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Canada V7Y 1B3

Tel 604 684 9151
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www.farris.com

Reply Attention of: Ludmila B. Herbst, Q.C.
Direct Dial Number: (604) 661-1722
Email Address: lherbst@farris.com

Our File No.: 19-1145

March 17, 2017

BY EMAIL

British Columbia Utilities Commission
6th Floor, 900 Howe St.
Vancouver, BC V6Z 2N3

Attention: Patrick Wruck, Commission Secretary and Manager, Regulatory Support

Dear Sirs/Mesdames:

Re: BCOAPO Application for Reconsideration and Variance of Order G-5-17 in respect of BC Hydro's 2015 Rate Design Application

I. Introduction

We are legal counsel to FortisBC Energy Inc. and FortisBC Inc. (collectively, **FortisBC** or the **Company**) in respect of the above-noted proceeding. We write further to Exhibit A-2, by which the British Columbia Utilities Commission (**BCUC** or the **Commission**) established phase one of the reconsideration process for the Reconsideration Application filed on February 17, 2017 (the **Reconsideration Application**) by the British Columbia Old Age Pensioners' Organization, *et al.* (collectively,[1] **BCOAPO**) in respect of Commission Decision and Order G-5-17 (the **Decision**).

FortisBC opposes the Reconsideration Application. BCOAPO has not established a *prima facie* basis for the errors alleged and there is, as such, no justification for proceeding to the second phase of the reconsideration process.

In the balance of this letter, we set out FortisBC's response to the questions the Commission posed at page 2 of Exhibit A-2. The focus is on the alleged errors of fact and law that BCOAPO claims in respect of the Commission's determination that it does not have jurisdiction (the **Jurisdiction Determination**) under the *Utilities Commission Act* (***UCA***) to approve a low income rate in the absence of an economic or cost of service justification (i.e. without "**non-status justifications**"). These alleged errors are the sole grounds BCOAPO puts forward as warranting reconsideration.

[1] British Columbia Old Age Pensioners' Organization, Disability Alliance of BC, Council of Senior Citizen's Organizations of BC, Tenant Resource and Advisory Centre, Active Support Against Poverty, Together Against Poverty Society and the BC Poverty Reduction Coalition.

II. Should the Commission Order Reconsideration?

Because the only reconsideration criterion BCOAPO relies upon is the alleged existence of errors of fact and law, it must satisfy the following test to warrant a second phase reconsideration process:

- The claim of error is substantiated on a *prima facie* basis; and
- The error has significant material implications.[2]

Respectfully, BCOAPO has not established any *prima facie* error in the Commission's Jurisdiction Determination and, accordingly, reconsideration should not be ordered. The following addresses each of the errors alleged in the Reconsideration Application.

A. The "Artificial Bifurcation" Argument

In its Final Submission on proposals for low income customers, dated September 26, 2016, BCOAPO asserted three "regulatory justifications" for the Commission to order that British Columbia Hydro and Power Authority (**BC Hydro**) establish an essential services unit block (**ESUB**) rate for low income customers: (i) improved cost-reflectivity; (ii) improved efficiency of collections; and (iii) bill affordability.[3] Separately, and as a threshold issue, BCOAPO argued in its Final Submission that the Commission has jurisdiction to order programs targeted at low income residential ratepayers.[4] BCOAPO did not rely on any non-status justifications, including the "regulatory justifications" noted above, in support of its jurisdictional argument. Similarly, in BCOAPO's Responding Argument, dated October 11, 2016,[5] and its Reply Argument, dated October 24, 2016,[6] the Commission's jurisdiction to set low income rates was argued as a separate legal issue and without reliance on the regulatory justifications of improved cost-reflectivity and efficiency of collections.

BCOAPO now argues in its Reconsideration Application that the Commission erred by bifurcating "the three interrelated factors into two categories: personal characteristics (or ability to pay) and cost of service factors (cost reflectivity and efficiency)" and thereby failed to "consider together the three rationales that BCOAPO argued collectively provide the Commission with jurisdiction".[7]

With respect, the Commission's Jurisdiction Determination is consistent with the form in which BCOAPO previously presented its argument. More importantly, after determining that it does not have jurisdiction to order rates or programs based only on customers' ability to pay, the Commission went on to consider and rejected BCOAPO's position that cost reflectivity and efficiency in collections justified the establishment of an ESUB rate.[8] BCOAPO does not challenge those determinations in its

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[2] BCUC Order No. G-46-14, FBC Radio-Off AMI Meter Option Reconsideration Decision, p. 3
[3] BCOAPO Final Submission, dated September 26, 2016, pp. 54-63
[4] *Ibid.*, pp. 25-48
[5] BCOAPO Responding Argument, dated October 11, 2016, pp. 29-41
[6] BCOAPO Reply Argument, dated October 24, 2016, pp. 43-52
[7] Reconsideration Application, paras. 12-14
[8] Decision, p. 85-86 and 90-91

Reconsideration Application. As such, even if the non-status justifications BCOAPO raised were considered relevant to the Jurisdiction Determination, which FortisBC denies, the outcome would not be any different. To borrow from BCOAPO's mathematical analogy at paragraph 15 of the Reconsideration Application, if the weight to be overcome is 50 kg and each of three factors weighs 10 kg, then it does not matter what combination of those factors is placed on the scales – they will not tip.

Furthermore, the Commission was correct to treat BCOAPO's "ability to pay" rationale for the ESUB rate and other low income proposals as a threshold issue of jurisdiction. If the *UCA* does not grant the Commission authority to set rates based on the personal characteristics of customers and their ability to pay for utility services, then clearly the Commission should not consider affordability justifications and associated socioeconomic evidence for the purposes of determining whether to order the implementation of the ESUB rate and other low income programs.

B. The Statutory Interpretation Argument

In its Final Submission, dated September 26, 2016, BCOAPO recognized that the Commission cannot exceed the powers granted to it in its enabling statute, the *UCA*, and that whether the Commission has a particular power is determined using the two-stage framework the Supreme Court of Canada described in *ATCO*;[9] i.e., jurisdiction is derived either from (i) an express grant in the terms of the *UCA* (explicit powers) or (ii) jurisdiction by necessary implication (implicit powers).[10] Under the heading "Express Jurisdiction", BCOAPO then argued that the wording of ss. 23 and 38 and the Commission's overriding public interest function "give the Commission the express jurisdiction to consider proposed low income programs, subject to Sections 59 and 60 of the *UCA*".[11]

BCOAPO now argues that Commission failed to conduct an analysis consistent with Driedger's modern principle of statutory interpretation as adopted by the Supreme Court of Canada. BCOAPO asserts that the Commission erred in not considering ss. 23 and 38 harmoniously with the scheme and object of the *UCA* and the intention of the BC legislature; in particular, by basing its conclusions on a plain reading of those provisions "divorced from the context of the broader statute".[12]

The *ATCO* framework for addressing questions of jurisdiction of administrative tribunals is consistent with the modern principle of statutory interpretation. The Supreme Court of Canada made this clear in the *ATCO* decision itself, which postdates the Driedger text and *Rizzo* decision cited at paragraph 26 of BCOAPO's argument.[13]

The principles of statutory interpretation are tools to be applied in interpreting a statutory provision. They do not obviate the need to find a statutory provision – whatever tools are used to interpret it – that serves as the foundation for a regulator's jurisdiction. The only exception to the requirement for an express grant of powers is the limited ability to find jurisdiction by necessary implication.

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[9] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4 (***ATCO***) at para. 38
[10] BCOAPO Final Submission, dated September 26, 2016, at p. 26-27
[11] *Ibid.*, p. 32, underlining added
[12] Reconsideration Application, paras. 26-27
[13] *ATCO*, paras. 37-38

Because BCOAPO previously relied on ss. 23 and 38 as providing a source of "express jurisdiction", it was incumbent on the Commission to specifically consider whether those provisions could support the grant of jurisdiction being asserted. With respect, it is inconsistent to now claim that the Commission erred in doing so and contrary to the interpretative approach the Supreme Court of Canada has mandated for questions of tribunal jurisdiction in this context.

The Reconsideration Application now states that BCOAPO is not arguing that ss. 23 and 38 "provide the Commission with explicit jurisdiction to set low income rates", but rather that those sections "inform the Commission's rate approval authority, which is broad enough to include ability to pay in setting rates".[14] Similarly, BCOAPO does not suggest that ss. 59-61 of the *UCA* contain an explicit power to order low income rates. Instead it takes the position in the Reconsideration Application that, "There is nothing in the language of the statute that precludes the Commission from considering income and ability to pay" in setting a rate.[15] The Reconsideration Application is effectively a concession that the only potential source of the required jurisdiction to establish the ESUB rate and other low income proposals is the jurisdiction by necessary implication doctrine.

There are, however, numerous reasons that the jurisdiction BCOAPO asserts cannot be based on an implicit power:

- Sections 23 and 38 are broadly drafted and do no more than place public utilities under the general supervision of the Commission and require them to provide service to the public that is "adequate, safe, efficient and just and reasonable". As noted in the Decision, these provisions only address the issue of service and do not address the issue of rate setting.[16]

- The implicit powers doctrine is "of less help" in the case of broadly drawn powers like ss. 23 and 38.[17] Further, the Supreme Court of Canada held in *ATCO* that in order to impute jurisdiction to a regulatory body by necessary implication in such circumstances "there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature".[18] Here, the Commission has no such legislatively prescribed objects and there is no evidence demonstrating that the imputed jurisdiction is a "practical necessity" for its functioning.

- The jurisdiction sought to be implied is contrary to established interpretation of the *UCA*'s rate-setting provisions. For example, in the BC Court of Appeal case *Prince George Gas Co. v. Inland Natural Gas Co.* cited by the Commission, it was held that "A rate which is set without regard to what is a fair and reasonable charge for the services rendered by a public utility, for the express purpose of compelling some consumers to subsidize others, is ... inconsistent with the statutory provisions governing rates".[19] Further, the decision of the Ontario Divisional Court on which BCOAPO itself relies recognized that, "A low income

[14] Reconsideration Application, para. 25
[16] Decision, p. 54
[16] Decision, p. 54
[17] *ATCO*, para. 74
[18] *Ibid.*, para. 77
[19] Decision, p. 57; BC Hydro Final Argument, dated September 26, 2016, pp. 88-89

rate affordability program would necessarily lead to treating consumer groups on a differentiated basis with higher prices for a majority of residential consumers and subsidization of the low-income subset by the majority group and/or other classes of consumers".[20]

- The jurisdiction sought to be implied is also contrary to prevailing common law standards regarding the duty on public utilities having practical monopolies to "treat all residential customers alike" in the supply of services.[21] Accordingly, to imply a power to set low income rates based on customers' ability to pay would be contrary to the presumption of statutory interpretation that a legislature does not intend a statute to change the prevailing law "without expressing its intentions to do so with irresistible clearness".[22]

In addition, by suggesting that there is "nothing in the plain wording of the *UCA* indicating that only cost of service factors can be taken into consideration",[23] BCOAPO's statutory interpretation analysis ignores the clear terms of s. 59 which prohibit rate discrimination or preference and further provide that a public utility must not "extend to any person a form of agreement, a rule or a facility or privilege, unless the agreement, rule, facility or privilege is regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description" (underlining added). The Commission correctly concluded, relying on BC Court of Appeal precedent, that the *UCA*'s rate setting provisions do preclude it from setting utility rates in the absence of non-status justifications.

C. Legislative Intent

BCOAPO argues that the Commission erred in not giving effect to statements from *Hansard* when the *UCA* was introduced for second reading in the BC legislature in 1980.[24] With respect, there is nothing in the statement of the Hon. Robert McClelland on which BCOAPO relies from which the Commission could reasonably conclude the legislature intended for it to have the rate-setting power in issue.

BCOAPO also argues that the Commission erred in accepting, as evidence of legislative intent, the BC legislature's refusal on three separate occasions to pass proposed amendments to the *UCA* that would have provided explicit authority for the Commission to establish a low income rate. In our submission, the Commission committed no error in considering this evidence for the reasons given in the Decision and in BC Hydro's Final Argument, dated September 26, 2016.[25]

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[20] *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board* (2008), 293 D.L.R. (4th) 684 (***Advocacy Centre***) at para. 45 (Ont. Sup. Ct. Just.)
[21] FortisBC Final Argument, dated October 11, 2016, para. 6 (citing *Chastain v. BC Hydro and Power Authority*, [1973] 32 D.L.R. (3d) 443 at paras. 29-32 (B.C.S.C.))
[22] *Ibid.*, para . 6 (citing *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70 at p. 90 and R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) (***Sullivan***) at pp. 504-505)
[23] Reconsideration Application, para. 31
[24] Reconsideration Application, para. 33
[25] Decision, pp. 65-66; BC Hydro Final Argument, pp. 82-85

We also note that in Ruth Sullivan's leading Canadian text on the *Construction of Statutes*, the author states (under the heading "Failure to amend"), "In a number of recent cases, in order to infer legislative intent, the Supreme Court of Canada has relied on the legislature's failure to amend legislation in the face of persistent lobbying in favour of amendment".[26] One of the Supreme Court of Canada decisions cited involved a question of the C.R.T.C.'s jurisdiction to grant certain signal rights to television broadcasters. Doing so was in conflict with s. 21 of the *Copyright Act*, which was ultimately concluded to circumscribe the statutory jurisdiction being asserted by the broadcasters. In reaching his conclusion on the proper interpretation of this provision, Rothstein J., for the majority, relied upon evidence of the broadcasters' lobbying efforts in the lead-up to the enactment of s. 21 in 1997 and also the following:

> Notwithstanding successive amendments to the *Copyright Act*, Parliament has not amended s. 21 in the fashion requested by the broadcasters. Parliament's silence is not necessarily determinative of legislative intention. However, in the context of repeated urging from the broadcasters, Parliament's silence strongly suggests that it is Parliament's intention to maintain the balance struck by s. 21 (see *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, at para. 42, *per* Abella J.).[27]

Significantly, s. 45 of the Federal *Interpretation Act*, R.S.C. 1985, c. I-21, which was in force at the time of this decision, is a substantially equivalent provision to s. 37 of the BC *Interpretation Act*, R.S.B.C. 1996, c. 238. BCOAPO argues that the Commission failed to properly apply s. 37 to preclude reliance on evidence of failed attempts to amend the *UCA*. Based on the Supreme Court of Canada's decisions, the Commission was correct to consider this evidence notwithstanding this provision in BC's *Interpretation Act*.

D. Guidance from Decisions in Other Canadian Jurisdictions

The final error BCOAPO alleges is with respect to the Commission's determination of which cases from other Canadian jurisdictions it would take guidance from in making the Jurisdiction Determination.

BCOAPO asserts, without elaborating on its prior submissions on this issue, that the legislation in Ontario and Manitoba is "more directly applicable to the Commission's jurisdiction under the *UCA*" and the Commission therefore erred in not applying decisions of the Ontario Superior Court of Justice and the Manitoba Public Utilities Board.[28] The Reconsideration Application does not raise any reason to doubt the correctness of the reasons given by the Commission in the Decision that the legislation in those jurisdictions is not sufficiently similar to the *UCA*.[29]

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[26] *Sullivan*, p. 693 (see enclosed copy of this excerpt from the text at Appendix "A" to this letter submission)

[27] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 SCR 489, 2012 SCC 68 at para. 73, underlining added (see enclosed copy of the Reasons for Judgment at Appendix "B" to this letter submission)

[28] Reconsideration Application, para. 37 (We note that the *Advocacy Centre* decision of the Ontario Superior Court of Justice, cited above at f.n. 20 was not appealed to or confirmed by the Ontario Court of Appeal as BCOAPO states at para. 38 of the Reconsideration Application.)

[29] Decision, p. 72-73 and 78

BCOAPO also argues that the Commission erred in relying on a decision of the Nova Scotia Court of Appeal because "the *Public Utilities Act* in Nova Scotia has much stricter wording than the UCA".[30] BCOAPO cites s. 67 of the *Public Utilities Act* as creating an "absolute requirement" against rate discrimination among person in substantially similar circumstances and conditions in respect of services, which it says has no parallel in the *UCA*.[31] In our submission, the distinctions between the Nova Scotia legislation and the *UCA*, if any, are *de minimus* and should not have prevented the Commission from taking some guidance from an appellate court in another jurisdiction on a comparable jurisdictional issue. Section 59 of the *UCA* is broadly similar to s. 67 of the Nova Scotia *Public Utilities Act* in its prohibition of discrimination and preference in rates and, as noted above, its prohibition against a public utility extending to "any person" a form of agreement, rule, facility, or privilege unless the same are extended to "all persons under substantially similar circumstances and conditions for service of the same description".

Further and in any event, the Commission simply turned to other jurisdictions for guidance, and noted correctly that it was not bound by decisions that had been made there.[32]

III. If there is a Reconsideration, Should the Commission Hear New Evidence and Should New Parties be Given an Opportunity to Present Evidence

FortisBC opposes a reconsideration of the Decision. If a reconsideration does proceed to a second phase, then FortisBC submits that new evidence or an opportunity for new parties to present evidence are not warranted at this stage of the BC Hydro rate design proceeding.

IV. If there is a Reconsideration, Should it Focus on the Items from the BCOAPO Reconsideration Application, a Subset of Those Items, or Additional Items

If a second phase reconsideration is ordered, then FortisBC proposes that the Commission should only address those issues that, despite FortisBC's arguments to the contrary, it is satisfied have met the necessary threshold of disclosing *prima facie* error in fact or law.

[30] Reconsideration Application, para. 36
[31] *Ibid.*
[32] Decision, p. 67.

V. Conclusion

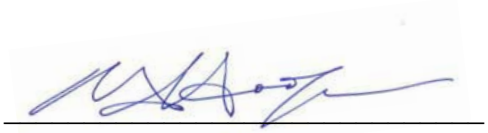
For the reasons stated above, we submit on behalf of FortisBC that BCOAPO has not substantiated to a *prima facie* threshold or at all any of the errors it alleges in respect of the Commission's Jurisdiction Determination and the Reconsideration Application should, accordingly, be dismissed.

Yours truly,

FARRIS, VAUGHAN, WILLS & MURPHY LLP

Per:

Ludmila B. Herbst, Q.C.



Nicholas T. Hooge

LBH/NTH/ls
c.c.: Other participants
Client

Appendix "A"

SULLIVAN ON THE CONSTRUCTION OF STATUTES

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by

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> Though of limited weight, Hansard evidence can assist in determining the background and purpose of legislation; ... In this case, it confirms Parliament's apparent intent to exclude legal titleholders from personal liability for air navigation charges. The legislative history and the statute itself make it clear that Parliament did not intend *CANSCA* to replace or override the existing regulatory framework but rather to fit cohesively within it. In introducing *CANSCA*, the Minister of Transport stated that the *Aeronautics Act*, which establishes the essential regulatory framework to maintain safety in the aviation industry, "will always take precedence over the commercialization legislation" (*House of Commons Debates*, March 25, 1996, at p. 1154). In the Ontario Court of Appeal, Cronk J.A. highlighted a number of other instances where government spokespersons emphasized to Members of Parliament that *CANSCA* was to fit within the existing regulatory framework which generally favours the narrow meaning of "owner"; see, e.g. *House of Commons Debates*, May 15, 1996, at p. 2834; May 29, 1996, at p. 3144; June 4, 1996, at pp. 3394 and 3410; and *Debates of the Senate*, June 10, 1996, at pp. 588-89.
>
> In 1985, during passage of the *Aeronautics Act*, a concern was raised in Parliament that liability under s. 4.4(5) (that Act's liability provision) could extend to legal titleholders. In response, the Government inserted the term "registered owner". The Parliamentary Secretary to the Minister of Transport specifically stated that the change was made to ensure that liability did not extend to those who had a security or other financial interest in the aircraft; *House of Commons Debates*, vol. IV, 1st Sess., 33rd Parl., June 20, 1985, pp. 6065-66.
>
> In 1996, the Government considered Bill C-20 (which became *CANSCA*) as it transferred the operation of the civil navigation system from Transport Canada to NAV Canada. The Clause by Clause Analysis brief presented to the Senate Committee explained that s. 55 is based on the wording of the equivalent section of the *Aeronautics Act* which, as stated, restricts "owner" to *registered* owner; see "Clause by Clause Analysis for the *Civil Air Navigation Services Commercialization Act*", as presented to the Senate Committee on Transport and Communications, at pp. 51-52.[117]
>
> [Emphasis in original]

The several materials relied on here, all of which make the same point, are quite persuasive of Parliament's intent.

§23.85 ***Failure to amend.*** In a number of recent cases, in order to infer legislative intent, the Supreme Court of Canada has relied on the legislature's failure to amend legislation in the face of persistent lobbying in favour of amendment. In

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117 *Ibid.*, at paras. 57-59. See also *Re: Sound v. Motion Picture Theatre Associations of Canada*, [2012] S.C.J. No. 38, 2012 SCC 38, [2012] 2 S.C.R. 376, at paras. 37-39 (S.C.C.); *R. v. Tse*, [2012] S.C.J. No. 16, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 28 (S.C.C.); *R. v. D.A.I.*, [2012] S.C.J. No. 5, 2012 SCC 5, at para. 29 (S.C.C.); *R. v. Imperial Tobacco Canada Ltd.*, [2011] S.C.J. No. 42, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 127 (S.C.C.); *Tele-Mobile Co. v. Ontario*, [2008] S.C.J. No. 12 (S.C.C.); *Canadian National Railway Co. v. Canada (Canadian Transportation Agency)*, [2010] F.C.J. No. 427, 2010 FCA 65, at paras. 46-50 (F.C.A.).

Tele-Mobile Co. v. Ontario,[118] for example, the appellant argued that requiring it to comply with production orders, without compensating it for the significant costs it would incur in doing so, was unreasonable within the meaning of s. 487.015(4)(b) of the *Criminal Code*. It provided that a judge may grant an exemption from compliance if satisfied that "it is unreasonable to produce the document, data or information." Alternatively, it argued that a judge could make compensation a condition of a production order. In rejecting both arguments, the Court relied heavily on the legislative history of the Code's production provisions, including government discussion papers and consultation documents and submissions made to government by telecommunication service providers, all of which addressed the issue of compensation for the costs of production — unlike the legislation itself, which made no reference to costs or compensation. Abella J. wrote:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders.[119]

§23.86 ***Other uses.*** Legislative history may be relied on to identify the scope of enabling powers, to determine whether legislation was meant to be retroactive or to establish that legislation implements, or only partly implements, an international obligation. In one recent case, it was relied on by the Supreme Court of Canada to establish that certain provisions in a statute were intended to re-enact rather than amend existing law. In *H.L. v. Canada (Attorney General)*,[120] the issue was whether *The Court of Appeal Act, 2000* expanded the Saskatchewan Court of Appeal's powers on an appeal from a power to review the trial judge's findings of fact for palpable error to a power to make its own findings of fact, as in a rehearing. Section 14 of the Act provided:

> 14. On an appeal from, or on a motion against, the decision of a trial judge or on any rehearing, the court is not obliged to grant a new trial or to adopt the view of the evidence taken by the trial judge, but the court shall act on its own view of what, in its judgment, the evidence proves, and the court may draw inferences of fact and pronounce the decision that, in its judgment, the trial judge ought to have pronounced.

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118 [2008] S.C.J. No. 12, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.).

119 *Ibid.*, at para. 42 (S.C.C.). See also *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] S.C.J. No. 68, 2012 SCC 68, [2012] 3 S.C.R. 489, at paras. 72-73 (S.C.C.); *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] S.C.J. No. 25, 2011 SCC 25, [2011] 2 S.C.R. 306, at para. 27 (S.C.C.).

120 [2005] S.C.J. No. 24, [2005] 1 S.C.R. 401 (S.C.C.).

Appendix "B"

Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, [2012] 3 SCR 489, 2012 SCC 68 (CanLII)

Date: 2012-12-13
Docket: 34231
Citation: Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, [2012] 3 SCR 489, 2012 SCC 68 (CanLII), <http://canlii.ca/t/fv76k>, retrieved on 2017-03-17

SUPREME COURT OF CANADA

CITATION: Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68, [2012] 3 S.C.R. 489

DATE: 20121213
DOCKET: 34231

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

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

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

BETWEEN:

Cogeco Cable Inc., Rogers Communications Inc., TELUS Communications Company and Shaw Communications Inc.
Appellants
and
Bell Media Inc. (formerly CTV Globemedia Inc.), V Interactions Inc., Newfoundland Broadcasting Co. Ltd. and Canwest Television Limited Partnership
Respondents

- and -

Canadian Radio-television and Telecommunications Commission

Intervener

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

REASONS FOR JUDGMENT: (paras. 1 to 83)	Rothstein J. (McLachlin C.J. and LeBel, Fish and Moldaver JJ. concurring)
JOINT DISSENTING REASONS: (paras. 84 to 126)	Abella and Cromwell JJ. (Deschamps and Karakatsanis JJ. concurring)

Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68, [2012] 3 S.C.R. 489

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

v.

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

and

Canadian Radio-television and Telecommunications Commission *Intervener*

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

2012 SCC 68

File No.: 34231.

2012: April 17; 2012: December 13.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

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

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

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

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

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

Per McLachlin C.J. and LeBel, Fish, Rothstein and Moldaver JJ.: The provisions of the *Broadcasting Act*, considered in their entire context, may not be interpreted as authorizing the CRTC to implement the proposed value for signal regime.

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

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

Second, further conflict arises between the value for signal regime and the retransmission rights in s. 31, which creates an exception to copyright infringement for the simultaneous retransmission by a BDU of a "work" carried in local signals. The value for signal regime envisions giving broadcasters deletion rights, whereby the broadcaster unable to agree with a BDU about the compensation for the distribution of its programming services would be entitled to require any program to which it has exclusive exhibition rights to be deleted from the signals of any broadcaster distributed by the BDU. The value for signal regime would effectively overturn the s. 31 exception, entitling broadcasters to control the simultaneous retransmission of works while the *Copyright Act* specifically excludes retransmission from the control of copyright owners, including broadcasters. In doing so, it would rewrite the balance between the owners' and users' interests as set out by Parliament in the *Copyright Act*. Because the CRTC's value for signal regime is inconsistent with the purpose of the *Copyright Act*, it falls outside of the scope of the CRTC's licensing and regulatory jurisdiction under the *Broadcasting Act*.

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

Per Deschamps, Abella, Cromwell and Karakatsanis JJ. (dissenting): The CRTC determined that the proposed regime was necessary to preserve the viability of local television stations and ensure the fulfillment of the broadcasting policy objectives set out in s. 3(1) of the *Broadcasting Act*. Courts have consistently

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

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

The proposed regime does not create a conflict with the *Copyright Act*. It does not give local stations a copyright in the retransmission of their television signals. BDUs derive their right to retransmit signals only from licences granted pursuant to s. 9 of the *Broadcasting Act*, and must meet the conditions imposed by the CRTC on their retransmission licences, including those set out in the proposed regime. Nothing in either the definition of "broadcaster" or in s. 21(1)(*c*) of the *Copyright Act* immunizes BDUs from licensing requirements put in place by the CRTC in accordance with its broadcasting mandate.

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

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By Rothstein J.

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Canadian Pacific Ltd., 1995 CanLII 112 (SCC), [1995] 2 S.C.R. 1031; *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606; *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 (CanLII), [2002] 2 S.C.R. 336; *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22 (CanLII), [2006] 1 S.C.R. 772; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 (CanLII), [2001] 2 S.C.R. 867; *Pointe-Claire (City) v. Quebec (Labour Court)*, 1997 CanLII 390 (SCC), [1997] 1 S.C.R. 1015; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3; *Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14 (CanLII), [2007] 1 S.C.R. 591; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23 (CanLII), [2007] 2 S.C.R. 86; *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (CanLII), [2004] 1 S.C.R. 339; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 (CanLII), [2004] 2 S.C.R. 427; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12 (CanLII), [2008] 1 S.C.R. 305; *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 (CanLII), [2012] 2 S.C.R. 283, [2012] 2 S.C.R. 283.

By Abella and Cromwell JJ. (dissenting)

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APPEAL from a judgment of the Federal Court of Appeal (Nadon, Sharlow and Layden-Stevenson JJ.A.), 2011 FCA 64 (CanLII), 413 N.R. 312, 91 C.P.R. (4th) 389, [2011] F.C.J. No. 197 (QL), 2011 CarswellNat 398. Appeal allowed, Deschamps, Abella, Cromwell and Karakatsanis dissenting.

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

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

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

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

No one appeared for the respondent Canwest Television Limited Partnership.

No one appeared for the intervener.

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

ROTHSTEIN J. —

I. Introduction

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

[68] Second, while the conflict of the proposed regime with s. 21 is sufficient to render the regime *ultra vires*, further conflict arises in my opinion between the value for signal regime and the retransmission rights in *works* set out in s. 31 of the *Copyright Act*.

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

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

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

[72] Leading up to the 1997 amendment to the *Copyright Act* (Bill C-32), under which s. 21 was introduced, broadcasters made submissions to the Standing Committee on Canadian Heritage seeking *signal* rights. They contended that they should be granted the right to authorize, or refuse to authorize, the retransmission of

their signals by others, including BDUs. The broadcasters, in fact, argued expressly against the narrow right that Parliament eventually adopted as s. 21(1)(*c*). See, e.g., submissions of CTV to Standing Committee on Canadian Heritage, "Re: Bill C-32" (August 30, 1996) (A.R., vol. VII, at p. 68); submissions of WIC Western International Communications Ltd. (1996) (A.R., vol. VII, at p. 15); submissions of the British Columbia Association of Broadcasters, "Bill C-32, the Copyright Reform Legislation" (August 28, 1996) (A.R., vol. VII, at p. 20); submissions of the Canadian Association of Broadcasters, "Clause by Clause Recommendations for Amendments to Bill C-32" (November 27, 1996) (A.R., vol. VII, at p. 77). In addition, although this section has not been amended since 1997, ongoing consultations between Parliament and the broadcasters show continued requests from the latter to include the right to authorize BDU retransmissions. See, e.g., submissions of CTVglobemedia, "Re: Government's 2009 Copyright Consultations" (September 11, 2009) (A.R., vol. IX, at pp. 35-37); Canadian Association of Broadcasters, "A Submission to the House of Commons Standing Committee on Canadian Heritage With Respect to A Statutory Review of the *Copyright Act*" (September 15, 2003) (A.R., vol. IX, at p. 28).

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

[74] The same purposeful balancing is evidenced in the legislative history of the s. 31 regime for the retransmission of *works*. The predecessor to the current s. 3(1)(*f*) guaranteed copyright holders an exclusive right to communicate works by *radio communication*. Jurisprudence interpreted the radio communication right as excluding transmissions by *cable*: *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382. Section 3(1)(*f*) was amended in 1988 to confer the exclusive right to "communicate the work to the public by telecommunication" to reflect the obligations entered into by Canada under the *Free Trade Agreement between the Government of Canada and the Government of the United States of America*, Can. T.S. 1989 No. 3 (see *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, ss. 61-62; see also *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 (CanLII), [2012] 2 S.C.R. 283, at paras. 36-37, and McKeown, at para. 3:2(b)). The change from radio communication to telecommunication meant that cable companies were now liable for copyright infringement when they communicate copyright-protected works to the public.

[75] However, at the same time, Parliament specifically addressed the question of whether the simultaneous retransmission of works carried in local and distant television signals should require the consent of the copyright owner: it adopted the compulsory licence and exception regime by way of ss. 31 and 71-76 of the *Copyright Act* (*Canada-United States Free Trade Agreement Implementation Act*, s. 62). Studies on the same question had preceded this enactment; there, too, a major

concern was that copyright owners "should not be permitted to stop retransmission because this activity is too important to Canada's communications system" (Standing Committee on Communications and Culture. *A Charter of Rights for Creators: Report of the Sub-Committee on the Revision of Copyright* (1985), at p. 80 (A.R., vol. III, at p. 118); Government Response to A Charter of Rights for Creators (February 1986) (A.R., vol. III, at p. 127)).

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

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

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

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

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

> **89.** No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament, but nothing in this