observe that the Final Order appears to impose a condition on the distribution of a Canadian television station’s signal; the order effectively says that a service provider can distribute such a signal during its broadcast of the Super Bowl *as long as* it does not carry out a request for simultaneous substitution for an American television station that also broadcasts the Super Bowl for the duration of the event (Final Decision, at para. 54). This, according to the CRTC, “reflects the way [in which] simultaneous substitution is actually performed”: the television service provider deletes and replaces the signal of the *television station*, and not of a specific *television program* (*ibid.*, at para. 55). Put simply, the Final Order imposes a requirement upon the carriage of a given “programming service” — in the sense of the affected television stations’ broadcast to the public — albeit only for the duration of a specific program.

[44] We need not decide, for the purpose of these appeals, whether the “terms and conditions” that can be imposed under s. 9(1)(h) of the *Broadcasting Act* can

relate directly to a specific program or must instead relate to a television station's slate of programming in its entirety. This is because we are of the view that the CRTC did not have the statutory authority to issue the Final Order pursuant to that provision in the first place. Specifically, the CRTC's authority under s. 9(1)(h) — interpreted in accordance with the provision's text, context and purpose — is limited to issuing orders that require television service providers to carry specific channels as part of their service offerings, and attaching terms and conditions to such mandatory carriage orders (A.F. (NFL), at paras. 3, 8, 12, 29, 35, 61-62 and 77-79; transcript, day 1, at pp. 5 and 17-21; transcript, day 3, at pp. 180-83). Section 9(1)(h) does not, as the Attorney General of Canada suggests (R.F., at paras. 65, 66, 71 and 76-78; transcript, day 1, at pp. 80 and 90-92), give the CRTC a broad power to impose conditions outside the context of a mandatory carriage order.

[45] We will begin this interpretive exercise with the statutory text of s. 9(1)(h) of the *Broadcasting Act*, the bilingual version of which we reproduce below for ease of reference:

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

...

**(h)** require any licensee who is authorized to carry on a distribution undertaking to carry, on such terms and conditions as the Commission

**9 (1)** Sous réserve des autres dispositions de la présente partie, le Conseil peut, dans l'exécution de sa mission :

...

**h)** obliger ces titulaires à offrir certains services de programmation selon les modalités qu'il précise.

deems appropriate,  
programming services specified  
by the Commission.

It is highly relevant that, in the English version of the Act, the phrase “on such terms and conditions as the [CRTC] deems appropriate” is couched in between commas, next to the words “carry” and “programming services”. This, in our view, indicates that the *primary* power delegated to the CRTC is to mandate that television service providers carry specific programming services as part of their cable or satellite offerings, and that the *secondary* power relates to the imposition of terms and conditions on such mandatory carriage orders.

[46] Support for this interpretation can also be found in the text of the French version. The language used there contemplates a direct link between “les *modalités*” (the terms and conditions) and the “*oblig[ation] . . . à offrir [les] services de programmation*” (obligation to carry programming services) — and therefore further weighs against interpreting this provision as conferring on the CRTC a general power to impose conditions on carriage. Indeed, there is no discordance between the English and French versions of s. 9(1)(h); both indicate that it is limited to authorizing the issuance of mandatory carriage orders on specified terms and conditions.

[47] The Federal Court of Appeal reached the same conclusion as to the plain meaning of this statutory text in *Bell Canada v. 7262591 Canada Ltd.*, 2018 FCA 174, 428 D.L.R. (4th) 311. At issue in that case was whether the CRTC had jurisdiction under s. 9(1)(h) of the *Broadcasting Act* to order that television service



providers adhere to the “Wholesale Code”, a broadcasting regulatory policy that governed “affiliation agreements” between television stations and service providers. Answering this question in the negative, Woods J.A. explained her conclusion as follows:

By its terms, paragraph 9(1)(h) provides the CRTC with the power to require a licensee to carry specified programming services, and if so required, it provides an additional power to mandate such terms and conditions of carriage of those services as the Commission deems appropriate . . . .

The ordinary meaning of this provision does not encompass a general power to regulate the terms and conditions of carriage. Such regulation must relate to terms and conditions of programming services that the CRTC specifies and requires to be provided by a licensee. [paras. 168-169]

[48] The context surrounding s. 9(1)(h) also supports our view as to its scope. It is important to recognize that this provision sets out but one power among many that the CRTC has in relation to the issuance of licenses to broadcasting undertakings pursuant to s. 9 of the *Broadcasting Act*. Of particular note are the powers under s. 9(1)(b), which allows the CRTC to subject such licenses to conditions it deems appropriate for the implementation of Canadian broadcasting policy, and under s. 9(1)(g), which allows the CRTC to “require any licensee who is authorized to carry on a distribution undertaking to give priority to the carriage of broadcasting”. The existence of these *specific* powers weighs against reading s. 9(1)(h) as conferring a *general* power to impose terms and conditions on any carriage of programming services.

[49] Moreover, s. 10 of the *Broadcasting Act* confers on the CRTC the power to make regulations in respect of various aspects of the broadcasting system, including “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)” (s. 10(1)(c)); “the carriage of any foreign or other programming services by distribution undertakings” (s. 10(1)(g)); and “such other matters as it deems necessary for the furtherance of its objects” (s. 10(1)(k)). Again, the extent of the CRTC’s powers under this section of the *Broadcasting Act* means that a narrow reading of s. 9(1)(h) will not hamper its efforts to regulate the broadcasting industry in accordance with the statutory objectives listed in s. 3(1).

[50] Further, the *Distribution Regulations* refer in various provisions to “the programming services of a programming undertaking that the [CRTC] has required, under paragraph 9(1)(h) of the Act, to be distributed as part of [a television service provider’s] basic service” (ss. 17(1)(g), 41(1)(b), and 46(3)(b); see also ss. 18(3)(a), 19(2)(d), 47(2)(a.1) and 49(2)(a)(i)). These regulatory provisions offer yet another contextual indication that the power under s. 9(1)(h) extends only to the issuance of mandatory carriage orders on specified terms and conditions.

[51] Finally, this interpretation is confirmed by the purpose for which s. 9(1)(h) of the *Broadcasting Act* was enacted. As was explained in a report entitled *Review of the Regulatory Framework for Broadcasting Services in Canada*:

Section 9(1)(h) provides an important means for the Commission to ensure carriage of important Canadian services which market forces might not otherwise dictate be carried in different regions of Canada. This power is also an important one in ensuring that the Canadian broadcasting system strengthens and enriches the cultural, political, social and economic fabric of Canada.

(L. J. E. Dunbar and C. Leblanc, *Review of the Regulatory Framework for Broadcasting in Canada — Final Report* (2007), at p. 195.)

[52] The power to mandate the carriage of specific programming services is thus a useful tool — albeit one among many — that the CRTC can use to achieve the various policy objectives listed in s. 3 of the *Broadcasting Act* (*ibid.*, at p. 75). The CRTC has in fact exercised this power on several occasions to mandate the distribution of an existing or proposed service that

- makes an exceptional contribution to Canadian expression and reflects Canadian attitudes, opinions, ideas, values and artistic creativity;
- contributes in an exceptional manner to achieving the overall objectives for the digital basic service and one or more objectives of the Act, such as:
  - Canadian identity and cultural sovereignty;
  - ethno-cultural diversity, including the special place of Aboriginal peoples in Canadian society;
  - service to and reflection and portrayal of persons with disabilities; or
  - linguistic duality, including improved service to official language minority communities (OLMCs); and
- makes exceptional commitments to original, first-run Canadian programming in terms of exhibition and expenditures.

(Broadcasting Regulatory Policy CRTC 2013-372, August 8, 2013 (online), at para. 7)

For example, the CRTC recently granted a mandatory carriage order to the Aboriginal Peoples Television Network, requiring that that network be distributed as part of the basic service of Canadian cable and satellite providers at a specified monthly rate of \$0.35 per subscriber (Broadcasting Order CRTC 2018-341, August 31, 2018 (online)). Other programming services that enjoy s. 9(1)(h) status include the Cable Public Affairs Channel (CPAC), Nouveau TV-5, and The Weather Network.

[53] More significantly, it appears that the CRTC has only *ever* validly exercised its power under s. 9(1)(h) for the issuance of mandatory carriage orders. As we noted above, its attempt to use that power to make the Wholesale Code binding upon television service providers (Broadcasting Order CRTC 2015-439, September 24, 2015 (online)) was rejected by the Federal Court of Appeal. Likewise, this Court held in *Cogeco*, in the context of a reference question, that the CRTC lacked jurisdiction under s. 9(1)(h) to implement a proposed “value for signal regime”. Apart from those cases, we have not been directed to, nor have we found, any orders under s. 9(1)(h) other than ones that mandate the distribution of particular programming services on specified terms and conditions.

[54] Furthermore, this use of s. 9(1)(h) is consistent with the way in which this provision was understood in various reports and publications that were prepared in advance of the enactment of the *Broadcasting Act* in 1991. In a clause-by-clause analysis of the bill that became the *Broadcasting Act*, the Department of Communications explained that s. 9(1)(h) addressed what was described as the

“cable-as-gatekeeper” problem in that it would “ensur[e] that the cable industry cannot frustrate the licensing of new satellite to cable services simply by refusing to carry them”. The analysis also included the following comments:

This clause provides a clear statutory basis for the [CRTC]’s priority carriage regulations (already enacted in the Cable Regulations). The 1968 Act was silent on such a power. It would also allow the CRTC to require carriage of a particular service such as, for example, TV-5, a second CBC service, or the alternative programmer. [Emphasis added.]

(Canada, Department of Communications, *The Broadcasting Act 1988: A Clause-by-Clause Analysis of Bill C-136* (1988), at s. 9(1)(h))

[55] The *Government Response to the Fifteenth report of the Standing Committee on Communications and Culture: A Broadcasting Policy for Canada* (1988) also refers, at various places, to the fact that, “[u]nder clause 9.(1)(h), the CRTC can require carriage of specified services” (see pp. 27, 56 and 90) — it appeared in particular in a response to a recommendation that the *Broadcasting Act* “be drafted so as to define the essential role of distribution undertakings as that of distributing Canadian radio and television services in French and English, both public and private, with first priority given to public-sector Canadian services” (p. 90). And after the Standing Committee on Communications and Culture expressed the view that the statute “should be drafted so as to provide authorization for the [CRTC] to establish any conditions respecting the carriage of programming services that are necessary to further the objectives of the Act” (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Communications and Culture*, No. 36, 2nd Sess., 33th Parl., May 4, 1987, at p. 78), the government showed

it was satisfied that this concern was adequately addressed by the narrowly drafted s. 9(1)(h) (*Government Response*, at p. 89).

[56] While certainly not determinative, this legislative history nevertheless provides a further indication as to the interpretation of s. 9(1)(h) that is borne out by its text and its context: that this provision *only* confers on the CRTC the authority to issue mandatory carriage orders on specified terms and conditions, and does not establish a “broad power to regulate the cable industry and impose any conditions necessary to do so” (Final Decision, at para. 21 (emphasis added)).

[57] Because the CRTC did not, in the Final Order, purport to mandate the carriage of any particular programming services, but instead sought to “add a condition that must be fulfilled should a [television service provider] carry [a Canadian] station” that broadcasts the Super Bowl (Final Decision, at para. 63 (emphasis added)), the issuance of that order was not within the scope of its delegated power under s. 9(1)(h) of the *Broadcasting Act*. We would therefore quash the Final Order, as well as the Final Decision.

[58] We would note that these appeals turn strictly on the scope of the CRTC’s authority under s. 9(1)(h) of the *Broadcasting Act*, and that neither Bell nor the NFL disputes the Federal Court of Appeal’s holding that it was reasonable for the CRTC to have determined that the public interest would be served by exempting the Super Bowl from the simultaneous substitution regime (paras. 23-24). Therefore, and although we maintain that s. 9(1)(h) did not give the CRTC the authority to

implement that policy determination, we express no view as to whether the CRTC could do so pursuant to some other statutory power.

#### IV. Conclusion

[59] For the foregoing reasons, we would allow these appeals with costs throughout, set aside the decision of the Federal Court of Appeal, and quash the decisions of the CRTC (CRTC 2016-334 and CRTC 2016-335).

The following are the reasons delivered by

ABELLA AND KARAKATSANIS JJ. —

[60] These cases concern the Canadian Radio-television and Telecommunications Commission’s 2016 decision to prohibit broadcasters from substituting Canadian advertisements for U.S. advertisements during the Super Bowl broadcast. The outcome of the appeals turns on whether the CRTC’s interpretation of “programming services” in its home statute is reasonable. In our view, that interpretation was reasonable and the decision should be upheld.

[61] As set out in our concurring reasons in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, as a general rule, administrative decisions are to be reviewed for reasonableness. None of the correctness exceptions apply to the

CRTC's decision and reasonableness review is consistent with the highly specialized expertise of the CRTC. When conducting reasonableness review, a court assesses whether the decision as a whole is reasonable, viewed in light of the reasons given and the decision-making context. Reviewing courts should pay particular attention to the administrative context and the consequences, operational implications and challenges identified by the decision-maker. To succeed, the party challenging the decision must satisfy the reviewing court that the decision is unreasonable.

[62] The Super Bowl is the championship match that closes each season of football games played by the 32 teams of the National Football League (NFL). The Super Bowl broadcast is among the most widely-viewed events on Canadian television.

[63] Bell Canada is the parent company of Bell Media Inc. (collectively, Bell). In addition to providing cable television services to Canadians, Bell owns and operates 30 local CTV television stations across the country. In 2013, Bell purchased an exclusive license to broadcast the Super Bowl on CTV until the 2018-19 season.

[64] The Canadian Radio-television and Telecommunications Commission is a regulatory body established in 1976. It has been called the “archetype” of an expert administrative tribunal: B. Kain, “Developments in Communications Law: The 2012-2013 Term — The *Broadcasting Reference*, the Supreme Court and the Limits of the CRTC” (2014), 64 *S.C.L.R.* (2d) 63, at p. 63. Parliament gave the CRTC an extensive mandate to implement measures that further Canadian broadcasting policy: *Reference*



*re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, at para. 2, per Rothstein J. Broadcasting policy in Canada seeks to maintain a distinctive Canadian culture while fostering a competitive environment for the development of a strong domestic telecommunications industry: *Broadcasting Act*, S.C. 1991, c. 11, s. 3.

[65] The powers and purposes of the CRTC in relation to broadcasting are set out in Part II of the *Broadcasting Act* (see also *Canadian Radio-television and Telecommunications Commission Act*, R.S.C. 1985, c. C-22, s. 12(1)). The CRTC licenses television stations and cable providers and can subject those licenses to terms and conditions that it deems appropriate. It can also make regulations about program standards, the character of advertising, and the proportion of time that may be allotted to Canadian and foreign content.

[66] Among the regulatory tools available to the CRTC is a technique called simultaneous substitution. First proposed by the CRTC's institutional predecessor in 1971, simultaneous substitution is a process by which the signal of a "distant" station (usually in the United States) is replaced by the signal of a "local" station: R. Armstrong, *Broadcasting Policy in Canada* (2nd ed. 2016), at p. 45. When a Canadian station, or broadcaster, broadcasts a U.S. program at the same time as a U.S. station, the Canadian station can request a Canadian distribution undertaking — the cable or television service provider — to replace the U.S. signal with its signal, which usually includes Canadian advertising: *Simultaneous Programming Service*

*Deletion and Substitution Regulations*, SOR/2015-240, s. 3 (*Simultaneous Substitution Regulations*). As long as a request respects certain guidelines, the distribution undertaking receiving the request must comply: s. 4.

[67] Canadian broadcasters frequently make simultaneous substitution requests as a means of protecting their distribution rights in Canada: Armstrong, at p. 116. Simultaneous substitution also allows Canadian companies to consolidate audiences for a given program and, as a result, permits broadcasters to charge higher rates for advertising during that time slot: Armstrong, at pp. 54-55. The CRTC reported that in 2012-13, simultaneous substitution created revenue of approximately \$250 million: Broadcasting Regulatory Policy CRTC 2015-25, January 29, 2015 (online).

[68] In October 2013, the CRTC launched “Let’s Talk TV”, a three-stage public consultation seeking input from Canadians on the future of Canadian television. The CRTC reported that it had received numerous complaints regarding simultaneous substitution, 20 percent of which were related to Super Bowl commercials: Broadcasting Notice of Consultation CRTC 2014-190, April 24, 2014 (online). The CRTC later issued a working document to provide models for reform concerning a number of issues and to stimulate discussion and debate among stakeholders, in which it proposed two options to address simultaneous substitution complaints — eliminating simultaneous substitution entirely or, alternatively, only during live event programming, including sporting events such as the Super Bowl:

Broadcasting Notice of Consultation CRTC 2014-190-3, August 21, 2014 (online). Bell subsequently submitted evidence to the CRTC to establish the significance of live event simultaneous substitution, which accounted for as much as 33 percent of the total simultaneous substitution revenues of one of its television networks: CRTC 2015-25.

[69] In January 2015, the CRTC announced its intention to proceed with the second option, disallowing simultaneous substitution for specialty services in general and for the Super Bowl in particular, beginning with the 2017 broadcast. It found this partial disallowance would be less harmful to the broadcasting industry than a complete elimination of simultaneous substitution: CRTC 2015-25. At the same time, the CRTC announced its intention to address “recurring, substantial simultaneous substitution errors” by imposing various sanctions for such errors: CRTC 2015-25, at para. 20.

[70] In July 2015, the CRTC issued a notice indicating that it would implement its decision to prohibit simultaneous substitution for the 2017 Super Bowl by issuing an order pursuant to s. 9(1)(h) of the *Broadcasting Act*: Broadcasting Notice of Consultation CRTC 2015-330, July 23, 2015 (online). That provision authorizes the CRTC to require any licensee to carry specific programming services on such terms and conditions as the Commission deems appropriate.

[71] In the notice, the CRTC also announced its intention to create the *Simultaneous Substitution Regulations*, which would update and amend the

*Broadcasting Distribution Regulations*, SOR/97-555, that governed the regime. Interested parties were given two months to comment on the proposed regulations: CRTC 2015-330. The same day, the CRTC issued an information bulletin explaining its rationale for the changes and indicating how viewers could submit simultaneous substitution-related complaints: Broadcasting Information Bulletin CRTC 2015-329, July 23, 2015 (online).

[72] Bell and the NFL filed submissions to the CRTC in response to the call for comments. They argued that the CRTC was engaging in impermissible “administrative law discrimination” by targeting a single show and lacked jurisdiction to make an order they saw as conflicting with the *Copyright Act*, R.S.C. 1985, c. C-42, and Canada’s treaty obligations. After receiving these and other submissions, the CRTC announced the promulgation of the *Simultaneous Substitution Regulations*, whereby it had the authority to prohibit simultaneous substitution in the public interest: s. 4(3). The new public interest provisions were broader than those repealed in the *Broadcasting Distribution Regulations*: ss. 38(4) and 51(3). In the CRTC’s view, s. 9(1)(h) of the *Broadcasting Act* — which authorizes it to impose terms and conditions on the distribution of programming services — permitted it to make targeted simultaneous substitution orders: Broadcasting Regulatory Policy CRTC 2015-513, November 19, 2015 (online).

[73] In February 2016, the CRTC again called for comments about its proposed order to prohibit simultaneous substitution during the Super Bowl. The NFL

reiterated its opposition and Bell made new submissions regarding the potential impact of the order on Canadian production and entertainment industries.

[74] On August 19, 2016, the CRTC issued Broadcasting Regulatory Policy CRTC 2016-334, and Broadcasting Order CRTC 2016-335, August 19, 2016 (online), its final order prohibiting simultaneous substitution during the Super Bowl, effective January 2017 (Super Bowl Order).

[75] Bell and the NFL appealed the Order pursuant to s. 31(2) of the *Broadcasting Act*, challenging the Commission's reliance on s. 9(1)(h) of the *Broadcasting Act* as being outside of its jurisdiction.

[76] Near J.A., writing for the Federal Court of Appeal, dismissed the appeals ([2018] 4 F.C.R. 300). He concluded that the standard of review for the jurisdictional question was reasonableness. In his view, the CRTC's previous interpretations of the term "programming services" left ample room for the interpretation applied here. He also concluded that it was not open to a reviewing court to step into the place of the CRTC to reweigh the competing objectives set out in the *Broadcasting Act*. Near J.A. dismissed the NFL's arguments that the decision conflicted with the *Copyright Act* and Canada's treaty obligations.

[77] Before this Court, Bell focuses its submissions on the standard of review, arguing that the applicable standard of review is correctness. Bell argues first that s. 9(1)(h) is a jurisdiction-conferring provision, framing the issue as a true question of

jurisdiction in “the narrow sense of [the CRTC’s] authority to enter upon an inquiry”: A.F. (Bell), at para. 52. It also argues that concerns regarding freedom of expression, the presence of a statutory appeal and the absence of policy considerations also militate in favour of correctness. Finally, Bell asserts that the question of whether the Super Bowl Order conflicts with the *Copyright Act* must be reviewed for correctness, because these questions extend beyond the CRTC’s home statute. In the alternative, Bell argues that the CRTC’s interpretation of s. 9(1)(h) is unreasonable because the statute permits only one reasonable interpretation.

[78] The NFL adopts Bell’s arguments regarding the standard of review and makes additional arguments regarding the merits of the CRTC’s decision. The NFL characterizes the CRTC’s interpretation of s. 9(1)(h) as the arrogation of an “Orwellian power to reach down into the specific shows that broadcasters create and decide which ones are worthy of distribution to the public”: A.F. (NFL), at para. 4. Drawing on dictionaries, previous CRTC decisions and other provisions of the *Broadcasting Act*, the NFL asserts that “programming services” can *only* mean an entire channel. It relies heavily on the legislative history of the provision to argue that s. 9(1)(h) was not intended to permit orders regarding individual programs. The NFL further asserts that the “contrived interpretation of the CRT[C] . . . was clearly designed to justify its end goal of banning Sim Sub for only a single program”: para. 96. Finally, the NFL argues that the CRTC’s interpretation creates an operational conflict with and frustrates the purposes of the *Copyright Act*.

[79] The Attorney General of Canada submits that the applicable standard of review is reasonableness and that a deferential analysis should begin with respectful attention to the CRTC's reasons. In its view, an administrative body may choose *any* reasonable interpretation of a statute — not only the *most* reasonable interpretation. Moreover, the Attorney General of Canada submits that Bell and the NFL have failed to demonstrate how the CRTC's interpretation was unreasonable, particularly in light of the CRTC's specialized, technical knowledge of its operational context and duty to balance the 40-odd objectives of the *Broadcasting Act*. The CRTC, it says, reasonably rejected the appellants' arguments regarding the *Copyright Act* and international treaties.

#### I. Analysis

[80] We are of the view that the applicable standard of review is reasonableness and that the CRTC's decision was reasonable. As we point out in our concurring reasons in *Vavilov*, the majority's framework disregards the significance of specialized expertise and results in broad application of the standard of correctness. It does so based solely on the premise that appeal clauses reflect the legislature's intention that all questions of law be reviewed by a court on the basis of correctness. Since there is an appeal clause in the *Broadcasting Act*, the majority says the Court is entitled to substitute its opinion for that of the CRTC. This case demonstrates the fundamental flaws of such an approach.

[81] Under reasonableness review, Bell and the NFL bear the onus of demonstrating that the CRTC's decision, as a whole, is unreasonable. In our view, the Federal Court of Appeal approached the decision with appropriate deference, providing an effective foil to the appellants' correctness-based arguments. We agree that the appellants have not met their burden.

[82] Reasonableness review begins with seeking to understand the decision and the reasons for that decision in light of the administrative context and the grounds on which it is challenged. Here, Bell and the NFL argue that the CRTC's interpretation of "programming services" was not available because, in their view, the term refers to an entire channel, whereas they characterize the Super Bowl Order as targeting a specific program. As a result, they argue, there was no legal basis for the Super Bowl Order.

[83] As an archetype of an expert administrative body, the CRTC's specialized expertise is well-settled. Extensive statutory powers have been granted to this regulatory body, and an exceptionally specialized mandate requires the CRTC to consider and balance complex public interest considerations in regulating an entire industry. The need for an expert body to balance sensitive public interest issues in a highly technical context is particularly evident in this case, with the record containing a series of public notices, consultations and policies spanning almost three years and leading to the decision at issue.



[84] In our view, the reasons provided by the CRTC in the Order and accompanying regulatory policy set out a rational and persuasive line of reasoning which clearly outlines the consequences, operational implications and challenges that motivated its decision. The challenges raised by Bell and the NFL fail to satisfy us that the CRTC was unreasonable in concluding that s. 9(1)(h) provided a legal basis to prohibit simultaneous substitution during the Super Bowl.

[85] In its decision, the CRTC highlighted that simultaneous substitution is not a right, but an exception to the general requirement that distribution undertakings may not alter the programs they transmit. The CRTC emphasized that the decision was part of “much broader policy determinations” in light of its duty to regulate and supervise the broadcasting system as a whole. Given the cultural significance of the Super Bowl, the decision was an attempt to balance support for Canadian programming with a response to the frustrations of viewers and other objectives of the *Broadcasting Act*, such as allowing subscribers to view complete programming. The CRTC noted that s. 4(3) of the *Simultaneous Substitution Regulations* prohibits simultaneous substitution where the CRTC has decided that the practice is not in the public interest.

[86] Given its decision that authorizing simultaneous substitution during the Super Bowl was not in the public interest, the CRTC determined it could use its power under s. 9(1)(h) of the *Broadcasting Act* to implement that decision.

[87] Section 9(1)(h) of the *Broadcasting Act* provides:

**Licences, etc.**

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

...

**(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.

[88] In the CRTC's view, s. 9(1)(h) of the *Broadcasting Act* was enacted "to clarify the Commission's broad power to regulate the cable industry and impose any conditions necessary to do so." The opening clause of s. 9(1) couches the CRTC's authority to make orders "in furtherance of its objects", and thus, in the purposes of the Act. In support of this, the CRTC cited a previous notice in which it had concluded that the broad wording of s. 9(1)(h) was part and parcel of the flexible mandate that allows it to use a combination of regulations, conditions and orders to achieve the objects of the *Broadcasting Act*. The Order was therefore found by the CRTC to be within its jurisdiction.

[89] The CRTC also responded to the NFL's argument that s. 9(1)(h) could only be used to make orders concerning the entire output of a programming service rather than an individual program. In the CRTC's view, the wording of the Order — directed at a programming service — was sufficient to indicate that this was in fact what was being done. The CRTC explained that, on a technical level, *any* simultaneous substitution order involves replacing the entire output of a programming service. As the CRTC wrote in its decision:

Moreover, the distribution order reflects the way simultaneous substitution is actually performed. The entire output of a programming service is, for a particular program, deleted and the entire output of another programming service is substituted, until that program ends. The distribution order reflects the notion that the entire output of the programming service of a television station will not be deleted and substituted for the Super Bowl, a particular program.

(Super Bowl Order, at para. 55)

[90] Finally, the CRTC wrote that policy determinations regarding simultaneous substitution do not affect the NFL's copyright and would, at most, have only a secondary impact on the revenues that could be generated from broadcasting the program. Furthermore, not only did the international trade agreements raised by the NFL not apply directly to the CRTC, they simply provided Canada with the ability to create simultaneous substitution and did not limit the Commission's ability to modify or remove the regime.

[91] Because judicial substitution is incompatible with reasonableness review, we do not begin our analysis by asking how we would have decided the issue before us. Rather, it is in light of the above reasons, as well as the broader administrative context and record, that we must consider whether Bell and the NFL have raised any arguments that, if accepted, would render the CRTC's decision unreasonable. The CRTC here holds the "interpretative upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist": *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, at para. 40 (emphasis in original).

[92] Bell and the NFL concentrated their textual analysis of s. 9(1)(h) on the term “programming services”. They submit that this term cannot support the issuance of an order with terms and conditions that relate to a single program. The NFL further argued that the use of the terms “programming services” and “programs” elsewhere in the *Broadcasting Act* indicates that the two terms serve different purposes in the Act.

[93] We agree with Near J.A. that neither Bell and the NFL’s submissions, nor the legislative history of s. 9(1)(h), exclude the possibility that “programming services” could relate to a single program in this context. Showing appropriate deference and attention to the administrative context, Near J.A. looked to a previous decision of the CRTC for guidance with respect to the interpretation of this term, which confirmed that the CRTC had previously relied on s. 33(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21, to support its conclusion that the term “programming services” may be singular or plural *depending on the context in which it is used*: Broadcasting Decision [CRTC 2005-195](#), May 12, 2005 (online), at paras. 27-28. As the intervener the “Wholesale Code Applicants” pointed out, Bell itself has advanced contradictory interpretations of s. 9(1)(h) in different proceedings: I.F. (Wholesale Code Applicants), at paras. 11-13. In addition, the fact that Parliament granted to the Governor in Council the right to make an order for the urgent broadcast of a specific “program” under s. 26(2) of the *Broadcasting Act* sheds little light on the interpretation of “programming services” in s. 9(1)(h), which operates in a completely different context and allows the CRTC to impose terms and conditions on the distribution of programming services.

[94] In any event, the Super Bowl Order attached a condition to the carriage of Canadian television stations and was, by its own terms, structured to apply to programming services — a reflection of how simultaneous substitution is actually performed. As the CRTC observed, when simultaneous substitution is performed, it is not simply the advertisements that are replaced, but the entire feed of the program. If a station were to make a simultaneous substitution request for the Super Bowl, for example, both the game *and* the advertisements would be re-broadcasted by distribution undertakings complying with the request. In other words, the resulting broadcast would not be an American signal of the Super Bowl game intermittently interrupted by a signal carrying Canadian commercials. It would be a continuous Canadian re-transmission of the entire Super Bowl broadcast, including Canadian commercials. We agree with the Attorney General of Canada’s submission that the CRTC’s reasoning here engaged its specialized and technical knowledge, leading to an interpretation that was reasonable in this operational context.

[95] In addition, the CRTC evidently considered s. 9(1)(h) in its context, including not only the objectives of the *Broadcasting Act* but also its broader statutory framework. In response to the jurisdictional arguments brought by Bell and the NFL, the CRTC relied on s. 4(1) and (3) of the *Simultaneous Substitution Regulations* which prohibit licensees from engaging in simultaneous substitution where the CRTC has determined that the practice is “not in the public interest”. We agree with the Federal Court of Appeal’s assessment that “[i]t is not for the Court to engage in weighing these competing policy objectives and substituting its own view

in deciding which policy objectives should be pursued” in the public interest: para. 24. The Super Bowl Order was one piece in a mosaic of decisions arising from nearly three years of consultation and was reasonably determined to further the policy objectives of the *Broadcasting Act*. Section 9(1)(h) contains no statutory limits on the types of terms or conditions that the CRTC may deem appropriate towards programming services, and the provision must be read in light of Parliament’s broad grant of discretion to the CRTC. Throughout the process, the CRTC made clear that its decision was weighed — and ultimately justified — in light of “much broader policy determinations” and the CRTC’s duty to regulate the “system as a whole”.

[96] Finally, Bell and the NFL argue that the CRTC’s interpretation of s. 9(1)(h) conflicts with the operation and purpose of the *Copyright Act*. It is well established that the purpose of the *Copyright Act* is to balance authors’ and users’ rights and that the CRTC may not choose to pursue its objectives in ways that are incompatible with the purposes of the *Copyright Act* or which operationally conflict with its specific provisions: *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, at para. 45. But given the NFL’s repeated submission that “[U.S.] advertising is not even part of the Super Bowl game or covered by the NFL’s copyright, much less integral to the Super Bowl”, it can hardly come as a surprise that the CRTC adopted the same position: A.R., vol. II, at p. 115 (emphasis added). We agree with Near J.A. that there is no operational conflict with the *Copyright Act*. The NFL submits that the Super Bowl Order conflicts with s. 31(2)(c) of the *Copyright Act* because it is not “required or permitted by or under the

laws of Canada”. As the Court of Appeal pointed out, however, this submission ignores that the Order was validly made pursuant to s. 9(1)(h) of the *Broadcasting Act* and by way of s. 4(3) of the *Simultaneous Substitution Regulations*. Finally, we see nothing wrong with the CRTC’s conclusion that the international treaties raised by the parties are permissive and do not *require* simultaneous substitution. There is therefore no conflict of purpose.

[97] Bell and the NFL’s burden was not only to show that their competing interpretation of s. 9(1)(h) was reasonable, but also that the CRTC’s interpretation was unreasonable (*McLean*, at para. 41). That they have not done. Deferential review of the decision and administrative context satisfy us that the CRTC reasonably interpreted s. 9(1)(h) of the *Broadcasting Act* and that its Super Bowl Order was reasonable and defensible in light of the facts and law. We would dismiss the appeals.

APPENDIX A

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

**Loi sur la radiodiffusion, L.C. 1991, c. 11**

**2 (1)** In this Act,

**2 (1)** Les définitions qui suivent s'appliquent à la présente loi.

...

...

**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; (*émission*)

**émission** Les sons ou les images — ou leur combinaison — destinés à informer ou divertir, à l'exception des images, muettes ou non, consistant essentiellement en des lettres ou des chiffres. (*program*)

...

...

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

**9 (1)** Sous réserve des autres dispositions de la présente partie, le Conseil peut, dans l'exécution de sa mission :

...

...

(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.

**h)** obliger ces titulaires à offrir certains services de programmation selon les modalités qu'il précise.

...

...

**18 ...**

**18 ...**

**(3)** The Commission may hold a public hearing, make a report, issue any decision and give any approval in connection with any complaint or representation made to the Commission or in connection with any other matter

**(3)** Les plaintes et les observations présentées au Conseil, de même que toute autre question relevant de sa compétence au titre de la présente loi, font l'objet de telles audiences, d'un rapport et d'une décision — notamment



within its jurisdiction under this Act if it is satisfied that it would be in the public interest to do so.

une approbation — si le Conseil l'estime dans l'intérêt public.

...

...

**31 (1)** Except as provided in this Part, every decision and order of the Commission is final and conclusive.

**31 (1)** Sauf exceptions prévues par la présente partie, les décisions et ordonnances du Conseil sont définitives et sans appel.

**(2)** An appeal lies from a decision or order of the Commission to the Federal Court of Appeal on a question of law or a question of jurisdiction if leave therefor is obtained from that Court on application made within one month after the making of the decision or order sought to be appealed from or within such further time as that Court under special circumstances allows.

**(2)** Les décisions et ordonnances du Conseil sont susceptibles d'appel, sur une question de droit ou de compétence, devant la Cour d'appel fédérale. L'exercice de cet appel est toutefois subordonné à l'autorisation de la cour, la demande en ce sens devant être présentée dans le mois qui suit la prise de la décision ou ordonnance attaquée ou dans le délai supplémentaire accordé par la cour dans des circonstances particulières.

***Simultaneous Programming Service  
Deletion and Substitution Regulations,  
SOR/2015-240***

***Règlement sur le retrait et la  
substitution simultanée de services de  
programmation, DORS/2015-240***

1 . . .

1 . . .

(2) In these Regulations, the expressions *Canadian programming service, comparable, customer, DTH distribution undertaking, educational authority, educational television programming service, format, licence, licensed, licensed area, licensee, non-Canadian television station, official contour, operator, programming service, regional television station, relay distribution undertaking, subscriber, subscription television system* and *terrestrial distribution undertaking* have the same meanings as in section 1 of the *Broadcasting Distribution Regulations*.

(2) Dans le présent règlement, *abonné, autorisé, autorité éducative, client, comparable, entreprise de distribution par relais, entreprise de distribution par SRD, entreprise de distribution terrestre, exploitant, format, licence, périmètre de rayonnement officiel, service de programmation, service de programmation canadien, service de programmation de télévision éducative, station de télévision non canadienne, station de télévision régionale, système de télévision par abonnement, titulaire* et *zone de desserte autorisée* s'entendent au sens de l'article 1 du *Règlement sur la distribution de radiodiffusion*.

. . .

. . .

**3 (1)** The operator of a Canadian television station may ask a licensee that carries on a terrestrial distribution undertaking to delete the programming service of another Canadian television station or a non-Canadian television station and substitute for it the programming service of a local television station or regional television station.

**3 (1)** L'exploitant d'une station de télévision canadienne peut demander au titulaire qui exploite une entreprise de distribution terrestre de retirer le service de programmation d'une station de télévision canadienne ou d'une station de télévision non canadienne et d'y substituer le service de programmation d'une station de télévision locale ou d'une station de télévision régionale.

. . .

. . .

**4 (1)** Except as otherwise provided under these Regulations or in a condition of its licence, a licensee that receives a request referred to in section

**4 (1)** Sous réserve du présent règlement ou des conditions de sa licence, le titulaire qui reçoit la demande visée à l'article 3 doit retirer le service de

3 must carry out the requested deletion and substitution if the following conditions are met:

(a) the request is in writing and is received by the licensee at least four days before the day on which the programming service to be substituted is to be broadcast;

(b) the programming service to be deleted and the programming service to be substituted are comparable and are to be broadcast simultaneously;

(c) the programming service to be substituted has the same format as, or a higher format than, the programming service to be deleted; and

(d) if the licensee carries on a terrestrial distribution undertaking, the programming service to be substituted has a higher priority under section 17 of the *Broadcasting Distribution Regulations* than the programming service to be deleted.

...

(3) A licensee must not delete a programming service and substitute another programming service for it if the Commission decides under subsection 18(3) of the *Broadcasting Act* that the deletion and substitution are not in the public interest.

***Broadcasting Distribution Regulations, SOR/97-555***

programmation en cause et effectuer la substitution demandée si les conditions suivantes sont réunies :

a) la demande est présentée par écrit et doit être reçue par le titulaire au moins quatre jours avant la date prévue pour la diffusion du service de programmation à substituer;

b) le service de programmation à retirer et le service de programmation à substituer sont comparables et doivent être diffusés simultanément;

c) le service de programmation à substituer est d'un format égal ou supérieur au service de programmation à retirer;

d) dans le cas où le titulaire exploite une entreprise de distribution terrestre, le service de programmation à substituer a priorité, en vertu de l'article 17 du *Règlement sur la distribution de radiodiffusion*, sur le service de programmation à retirer.

...

(3) Le titulaire ne peut retirer un service de programmation et y substituer un autre service de programmation si le Conseil rend une décision, en vertu du paragraphe 18(3) de la *Loi sur la radiodiffusion*, portant que le retrait et la substitution ne sont pas dans l'intérêt public.

***Règlement sur la distribution de radiodiffusion, DORS/97-555***

1 The definitions in this section apply in these Regulations.

1 Les définitions qui suivent s'appliquent au présent règlement.

...

...

*programming service* means a program that is provided by a programming undertaking. (*service de programmation*)

*service de programmation* Émission fournie par une entreprise de programmation. (*programming service*)

...

...

7 Subject to section 7.2, a licensee shall not alter the content or format of a programming service or delete a programming service in a licensed area in the course of its distribution except

7 Sous réserve de l'article 7.2, le titulaire ne peut modifier le contenu ou le format d'un service de programmation ou retirer un tel service au cours de sa distribution dans une zone de desserte autorisée, sauf si, selon le cas :

(a) as required or authorized by a condition of its licence or under the *Simultaneous Programming Service Deletion and Substitution Regulations*.

a) la modification ou le retrait est fait en conformité avec les conditions de sa licence ou le *Règlement sur le retrait et la substitution simultanés de services de programmation*;

*Appeals allowed with costs throughout, ABELLA and KARAKATSANIS JJ.*

*dissenting.*

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*Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.*

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*Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.*

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*Solicitor for the intervener the Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program: Advocacy Centre for Tenants Ontario, Toronto.*

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*Solicitors for the intervener Queen's Prison Law Clinic: Stockwoods, Toronto.*

*Solicitors for the intervener Advocates for the Rule of Law: McCarthy Tétrault, Vancouver.*

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*Solicitors for the intervener the Canadian Bar Association: Gowling WLG (Canada), Ottawa.*

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