Court File No. A-337-13

FEDERAL COURT OF APPEAL

BETWEEN

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

APPELLANTS

- and -

AMTELECOM LIMITED PARTNERSHIP, BRAGG COMMUNICATIONS INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC., GLOBALIVE WIRELESS MANAGEMENT CORP., HAY COMMUNICATIONS CO-OPERATIVE LIMITED, HURON TELECOMMUNICATIONS CO-OPERATIVE LIMITED., MORNINGTON COMMUNICATIONS CO-OPERATIVE LIMITED, NEXICOM MOBILITY INC., NORTHWESTEL INC., PEOPLE'S TEL LIMITED PARTNERSHIP, PUBLIC MOBILE INC., QUADRO COMMUNICATIONS CO-OPERATIVE INC., QUEBECOR MEDIA INC., SOGETEL MOBILITÉ INC., THUNDER BAY TELEPHONE, VAXINATION INFORMATIQUE, CONSUMERS' COUNCIL OF CANADA, DIVERSITY CANADA FOUNDATION, MEDIA ACCESS CANADA, MOUVEMENT PERSONNE D'ABORD DU QUÉBEC, PUBLIC INTEREST ADVOCACY CENTRE, CONSUMERS' ASSOCIATION OF CANADA, COUNCIL OF SENIOR CITIZENS' ORGANIZATIONS OF BRITISH COLUMBIA, OPENMEDIA.CA, SERVICE DE PROTECTION ET D'INFORMATION DU CONSOMMATEUR, UNION DES CONSOMMATEURS, CANADIAN WIRELESS TELECOMMUNICATIONS ASSOCIATION, COMMISSIONER FOR COMPLAINTS FOR TELECOMMUNICATIONS SERVICES INC., COMPETITION BUREAU OF CANADA, GLENN THIBEAULT, HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA, GOVERNMENT OF MANITOBA, GOVERNMENT OF THE NORTHWEST TERRITORIES, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, ATTORNEY GENERAL OF QUÉBEC, GOVERNMENT OF YUKON, OFFICE OF THE PRIVACY COMMISSIONER OF CANADA, CATHERINE MIDDLETON, TAMARA SHEPHERD, LESLIE REGAN SHADE, KIM SAWCHUK, BARBARA CROW, SHAW TELECOM INC., TERRY DUNCAN, GLENN FULLERTON, TANA GUINDEBA, NASIR KHAN, MICHAEL LANCIONE, ALLAN MUNRO, FREDERICK A. NAKOS, RAINER SCHOENEN AND DANIEL SOKOLOV

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TABLE OF CONTENTS

Page

PART I – CONCISE STATEMENT OF FACTS

1. This Appeal raises issues going to the heart of the capacity of the Canadian Radio-television and Telecommunications Commission (CRTC) – a regulator tasked with the obligation to comprehensively oversee a highly complex industry – to impose a set of necessary consumer and market protections in a uniform matter.

2. The CRTC's regulation of the wireless market is characterized by a policy of general forbearance with a number of specific conditions of service designed to supplement market forces where necessary to meet important policy objectives embodied in section 7 of the *Telecommunications Act*. Telecom Regulatory Policy CRTC 2013-271 ("TRP CRTC 2013-271") put in place a Wireless Code designed to address a broad set of consumer and market harms in the wireless service market. In doing so, the Commission found that the facts of this proceeding supported a phased in implementation of the Code, that encompassed future contracts as of December 2, 2013, and to any remaining pre-existing contracts as of June 3, 2015 (two years from the issuing of TRP CRTC 2013-271). Its decision to do so was premised on its broad legal authority under section 24 of the *Telecommunications Act*, as well as on the need to accommodate existing service providers, on the one hand, and the need to ensure uniform and non-discriminatory market conditions on the other.

Telecom Regulatory Policy CRTC 2013-271, Appeal Book, Tab 2, paras. 360-369

3. Its decision to do so was both reasonable and correct at law. It involved a complex weighing of the factors at the core of the proceeding, which put directly at issue the problems inherent in a wireless market where consumers consistently face prohibitive switching penalties that operate to lock them out of the market for excessively long periods of time. Indeed, as part of TRP CRTC 2013-271, the Commission decided to end the ability of service providers to impose these types of prohibitive penalties on customers wishing to leave their service agreements after two years of service. This limit was premised on the conclusion that permitting service providers to impose switching penalties on a trajectory that is longer than two years is unfair to consumers given the rapid pace of technological advancement and the changing nature of market offers. This state of affairs has specific negative implications for new market entrants, as it is primarily incumbents that benefit from these switching penalties. Ultimately, TRP CRTC 2013-271 concluded that permitting customers to switch providers every two years is necessary to securing a dynamic market. In this context, it decided to ensure that the protections of TRP CRTC 2013-271 applied to all contracts within two years of the issuing of the decision.

Telecom Regulatory Policy CRTC 2013-271, Appeal Book, Tab 2, paras. 215-232

4. Moreover, the decision to apply the Wireless Code uniformly within two years of the issuing of TRP CRTC 2013-271 recognized that the uneven application of the Code can lead to undue discrimination as some elements of the market will be obligated to respect its rights for their entire customer base while others will not. This may well exacerbate some of the objectives of the Code.

5. As such, the CRTC's decision to apply the Code to all contracts as of June 3, 2015 involved a complex weighing of competing factors central to its regulatory obligations. It directly engaged the CRTC's expertise in matters of telecommunications regulations, and was reasonable and correct.

PART II – POINTS IN ISSUE

6. The points at issue in this appeal are:

   a. The appropriate standard of review in this matter;

   b. The reasonableness and correctness of the TRP CRTC 2013-271;

   c. Costs immunity for the Respondents.

PART III – SUBMISSIONS

7. The Respondents respectfully submit that the CRTC's decision in Telecom Regulatory Policy CRTC 2013-271, and specifically the application of that decision to pre-existing contracts as of June 2015, was reasonable and correct at law. The determination in question involved an assessment of complex factors relating to the wireless services competitive landscape and to the ability of consumers of that market to navigate it effectively. The decision did not attract any adverse presumptions against retroactive or retrospective application and, moreover, the CRTC is empowered to impose conditions of service retrospectively. The appeal should be dismissed.

A. DECISION TO APPLY TRP CRTC 2013-271 AS OF JUNE 3, 2015 DESERVES DEFERENCE AND IS REVIEWABLE ON A REASONABLENESS STANDARD

8. The *Telecommunications Act* grants the CRTC comprehensive powers in order to regulate the provision of telecommunications services in a manner consistent with its policy objectives, as explained by Madam Justice Abella in *Bell Canada v. Bell Aliant*:

> The Telecommunications Act grants the CRTC the general power to set and regulate rates for telecommunications services in Canada...The CRTC has other broad powers which, while not at issue in this case, nevertheless further demonstrate the comprehensive regulatory powers Parliament intended to grant...The statute contemplates a comprehensive national telecommunications framework.

The decision to apply TRP CRTC 2013-271 to all Canadians and to all service providers as of June 3, 2015 involved a complex weighing of competing stakeholder interests and engaged several of the Commission's core policy objectives.

Bell Canada v. Bell Aliant Regional Communications, 2009 SCC 40, per Abella, J., paras. 29, 32 and 72; ***Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission)***, 2014 ABCA 28, paras. 26-28

9. In imposing the Wireless Code onto providers of wireless telecommunications services, and in setting the timeline for the implementation of the Code, the Commissioner relied on section 24 of the Act. Section 24 confers onto the Commission a broad statutory discretion to impose "any conditions" onto regulated entities as a condition of providing telecommunications services in Canada:

> **24.** The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.

This is a central and broad power that the CRTC employs to carry out its policy objectives as set out in section 7 of the *Telecommunications Act*.

Bell Canada v. Bell Aliant Regional Communications, 2009 SCC 40, per Abella, J., para. 29; ***Telecommunications Act***, S.C. 1993, c. 38, ss. 7, 24, 47

10. The Appellant argues for a 'reasonableness' standard, arguing that the Commission lacks expertise in the interpretation of its own Act to determine questions of jurisdiction. However, courts have in recent years have rejected the "older command and control" relationship between courts and administrative tribunals. Quasi-judicial bodies such as the CRTC are now owed deference even when determining the scope of their own enabling statute. Where regulatory action threatens to interfere with important rights, courts have held that administrative bodies have a "distinct advantage" in applying fundamental values "to a specific set of facts and in the context of their enabling legislation."

Appellant's Factum, January 24, 2013, para. 46; ***Boardwalk Equities Inc. v. Capital Health***

Authority, 2005 ABQB 34, para. 22; ***Doré v. Barreau du Québec***, 2012 SCC 12, paras. 35 and 48; ***Wheatland County v. Shaw Cablesystems Ltd.***, 2009 FCA 291, para. 53

The matters at issue in this appeal, including the question of whether TRP CRTC 2013-271 could and should apply to pre-existing contracts or not, involved questions and considerations central to the CRTC's regulatory capacity and engaged its special expertise. Review of this matter should therefore attract a reasonableness standard.

B. THE CRTC'S DECISION TO APPLY TRP CRTC 2013-271 AS OF JUNE 3, 2015 WAS REASONABLE AND CORRECT

11. The Appellants argue that elements of TRP CRTC 2013-271 apply retroactively, have retrospective impact and interfere with vested interests. Relying on a strong common law presumption against the retroactive impact of legal action, the Appellants argue that the Wireless Code put in place by TRP CRTC 2013-271 cannot be applied to any contracts that existed prior to its coming into force date of December 3, 2013 absent a clear statement granting the CRTC the power to act retroactively. The Appellants argue that no such clear statement exists in the *Telecommunications Act*, the CRTC's underlying statute.

12. In order to properly assess the Appellants' claims, it is first critical to properly analyze the nature of the alleged backward-looking elements. There are, in fact, at least two distinct presumptions that may impact on a regulator's ability to impact detrimentally on past events, each with its own rules and limitations, as Professor Sullivan explains:

> A major source of confusion in temporal law is the absence of a clear and consistent terminology. In the past, the terms "retrospective" and "retroactive" were used interchangeably to refer to legislation that applied to past events. No attempt was made to distinguish the different ways in which this might occur or the different effects it might produce. The first step out of the morass was to distinguish sharply between retroactive or retrospective applications on the one hand and applications that interfere with vested rights on the other.

These include a strong presumption against retroactive application and a limited presumption against retrospective interference with vested rights.

R. Sullivan, "**Statutory Interpretation**", 2nd Ed., (Toronto: Irwin Law, 2007), pp. 268-269

13. TRP CRTC 2013-271 does not attract any of these presumptions. It provides prospective protections for consumers within the context of a comprehensive regulatory scheme. It does not interfere with any vested rights. Moreover, in the context of a comprehensive regulatory scheme such as that imposed by the *Telecommunications Act*, retrospective and even

retroactive interference with vested rights by a regulator is common and necessary.

(i) Impugned elements of TRP CRTC 2013-271 do not have retroactive effect

14. The law recognizes as a rule of statutory interpretation a strong presumption against any retroactive effects that legislation or regulatory activity might have. The Appellant argues that the refuted elements of TRP CRTC 2013-271 have retroactive effect. Quoting a decision of the Supreme Court of Canada relating to the regulatory powers of the Canadian Human Rights Commission, the Appellant states that the "CRTC's 'guidelines...are subject to the presumption against retroactivity. Since the [Human Rights Act] does not contain explicit language indicating an intent to dispense with this presumption, no guideline can apply retroactively.'" As TRP CRTC 2013-271 does not purport to change past outcomes of a past action, it cannot be classified as retroactive regulatory action and hence does not attract the strong presumption against such outcomes.

Appellant's Factum, January 24, 2013, para. 62; ***Bell Canada v. Canadian Telephone Employee's Assn***, 2003 SCC 36, para. 47

15. While confusion has mired these terms in the past, the Supreme Court of Canada has recently held that it is important not to conflate the concepts of retroactivity and retrospectivity. Both principles involve regulatory action that dictates new outcomes on a past event. However, while retroactivity entails interference with past outcomes of a past event (outcomes that occurred before the regulatory act took place), retrospectivity entails an interference with *future* outcomes of a past event (underline added):

> The principles of retroactivity, immediate application and retrospectivity of new legislation must not be confused with each other...According to this principle [of retrospective effect], the new legislation governs the future consequences of events that happened before it came into force but does not modify effects that occurred before that date (Côté, *supra*, at pp. 133 *et seq*. and pp. 194 *et seq*.). When new legislation modifies those prior effects, its effect is retroactive (Côté, *supra*, at pp. 133 *et seq*.). Professor Driedger gave a good explanation of this distinction between retroactive and retrospective effect:
>
> > A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute

> changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]

Determining whether a regulatory action is 'retroactive', 'retrospective', or prospective will often depend on when the effect in question has 'crystallized'. As TRP CRTC 2013-271 does not seek to impact on any outcomes that occurred before its issuance, it cannot be characterized as retroactive and does not attract the strong presumption against retroactivity.

> ***Épiciers Unis Métro-Richelieu Inc., division "Économgros" v. Collin***, 2004 SCC 59, para. 47; E.A. Driedger, "**Statutes: Retroactive Retrospective Reflections**" (1978), 56 *Canadian Bar Review* 264; R. Sullivan, "**Statutory Interpretation**", 2nd Ed., (Toronto: Irwin Law, 2007), p. 269

16. The Appellant provides a number of examples where the strong presumption against retroactivity has been applied by the courts. It is useful to examine these in order to understand the scope of the principle of retroactivity. In *Parklane Private Hospital Ltd. v. British Columbia*, the Supreme Court of Canada held that an Order in Council issued by the British Columbia government in December 1971 could not be relied upon to limit rates collected for services rendered to the government from 1968 until January 1972 without clear grant of statutory authority to act retroactively. By changing the rate for services already rendered, the Order in Council would have altered *past* effects of a past event. These effects had already crystallized (the services had been rendered and the fees had been incurred) at the time the Order in Council was issued.

> ***Appellant's Factum***, January 24, 2013, para. 53 *et seq*, and particularly at footnote 41; ***Parklane Private Hospital Ltd. v. British Columbia (Attorney-General)***, [1975] 2 S.C.R. 47, pp. 50 and 59-60

17. In *Northern Utilities Ltd. v. Edmonton (City)*, the Supreme Court of Canada similarly held that, in exercising its rate-setting power, the Utilities regulator at issue could not change the rate for "expenses incurred in the past" as this would amount to changing rates that were collected prior to the date for which they were applied. While the Board was free to set *future* or retrospective rates, it could not retroactively change rates for services or losses already incurred as these had "crystallized prior to the date of the application."

> ***Northwestern Utilities Ltd. v. Edmonton (City)***, [1979] 1 S.C.R. 684, pp. 690-694

18. In *Association internationale des commis du détail, Local 486 v. Québec (Commission des Relations de Travail*), the Québec Labour Relations Board refused a petition to certify a union based on a sub-division of members that was not presented in the union's initial

petition. At the time the union had filed its petition there was no existing requirement to specify such sub-divisions in a petition in the statute or in regulations issued under the statute. In reviewing the Board's decision the Supreme Court of Canada accepted that the Board had the power to issue regulations that would impose this type of requirement, but rejected the claim that the Board could do so in a manner that affected a petition already being adjudicated by it. It was held that such a regulation would have retroactive effect, as it would interfere with an outcome for a petition that was filed prior to the issuance of this new regulation and whose facts had already crystallized upon its filing.

Association internationale des commis du détail, Local 486 v. Québec (Commission des Relations de Travail), [1971] S.C.R. 1043, p. 1048

19. Similarly, in *Bell v. CTEA*, the Supreme Court of Canada noted in passing that while the Canadian Human Rights Commission has the power to issue legal guidelines, these cannot influence cases "currently being prosecuted before the Tribunal". Substantive changes to the law – whether through legislative acts or the issuance of regulatory instruments – are retroactive when applied to the facts of a dispute that is already being adjudicated. Such an application is retroactive as it interferes with an outcome that is already the object of a complaint and is therefore a 'past outcome' as its facts have crystallized.

Re: Royal Canadian Mounted Police Public Complaints Commission, [1991] 1 F.C. 529 (F.C.A.), para. 61; ***Apotex Inc. v. Merck & Co.***, 20011 FCA 329, para. 65-66; ***Bell Canada v. Canadian Telephone Employee's Assn***, 2003 SCC 36, para. 47; ***Dell Computer Corp. v. Union des consommateurs***, 2007 SCC 34, para. 116

20. The principle of retroactivity is only engaged where a legal instrument or regulatory action interferes with past outcomes of a past event. This includes past effects or outcomes that are currently the subject of legal disputes. It does not, however, include future effects of past events. The Appellants only specify one the substantive elements of the Code to which they object – the prohibition on penalizing customers for cancelling a fixed term service contract after 24 months of paid service have passed. A retroactive application of this prohibition would require service providers to reimburse customers who were penalized for cancelling a fixed term service contract *before* the regulatory policy was issued (or, alternatively, to any ongoing lawsuit in which these penalty clauses were disputed and which was initiated before the regulatory policy was issued).

Appellant's Factum, January 24, 2013, paras. 32-38

21. Retroactive impact is inherently more onerous then retrospective impact. It could force

entities to disgorge funds already committed to other objectives (*Northern Utilities*). It could grant rights and obligations that can no longer be carried out because they apply in the past (*Association internationale*). It could impose penalties for activities that have already been penalized under old rules, or force individuals to prove their innocence more than once for previously investigated alleged wrongs (*Re RCMP*). It could permit arbitrariness, as regulators or legislatures impose new laws with the specific intention of gaining a benefit in a particular proceeding against a particular individual (*Bell v. CTEA*).

Association internationale des commis du détail, Local 486 v. Québec (Commission des Relations de Travail), [1971] S.C.R. 1043, p. 1051; ***Bell Canada v. Canadian Telephone Employee's Assn***, 2003 SCC 36, para. 47; ***Northwestern Utilities Ltd. v. Edmonton (City)***, [1979] 1 S.C.R. 684, pp. 690-694; ***Re: Royal Canadian Mounted Police Public Complaints Commission***, [1991] 1 F.C. 529 (F.C.A.), para. 61

22. TRP CRTC 2013-271 does not apply this or any other condition retroactively. As clearly stated in TRP CRTC 2013-271:

> In light of the above, the Commission determines that all aspects of the Wireless Code will take effect on 2 December 2013.
>
> The Commission finds that where an obligation relates to a specific contractual relationship between a WSP and a customer, the Wireless Code should apply if the contract is entered into, amended, renewed, or extended on or after 2 December 2013. In addition, in order to ensure that all consumers are covered by the Wireless Code within a reasonable time frame, the Wireless Code should apply to all contracts, no matter when they were entered into, by no later than 3 June 2015.

In either scenario, the Code is prospective in application. It does not deem to impose its dictated outcomes prior to its coming into force date of December 2, 2013, or prior to the date on which the Code was issued (June 3, 2013).

Telecom Regulatory Policy CRTC 2013-271, Appeal Book, Tab 2, paras. 368-369

23. TRP CRTC 2013-271 therefore does not attract the strong presumption against retroactive application.

(ii) Impugned elements of TRP CRTC 2013-271 do not attract the limited presumption against retrospective interference with vested rights

24. The law recognizes a limited presumption against retrospective, as well as retroactive, impact of regulatory action. This presumption can be engaged by legal or regulatory action that imposes different *future* outcomes on past events. The principle of retrospectivity

attaches to regulatory action that 'operates forwards', while the principle of retroactivity applies to regulatory action that 'operates backwards'. The presumption against retrospectivity differs from the presumption against retroactivity in that it is far narrower in scope and weaker in application. As Professor Sullivan explains [underline added]:

> In practice, the presumption against the retrospective application of legislation is not often relied on to limit the application of legislation to future facts. That is because retrospectivity often entails interference with vested rights and is addressed by applying the presumption against such an interference. In addition, the presumption against retrospective application is subject to exceptions: it does not apply to purely procedural legislation or to legislation that protects the public.

While clear statutory language expressly sanctioning retrospective application is rare, the presumption against retrospective application operates infrequently. This is particularly so where there is no interference with vested rights.

R. Sullivan, "**Landlord and Tenent/Legislation**", Halsbury's Laws of Canada (Canada: LexisNexis Canada, 2012), section V.1(3)(a)

25. The presumption against retrospectivity is subject to a number of exceptions. These include an exception against retrospective impacts that are deemed benevolent or purely procedural. In addition, a number of contextual factors operate to limit the application of the presumption against retrospectivity. Where legal or regulatory action is benevolent in its objectives and does not interfere with any vested rights, the presumption against retrospective application is rarely applied. This is especially so where a regulator acts under a broad regulatory power to protect the public in a manner that imposes no penal sanction or stigma on a regulated entity and does not interfere with any vested rights. Below we explore these contextual factors in light of the impugned elements of TRP 2013-271.

Gustavson Drilling (1964) Ltd. v. Minister of National Revenue, [1977] 1 S.C.R. 271, pp. 279-283; ***Brosseau v. Alberta (Securities Commission)***, [1989] 1 S.C.R. 301, paras. 53-55; ***Re: Royal Canadian Mounted Police Public Complaints Commission***, [1991] 1 F.C. 529 (F.C.A.), paras. 32, 61, footnotes 3-4; ***Mandavia v. Central West Health Care Institutions Board***, 2005 NLCA 12, para. 104

Public Protection & Social Welfare.

26. Where the objective of a disputed regulatory action is to protect the public, the presumption against retrospectivity is applied tenuously. This can only apply if the objective of the regulatory action is not to stigmatize or directly penalize, but rather to protect the public. In *Brosseau v. Alberta (Securities Commission),* the Supreme Court of Canada held that

"enactments that may impose a penalty on a person related to a past event, so long as the goal of the penalty is not to punish the person in question, but to protect the public." Further, where legislative or regulatory action is intended to remedy some ongoing public harm, its impact if often deemed to "look forward" (prospectively):

> If one could see some reason for thinking that the intention of this enactment was merely to aggravate the punishment for felony by imposing this disqualification in addition, I should feel the force of Mr. Poland's argument, founded on the rule which has obtained in putting a construction upon statutes - that when they are penal in their nature they are not to be construed retrospectively, if the language is capable of having a prospective effect given to it and is not necessarily retrospective. But here the object of the enactment is not to punish offenders, but to protect the public against public-houses in which spirits are retailed being kept by persons of doubtful character. It may be that the felony may in some instances be such as not to affect the character in the ordinary sense of the term, as when by negligence so as to involve no criminality of purpose, a person may have caused the death of another and have been convicted of manslaughter and suffered only a trifling punishment. But the legislature has categorically drawn a hard and fast line, obviously with a view to protect the public, in order that places of public resort may be kept by persons of good character; and it matters not for this purpose whether a person was convicted before or after the Act passed, one is equally bad as the other and ought not to be intrusted with a licence. [emphasis added]

In such scenarios, the legislative or regulatory intent is directed at all indicia of the ongoing harm sought to be averted, even where this indirectly imposes additional negative consequences for past events, and hence is not retrospective.

Brosseau v. Alberta (Securities Commission), [1989] 1 S.C.R. 301, para. 49; ***R. v. Vine*** (1875), L.R. 10 Q.B. 195, (U.K. Div. Ct.), per Cockburn, C.J., pp. 199-200; ***McColl-Frontenac Inc. v. Alberta (Minister of Environment)***, 2003 ABQB 303, para. 111; ***Benner v. Canada (Secretary of State)***, [1997] 1 S.C.R. 358, paras. 44-46

27. When defining whether a particular regulatory action can be classified as 'public protection', caution is advised. A "public interest" exception of general application may well operate to make the presumption against retrospective operation fully redundant as "every statute, whatever its content, can be said to be in the public interest..." It is therefore important to identify a subset of legal and regulatory activities that "really protect[] all members of the public the way that securities legislation or health legislation prevent unscrupulous promoters or typhoid carriers from preying on all the public." Remedies such as limitation periods, for example, are typically seen as neutral as they benefit one litigant while harming another and do not protect the public 'at large'. Some regulatory activities, on the other hand, are inherently "public protection" schemes aimed at "ensuring the there is economic

growth and prosperity" or at "the integrity of human health and the well being of society."

> ***McColl-Frontenac Inc. v. Alberta (Minister of Environment)***, 2003 ABQB 303, paras. 102-110; ***D.D.S. v. R.H.***, 141 A.R. 44 (Alta. C.A.), para. 7; ***Re: Royal Canadian Mounted Police Public Complaints Commission***, [1991] 1 F.C. 529 (F.C.A.), paras. 34-35

28. The mere presence of this contextual factor is not, in and of itself, sufficient to wholly displace the presumption against retrospective impact. As noted above, where the regulatory action in question is penal in character or operates to stigmatize an individual, the contextual factor is attenuated. Where the action in question "is not based on any concept of fault" but rather is "social legislation designed to provide a remedy for people who find themselves in a situation of need", it is less likely to be characterized as penal or imposing stigma. Where, on the other hand, the operation of the regulatory act includes determinations of fault, it is more clearly stigmatizing or penalizing. In addition, the operation of this contextual factor is highly attenuated when it interferes with vested rights (see below). Such impact (stigma or interference with vested rights) can have the effect of grounding a prospective regulatory action in the past by tying its impact more directly to past conduct.

> ***Re: Royal Canadian Mounted Police Public Complaints Commission***, [1991] 1 F.C. 529 (F.C.A.), paras. 32 and 61; ***Re: Sanderson and Russell*** (1979), 24 O.R. (2d) 429 (Ont. C.A.), para. 28; ***Dikranian v. Quebec (Attorney General)***, 2005 SCC 73, para. 53; ***Brosseau v. Alberta (Securities Commission)***, [1989] 1 S.C.R. 301, para. 49

29. In the absence of stigmatizing or penal impact or interference with vested rights, however, courts have repeatedly found that legislation or regulatory conduct intended to protect the public is prospective and 'forward looking', even when not purely procedural: *Brosseau v. Alberta* (securities regulator's order to cease trading securities based on provisions passed after the disqualifying activity took place held not to attract the presumption against retrospective application because it is not penal in nature but aimed at protecting the public from being defrauded); *McColl-Frontenac v. Alberta* (the Environment Appeal Board's decision holding the appellant responsible for polluting a site even though the pollution occurred prior to the coming into force of the statute does not attract the presumption of retrospectivity because the statute aims to protect the public); *Delivery Drugs v. British Columbia* (termination of plaintiffs further to Termination Guidelines does not attract the presumption against retrospective application because Termination Guidelines designed to maintain the integrity of the PharmaCare program, not to penalize individual contractors); *West v. Gwynne* (statute invalidating "on grounds of public policy" any right to extract payment as a pre-requisite to consent for a sub-lease absent express provision in initial lease

agreement deemed not to attract the presumption against retrospectivity as it does not invalidate underlying contract but imposes requirements to all future attempts to sublet); *Hayward v. Hayward* (statute aimed at ensuring testamentary wishes are respected by revoking a testator's bequest of a divorcee characterized as not attracting the presumption against retrospectivity because it is beneficial and does not interfere with any vested rights); *1392290 Ontario v. Ajax* (new property scheme designed to correct feature of existing tax scheme which was outdated and unfair seen as addressing a public harm which prevents the presumption against retrospectivity from operating).

1392290 Ontario Ltd. v. Ajax (Town), 2010 ONCA 37, para. 43; ***Brosseau v. Alberta (Securities Commission)***, [1989] 1 S.C.R. 301, paras. 32-33, 55 ; ***Delivery Drugs (c.o.b. Gastown Pharmacy) v. British Columbia (Deputy Minister of Health)***, 2007 BCCA 550, paras. 79, 81-82; ***Hayward v. Hayward***, 2011 NSCA 118, per D.R. Beveridge and J.E. Fichaud, JJ.A., concurring respectively at paras. 121 and 153-156; ***McColl-Frontenac Inc. v. Alberta (Minister of Environment)***, 2003 ABQB 303, paras. 102-110; ***West v. Gwynne***, [1911] 2 Ch 1, per Cozens-Hardy, M.R. (U.K. Court of Appeal), p. 11

30. In Telecom Decision CRTC 2012-556, the Commission examined the ongoing sufficiency of its current regulatory framework in protecting the interests of customers of wireless services. The Commission concluded that protection of customer interests did not, at that time, require rate regulation, but identified "significant consumer concerns" and that a number of provinces had enacted wireless industry-specific consumer protection statutes. In light of this, the CRTC issued a consultation to "ensure that consumers have the information and protection they need to make informed choices in the competitive market." This consultation led to the adoption of the "Wireless Consumer Protection Code", which established a set of rights for consumers of wireless services. The obligations imposed in TRP CRTC 2013-271 are "carefully tailored to ensure that [they target] the real problems for consumers".

Telecom Decision CRTC 2012-557, CRTC Reference Nos.: 8661-C12-201204057; 8620-R28-201202598; 8661-P8-201116807, paras. 11, 24-25, 27

31. In issuing the Wireless Code, the Commission found that it will "make it easier for individual...customers to obtain and understand the information in their wireless service contracts; establish consumer-friendly business practices for the wireless service industry where necessary; and contribute to a more dynamic wireless market." Those elements aimed at ameliorating customer lock-in penalties and mechanisms specified by the Appellants as problematic are aimed at ensuring customers are able to "take advantage of competitive offers at least every two years" and to "enable consumers to take advantage of technological advances". They are also aimed at ensuring customers of wireless services can benefit from a

"more dynamic wireless marketplace."

Telecom Regulatory Policy CRTC 2013-271, Appeal Book, Tab 2, paras. 215-220, 399 and Appendix 1

32. The regulatory action at issue in this appeal is directly designed to protect customers of wireless services. The Wireless Code is, at its core, a regulatory act designed to protect consumers. Its objectives are to protect customers and to help secure a dynamic market for wireless services. Moreover, it does not involve any determinations of fault, or impose any penal sanctions or stigma. It is addressed at ameliorating features of the current wireless marketplace that hinder its dynamic nature and that harm customers of such services. The provision limiting lock-in penalties specified by the Appellants is forward looking. It "does not annul or make void any existing contract", but instead "provides that, in the future...there shall be no right to exact a fine" for early termination of a contract. As explained below, it also does not interfere with any vested rights.

Appellant's Factum, January 24, 2013, paras. 14-16; **Telecom Regulatory Policy CRTC 2013-271**, Appeal Book, Tab 2, paras. 215-220; ***West v. Gwynne***, [1911] 2 Ch 1, per Cozens-Hardy, M.R. (U.K. Court of Appeal), p. 11

Comprehensive Regulatory Scheme.

33. Another contextual factor applied by courts in deciding whether a given legal imperative attracts the presumption against retrospective impact is whether the action in question is taken in the context of a comprehensive regulatory scheme. This can change the nature of the legal interests affected from purely private, to components of an ongoing public regulatory scheme, particularly when combined with other contextual factors:

> ...the analysis must transcend private law principles and recognize the public aspects of these agreements, including the fact that they are an integral part of a regulatory scheme to provide health care, that they are funded from the public purse, and that there is a public interest in ensuring the integrity of the PharmaCare program.

Where a regulator is tasked with a "protective role", this imbues such an entity with a "special character" which "must be recognized when assessing the way in which [its] functions are carried out under [its] Acts." Where such a regulator adopts a "measure designed to protect the public" which is "in keeping with the general regulatory role", the presumption against retrospective effect is less likely to apply. Limits imposed on regulated activities are also more likely to be viewed as prospective, as opposed to retrospective,

because they are directed at remedying ongoing market wide conditions and parties are on notice that they are operating within an ongoing and comprehensive regulatory environment where conditions may change. This is particularly so where there is no interference with vested rights and where there is a need for market uniformity.

Brosseau v. Alberta (Securities Commission), [1989] 1 S.C.R. 301, paras. 32-33, 55; ***Delivery Drugs (c.o.b. Gastown Pharmacy) v. British Columbia (Deputy Minister of Health)***, 2007 BCCA 550, para. 79; ***Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)***, [1977] 1 S.C.R. 271, p. 281; ***1392290 Ontario Ltd. v. Ajax (Town)***, 2010 ONCA 37, para. 40; ***Dikranian v. Quebec (Attorney General)***, 2005 SCC 73, paras. 23, 52, 54

34. The rationale for treating comprehensive regulatory schemes as generally 'operating forward' is the reality that most comprehensive regulatory regimes need to be capable of being responsive to evolving environments if they are to be effective. Such regulatory entities need to be free to carry out their regulatory objectives "in keeping with the general regulatory role" assigned to them (*Brosseau*; *McColl*). Regulators charged with carrying out a comprehensive regulatory regime often act to remedy market conditions and, hence, tend to direct their regulatory activities at correcting an ongoing state of affairs. This frequently includes changing contractual terms of regulated entities. For example, a gas regulator seeking to impose uniform price conditions across Canada is directing its rate-setting power at the market in general, and need not wait until all existing industry contractual relations expire, otherwise its objective "would result in a delay of many years" (*Saskatchewan Power*; *Acme Dikranian*). Absent a vested right to assert, entities entering into contractual relations within the context of a comprehensive regulatory regime are effectively 'on notice' that their contractual terms and conditions are "always subject to change" (*Acme*; *Ajax*; *Apotex*).

Brosseau v. Alberta (Securities Commission), [1989] 1 S.C.R. 301, paras. 32-33, 55; ***McColl-Frontenac Inc. v. Alberta (Minister of Environment)***, 2003 ABQB 303, paras. 102-110; ***Saskatchewan Power Corp. v. TransCanada Pipelines Ltd.***, [1989] 73 Sask.R. 247 (Sask. C.A.); ***Acme (Village) School District No. 2296 v. Steele Smith***, [1933] S.C.R. 47, per Crocket, J., p. 59 and per Cannon, J., p. 61; ***Dikranian v. Quebec (Attorney General)***, 2005 SCC 73, para. 52; ***1392290 Ontario Ltd. v. Ajax (Town)***, 2010 ONCA 37, paras. 40, 42-43; ***Apotex Inc. v. Merck & Co.***, 2011 FCA 329, para. 57

35. The CRTC put in place TRP 2013-271 as part of a comprehensive regulatory regime in a manner aimed at protecting consumers and it is directed at market conditions. In doing so, the CRTC relied on section 24 of the *Telecommunications Act*, which establishes that all wireless service contracts are "subject to any conditions imposed by the Commission". In deciding whether to impose such terms and conditions, the CRTC is obligated to carry out the policy objectives encoded in section 7 of the Act. In the past, the Commission has

imposed several conditions into telecommunications service providers' terms of service. These include: imposing contractual terms of service designed to protect customer privacy, imposing conditions of service aimed at securing accessibility to those with disabilities, include obligations in all contracts to support telephone number porting; insert consumer safeguards for 900 telephone services into terms of service; imposing the obligation to become a member of the Commissioner for Complaints in Telecommunications Services including the obligation to abide by the CCTS' dispute resolution and remedy mechanisms; conditions to protect customers with respect to service disconnection and limits on deposits. Where appropriate, the CRTC has imposed these conditions to all existing customers and service contracts so that existing customers need not wait until their next contract before benefiting from the protections in question.

Telecom Regulatory Policy CRTC 2009-657, paras. 100-105; **Telecom Decision CRTC 2003-33,** para. 3; **Broadcasting and Telecom Regulatory Policy CRTC 2009-430**, paras. 23, 45, 70; **Telecom Decision CRTC 2005-72**, para. 38; **Telecom Decision 2006-58**, paras. 39, 94; **Telecom Regulatory Policy 2011-46**, paras. 13-14 and 44; **Telecom Regulatory Policy CRTC 2009-424**, para. 43

36. The CRTC "has broad regulatory jurisdiction over the Terms of Service provide by telecommunications carriers." While the CRTC has forborne from proactive rate regulation in the context of wireless services. In doing so, it explicitly retained its power under section 24 and notified wireless service providers that it would "maintain its ability to require conditions governing customer confidential information, and in order to place other general conditions on the provision of cellular service and PCTS should it prove appropriate to do so":

> In addition, the Commission considers that all terms and conditions currently applicable to cellular service providers governing the protection of the confidentiality of customer information, whether set out in tariffs, service contracts or otherwise in Commission rulings, should remain in effect. On a going-forward basis, all such provisions are to be included in customer service contracts. In addition, these provisions will continue to apply to existing customers, whether or not they were included in the service contracts signed by those customers. Finally, the Commission considers that the same terms and conditions governing the protection of the confidentiality of customer information should apply to providers of PCTS. Accordingly, as with cellular service, PCTS providers are to include those terms and conditions in any customer service contracts.
>
> In order to maintain its ability to require conditions governing customer confidential information, and in order to place other general conditions on the provision of cellular service and PCTS should it prove appropriate to do so, the Commission will continue to exercise powers and perform duties under section 24.

It has, in the past, often exercised this power in order to "achieve the policy objectives in section 7 of the Act." It has applied this power repeatedly over the years, as a central tool of its comprehensive regulatory regime and the conditions of this comprehensive regulatory regime are subject to change from time to time. In this context, CRTC regulatory action such as the imposition of the Wireless Code is prospective, in that it applies itself to all market conditions on a forward looking basis.

Telecom Decision CRTC 94-15; **Telecom Regulatory Policy CRTC 2009-424**, para. 43; ***Penny v. Bell Canada***, 2010 ONSC 2801, para. 126; ***Gustavson Drilling (1964) Ltd. v. Minister of National Revenue***, [1977] 1 S.C.R. 271, p. 283; ***1392290 Ontario Ltd. v. Ajax (Town)***, 2010 ONCA 37, paras. 40; ***Apotex Inc. v. Merck & Co.***, 2011 FCA 329, para. 57;

37. In deciding when the Wireles Code should "begin to dictate outcomes with respect to pre-existing contracts", the Commission was acting "in keeping with [its] general regulatory role". It explicitly decided not to apply the Code to pre-existing contracts immediately, as this would impact disproportionately on service providers given "the costs and resources necessary to immediately implement the Code". On the other hand, the Commission noted that delayed application to all customers would prevent significant numbers of customers from benefiting from its protections and, moreover, that the lack of uniform market requirements "could be considered undue discrimination" as some providers are forced to adhere to the Code while others remain immune from its obligations with respect to substantial numbers of their customer base. In light of this balance, the Commission found as a question of fact that a two year implementation time is appropriate.

Telecom Regulatory Policy CRTC 2013-271, Appeal Book, Tab 2, paras. 361-369; ***Brosseau v. Alberta (Securities Commission)***, [1989] 1 S.C.R. 301, para. 55

38. The two year limit set by the Commission is well-supported by the record of the proceeding. This is especially so with regards to those provisions affecting the switching penalty specified by the Appellants as problematic. Indeed, the Respondent argued throughout the hearing that locking customers out of the telecommunications marketplace for 3 years by the imposition of a contract termination penalty should not be permitted given the consumer and market harms that result. The Respondent specifically argued that 3 years is far too long for service providers to lock-in customers, and that a two year time block is more appropriate:

> These comparative figures strongly suggest that Canadian WSPs have succeeded in establishing an environment where customers effectively pay 3 years for what customers in other comparable jurisdictions can have in 2 years.

> Finally, it is important to note the impact that a three year lock-in period has in the context [of the] unique Canadian competitive mobile landscape. The true competitive nature of this landscape is currently heavily reliant on a small number of new entrants who have succeeded in gaining a foothold after the 2008 AWS spectrum [auction]. These new entrants launched their services in late 2009/early 2010, meaning 3 years have barely passed since their entrance into the market. The AWS spectrum that these new entrants are building their networks upon includes a non-reversionary set-aside provision to ensure this spectrum will not revert to an incumbent for 5 years. The 5 year set-aside was deemed sufficient time to allow new entrants to gain a foothold before facing buy-out pressures from incumbents.
>
> Three years is a long period of time to lock customers out of *any* mobile broadband market, given the highly innovative and constantly evolving nature of the services in question. Particularly in the Canadian context, however, 5 years (minus one year to set up services) may well come and go before some customers ever surface from their fixed contractual periods (particularly keeping in mind that these three year periods are often renewed in mid-term). In this sense, any steps that will ease customer's ability to re-enter the market on a shorter time-frame are likely to increase competition and benefit customers on a macro level. More robust competition might lead to lower ARPU and higher churn, but is also likely to lead to lower prices.

The Respondent similarly argued on the record of the proceeding that the use of three year lock-in periods can have unduly discriminatory effects, particularly with respect to the ability of new market entrants to compete. This particular feature emphasized a need for uniformity in application,

> ***Appellant's Factum***, January 24, 2013, paras. 14-16; CIPPIC/OpenMedia.ca, **Final Comments**, March 1, 2013, Appeal Book, Tab 36, paras. 21-23, 28;

39. In its determination of the matter, the Commission found that it:

> ...considers that the [Code] should minimize consumers' barriers to switching WSPs and to keeping pace with technological progress. The Code should enable consumers to take advantage of competitive offers more frequently. [..]
>
> The Commission notes that early cancellation fees are a mechanism by which WSPs enforce wireless contracts and considers it appropriate for WSPs to have the ability to charge limited early cancellation fees in certain circumstances. However, the Commission considers that early cancellation fees must be significantly limited to empower consumers to take advantage of competitive offers and technological advances at least every two years. The record of the proceeding is clear that market forces alone have not appropriately restricted early cancellation fees in a way that responds to consumer concerns.

In doing so, it was acting to remedy existing market conditions that were impacting detrimentally on consumers as part of its comprehensive regulatory obligations in a context where providers were well aware that the conditions of service were subject to change. As such, its application of the Code to pre-existing contracts is 'prospective' and does not attract the presumption against retrospective impact.

Telecom Regulatory Policy CRTC 2013-271, Appeal Book, Tab 2, paras. 215-221

Non-Interference with Vested Rights.

40. Absent an interference with a vested right, the infrequent application of the principle has led some courts to conclude that "[t]here is no presumption against retrospective application" at all. Other courts have simply not applied, particularly where a state entity acts within a comprehensive regulatory regime to protect the public. This is especially so where no vested right is interfered with. Even with respect to vested rights, the presumption is adopted 'fluidly' [emphasis added]:

> The presumption against interference with vested rights is rooted in the same considerations as the presumption against retroactivity. <u>However, while the presumption against retroactivity is heavily weighted and difficult to rebut, the presumption against interfering with vested rights is more fluid. As the courts frequently point out, many legislative initiatives interfere to some extent with existing rights and are obviously meant to do so; such interference is a normal by-product of change</u>. To determine whether the presumption is rebutted, the courts balance several factors: the degree of unfairness the interference would create, the importance of the policies implemented by the new legislation, and the impact that limiting or delaying its application would have, as well as any textual or other evidence of the legislature's intent.

As such, it is critical to assess whether TRP CRTC 2013-271 interferes with any vested rights.

E.A. Driedger, "**Statutes: Retroactive Retrospective Reflections**" (1978), 56 *Canadian Bar Review* 264; R. Sullivan, "**Statutory Interpretation**", 2nd Ed., (Toronto: Irwin Law, 2007), p. 269; ***Mandavia v. Central West Health Care Institutions Board***, 2005 NLCA 12, para. 104

41. Courts have recently articulated the conditions under which a right can be considered to have 'vested'. Not all rights are 'vested'. In order to assert a vested right, "an individual's legal situation must be tangible and concrete and this legal situation must have been sufficiently constituted at the commencement of the new statute." The Supreme Court of Canada explained the matter as such:

> A court cannot therefore find that a vested right exists if the juridical situation

> under consideration is not tangible, concrete and distinctive. The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists...In other words, the right must be vested in a specific individual...But there is more. The situation must also have materialized. When does a right become sufficiently concrete? This will vary depending on the juridical situation in question.

In essence, before a regulatory action can be said to have interfered with a vested right, that right must have crystallized prior to the issuance of the regulatory action in question.

1392290 Ontario Ltd. v. Ajax (Town), 2010 ONCA 37, para. 38; ***Dikranian v. Quebec (Attorney General)***, 2005 SCC 73, paras. 37, 39-40; ***Hayward v. Hayward***, 2011 NSCA 118, per Oland, J.A., concurring, paras. 48-50

42. Courts have consistently held that a conditional right in an agreement does not 'crystallize' until it is 'triggered'. Warranty clauses, for example, do not 'crystallize' until they are invoked to remedy a problem, as Justice L'Hereux-Dubé explained in *Dell v. Union des consommateurs* with respect to a warranty against latent defects*:*

> This obligation comes into existence upon the conclusion of the sale, but the warranty clause does not produce tangible effects unless a problem arises with the property sold. The warranty comes into play either when the vendor is put in default or when a claim is made. Once all the effects of the warranty have occurred, the situation is no longer ongoing and the new legislation will not apply to the situation unless it is retroactive.

Similarly, in *Collett*, at issue was the application of the Ontario Consumer Protection Act, which came into force in 2005, to a rental contract for a water heater that was initiated in 2004. The CPA imposed an implied term of warranty into contractual agreements applied to goods and specifies that waivers of such implied terms are void. The Ontario Court of Appeal held that because the trigger for the warranty – the failure of the water tank – occurred after 2005, the CPA applied. The contractual provision in question only crystallized upon being triggered by the failure of the water heater. The right inherent in the implied warranty and the corresponding obligation to respect it could only be exercised once the damage has occurred. There was no interference with any vested rights arising from the contract, even though the agreement was concluded in 2004.

Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34, paras. 114-116; ***Griffin v. Dell Canada Inc.***, 2010 ONCA 29, paras. 35-43

43. In *Griffin v. Dell*, the plaintiff was permitted to rely on an amendment to the Ontario

Consumer Protection Act rendering mandatory arbitration clauses unenforceable in a class action over computer defects. While the mandatory arbitration clause asserted by the defendant was imposed onto the plaintiffs in computer sales contracts that were entered into before the coming into force of the CPA amendments, no right to mandatory arbitration had vested. The subject matter of the class action was computer failures that occurred after thee coming into force of the prohibitions in the CPA. The contractual right to mandatory arbitration is conditional, and only crystallizes or is triggered at the time at which it is invoked by an actual event – the failure of the computer.

Collett (appeal by Szilvasy) v. Reliance Home Comfort Limited Partnership, 2012 ONCA 119, leave to appeal denied, [2013] S.C.C.A. No. 37, paras. 35-37

44. In *Upper Canada College*, the Supreme Court of Canada held that a legislative provision prohibiting the collection of commission on the sale of real property if the right to payment or commission is not set out in writing. A sale had occurred before the legislative provision came into force and the question was whether the plaintiff was barred from collecting commission for the sale he had completed for failure to specify in writing the right of remuneration. The court properly held that the legislative provision did not apply to sales that had occurred prior to its coming into force, as the rights and obligations attached to those sales had already crystallized and there was no ongoing element which might attract retrospective. The rights to compensation had already been exercised prior to the legislative change and, hence, had vested. The law could not be applied retroactively to this sale.

Upper Canada College v. Smith (1920), 61 S.C.R. 413

45. Similarly, in *Dikranian*, the Supreme Court of Canada held that the interest rates in loan agreements entered into by students could not be retrospectively altered by legislation. Justice Bastarache held that the obligation to repay the loan at a certain interest rate over a certain period crystallized at the time the loan was paid out to the student. Interference with the interest rates set out in such a loan agreement would attract the presumption against retrospective interference with vested rights, as the effects at the core of the agreement – the issuing of the loan – had already occurred. By contrast, if a loan offer was issued prior to the legislative changes coming into force but the loan itself was only issued after, there would be no retrospective interference with any vested rights. It is only once the loan is issued that the right of compensation has been exercised and, hence, has vested.

Dikranian v. Quebec (Attorney General), 2005 SCC 73, paras. 47 and 51

46. In *Gwynn*, lease clauses conditioning assignment of the lease on the leasor's consent were at issue. The court held that, until an assignment occurs, the right of refusal is merely a 'power' and not a vested right. Legislation prohibiting the imposition of fees for such assignments on the basis of this 'power' did not interfere with any vested rights and could be applied to lease agreements entered into prior to the coming into force of the legislation. Neither the right to compensation, nor the right to assignment had been exercised prior to the legislative change and no vested right could be asserted.

West v. Gwynne, [1911] 2 Ch 1, (U.K. Court of Appeal)

47. In *Acme*, the Supreme Court of Canada held that legislation imposing the right to terminate employment upon 30 days notice into employment agreements operates prospectively, even when applied to "existing as well as to future agreements." This is because the 'trigger' for such clauses – termination – is a future event. Once again, neither the right to terminate, nor the obligation to respect such termination had been exercised prior to the legislative amendment. Similarly, in *Noble*, the Alberta Court of Appeal held in the context of an employment contract that the obligation to provide reasonable notice prior to termination crystallizes at time of breach. The right (and corresponding obligation to honour it) to such notice can only be exercised when termination occurs without notice.

Acme (Village) School District No. 2296 v. Steele Smith, [1933] S.C.R. 47, per Crocket, J., p. 58; ***Noble v. Principal Consultants Ltd. (Trustee of)***, 2000 ABCA 133, paras. 11, 26-27

48. In *Hayward*, a similar conclusion was reached in the context of a will. Amendments to the Wills Act that came into force in 2008 invalidated any grants to a testator's spouse in a will absent a clear indication from the testator that the ex-spouse remains an intended beneficiary after the divorce. In *Hayward*, the testator passed away after 2008, but the will was concluded in 1995 and continued to mention the divorcee. The court held that the divorcee could not claim a vested right because the right in question did not 'crystallize' at the time of its signing, but only upon being 'triggered' by the death of the testator. The obligation of the estate to respect the will as well as the right of the divorcee to inherit could not be exercised until the death of the testator and therefore had not vested at the time the amendments came into force.

Hayward v. Hayward, 2011 NSCA 118, paras. 26, 48-49; per Oland, Beveridge and Fichaud, JJ.A., concurring respectively at paras. 48-49, 121-122 and 153-156

49. A right cannot be considered as vested before it has crystallized. Such crystallization can only occur once the underlying factors that give rise to the particular obligations at issue

have occurred. The Appellants point primarily to the imposition of limits on early termination penalties imposed by TRP CRTC 2013-271 to existing service contracts. However, the contractual rights and obligations associated with the early termination of a service agreement cannot be 'exercised' until termination actually occurs. Indeed, it is uncertain how many customers will ever exercise the right to be free from termination penalties after 24 months of service offered by the Code, as many pre-existing customers may simply continue their existing arrangements for three years or more. The rights in question are conditional on future facts and events, triggered only by the act of termination.

Appellant's Factum, January 24, 2013, paras. 14-16

50. Such termination agreements are distinct from loan compensation agreements, as no loan occurs. The record of the proceeding is consistent in establishing that the early termination fees are not reflective of a 'loan' provided to customers covering the cost of a device, but rather as a means of imposing high switching costs onto customers. Findings of fact central to TRP CRTC 2013-271 confirm this:

> The Commission considers that the fundamental barrier to consumers taking advantage of competitive offers every two years is not the availability of three-year contracts in the marketplace, but rather the high early cancellation fees that many consumers must pay if they wish to upgrade devices or change WSPs.
>
> The Commission notes that early cancellation fees are a mechanism by which WSPs enforce wireless contracts and considers it appropriate for WSPs to have the ability to charge limited early cancellation fees in certain circumstances. However, the Commission considers that early cancellation fees must be significantly limited to empower consumers to take advantage of competitive offers and technological advances at least every two years. The record of the proceeding is clear that market forces alone have not appropriately restricted early cancellation fees in a way that responds to consumer concerns.

Telecom Regulatory Policy CRTC 2013-271, Appeal Book, Tab 2, paras. 217-218

The record of the proceeding similarly made clear that there is no 'loan' for a device involved. As one party noted when explaining the relationship between early termination penalties and device cost recovery, the term 'device subsidy' is "jargon" but should not be considered "some kind of instalment loan". The lack of correlation between compensation for a device and termination penalties imposed by providers onto customers was one of the underlying purposes for the adoption of a clear formula for Early Termination Fees in the Wireless Code. Indeed, the record suggested that most devices are effectively 'compensated'

for within two years of a service agreement. The characterization of these termination penalties as a sale recovery mechanism was rejected. Such penalties are, instead, "a mechanism...to enforce contracts". As with any other termination penalty, the rights and obligations associated with such penalties are 'triggered' by the act of early termination, not the formation of the contract, and cannot be exercised prior to early termination. The right to impose a penalty for early termination is conditional on early termination occurring and will never manifest if no early termination occurs. As such, no right has crystallized or vested before early termination occurs.

Transcript of Proceeding, Vol. 4, February 14, 2013, Appeal Book, Tab 39, lines 7052-7053;
Telecom Regulatory Policy CRTC 2013-271, Appeal Book, Tab 2, paras 217-218;
CIPPIC/OpenMedia.ca, **Final Comments**, March 1, 2013, Appeal Book, Tab 36, paras. 18-19

51. Subsequently, the application of the Wireless Code to all pre-existing contracts as of June 3, 2015 does not attract the presumption against retroactive application, nor does it attract the presumption against retrospective interference with vested rights. TRP CRTC 2013-271 represents a set of important consumer protections imposed prospectively within the context of a comprehensive regulatory regime, in a scenario where uniformity of application is directly relevant to the market conditions being addressed.

(iii) The Telecommunications Act grants the power to retrospectively impose conditions of service under section 24

52. Ultimately, whether a legal action can retrospectively interfere with vested rights or not will often amount to an exercise in statutory interpretation. In enacting TRP CRTC 2013-271, the statutory authority relied upon by the CRTC can be found in section 24 of the *Telecommunications Act*, which states:

> **24.** The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.

Were TRP CRTC 2013-271 to attract a presumption against retrospective interference, the broad nature of this regulatory power, which permits the CRTC to impose "any condition" on the provision of any telecommunications service, encompasses the power to interfere retrospectively with vested rights. Under section 47 of the Act, the CRTC is obligated to use its regulatory powers so as to achieve the broad policy objects found in section 7 of the Act. Further, section 32 of the Act grants the CRTC broad remedial powers, including the right to "determine any matter and make any order relating to the...telecommunications services of Canadian carriers."

McColl-Frontenac Inc. v. Alberta (Minister of Environment), 2003 ABQB 303, para. 111; ***Telecommunications Act***, S.C. 1993, c. 38, ss. 7, 24, 32, 47; ***Bell Canada v. Bell Aliant***,

53. While historically, rebuttal of the presumption against retrospective interference with vested rights required an express grant of power, the modern principle of statutory interpretation requires that "the 'entire context' of a provision must be considered to determine if the provision is reasonably capable of multiple interpretations." In addition, where, taking into account the objectives of the statutory framework in place, the power to act retrospectively is evident by necessary implication, any effect of the presumptions against retrospectivity will be rebutted.

Dikranian v. Quebec (Attorney General), 2005 SCC 73, paras. 19, 36-37; ***Upper Canada College v. Smith*** (1920), 61 S.C.R. 413, p. 419

54. Where a statute puts in place a comprehensive regulatory regime, courts will tend to recognize the capacity of a regulatory to retrospectively interfere with vested rights. This is because the ability to regulate a market uniformly can be an important and necessary component of some regulatory actions (*Saskatchewan Power*; *Dikranian*). It is also out of recognition that in industries where service contracts are a common feature, a presumption against interference with vested contractual rights can be a significant barrier to effective regulation (*Saskatchewan Power*; *Acme*). Particularly where the legislation at issue is "social legislation" which is designed to "provide a remedy for people who find themselves in a situation of need" is at issue, as opposed to impacts intended to stigmatize or penalize based on an assessment of fault for past events, courts are more likely to find that the legislation is intended to be capable of retrospective impacts. (*Sanderson and Russell*; *McColl-Frontenac*; *Normand Latif; Brosseau*).

Acme (Village) School District No. 2296 v. Steele Smith, [1933] S.C.R. 47; ***Brosseau v. Alberta (Securities Commission)***, [1989] 1 S.C.R. 301, paras. 33 and 55; ***Dikranian v. Quebec (Attorney General)***, 2005 SCC 73, paras. 52; ***McColl-Frontenac Inc. v. Alberta (Minister of Environment)***, 2003 ABQB 303, paras. 110-112; ***Saskatchewan Power Corp. v. TransCanada Pipelines Ltd.***, [1989] 73 Sask.R. 247 (Sask C.A.); ***Normand Latif v. Canadian Human Rights Commission and R.G.L. Fairweather***, [1980] 1 F.C. 687 (F.C.A.), ***p***aras. 29-31

55. The power to impose "any conditions" on carriers of telecommunications services is broad and an increasingly necessary tool in the CRTC's regulatory framework. Given the breadth of conditions that can be imposed by the Commission under this power and the prevalence of long-term contractual relations in the industries under its purview, its ability to carry out its broad objectives as imposed by the *Telecommunications Act* would be greatly impacted if it could not, on some occasions, act retrospectively. An inability to do so would in certain

instances lead to problematic uneven market conditions and may even compound market problems by providing some market players advantages over others. As such, section 24 grants the CRTC the power to act retrospectively by necessary implication. It would simply not be able to effectively carry out its legislative mandate without the capacity to act retrospectively.

Bell Canada v. Bell Aliant Regional Communications, 2009 SCC 40

56. Moreover, TRP CRTC 2013-271 was explicit and unambiguous with respect to its retrospective application. It clearly states that its protections will apply to all pre-existing contracts as of June 3, 2015:

> 361. The Commission considers that there are two distinct implementation issues to address: (i) when the Wireless Code will come into force; and (ii) when the Code's requirements begin to dictate outcomes with respect to pre-existing contracts. […]
>
> 368. In light of the above, the Commission determines that all aspects of the Wireless Code will take effect on **2 December 2013**.
>
> 369. The Commission finds that where an obligation relates to a specific contractual relationship between a WSP and a customer, the Wireless Code should apply if the contract is entered into, amended, renewed, or extended on or after **2 December 2013**. In addition, in order to ensure that all consumers are covered by the Wireless Code within a reasonable time frame, the Wireless Code should apply to all contracts, no matter when they were entered into, by no later than **3 June 2015**.

The word "should" is consistently used as an imperative in the implementing sections of TRP 2013-271 (para. 369) as well as throughout the rest of the Policy. It is unambiguous. The CRTC's decision to apply the Code retrospectively involved a careful balance between "the interests of consumers" and "what is reasonable and technically feasible for WSPs to achieve." The Commission further noted that lack of uniformity in application could result on "undue discrimination" in the market. As such, it was both reasonable and correct at law, and should not be disturbed.

Telecom Regulatory Policy CRTC 2013-271, Appeal Book, Tab 2, paras 360-367

C. NO COSTS SHOULD BE AWARDED AGAINST THE RESPONDENT

57. The Respondent seeks costs immunity from the general rule that costs be awarded to the successful party. The Respondent notes that its intervention in this matter was purely in the public interest and that the issues at stake in this matter are of broad public interest in that they will affect the ability of many Canadians to benefit from the important protections

offered in the Wireless Code, as well as the general competitive landscape of wireless service provision in Canada. The Respondent, (alongside its co-Respondents) was named a party to this matter by virtue of its status as a public interest intervener in the proceeding that established TRP CRTC 2013-271. It notes that it is only in rare instances that a court will award costs against a public interest intervener even where unsuccessful. Finally, the Respondent notes that the *Telecommunications Act* recognizes the fragile nature of public interest participation in an area where context-specific expertise is important and difficult to acquire and where the interests of the public need to be robustly represented.

Conseil scolaire francophone de la Colombie-Britannique v. British Columbia, 2013 SCC 42, para. 64; **Telecom Order CRTC 2013-523**, *Determination of costs award with respect to the participation of the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic in the proceeding leading to Telecom Regulatory Policy 2013-271*, September 27, 2013; ***Bell Canada v. Consumers' Association of Canada***, [1986] 1 S.C.R. 190, paras. 19 and 30

PART IV – ORDER SOUGHT

58. The Respondent asks that the Appeal be dismissed.

59. The Respondent further asks that no costs be awarded against it in this matter. While classified a Respondent in this matter the strictly technical sense, the Respondent was a public interest intervener at first instance and it is by virtue of its status as a public interest intervener that it was made a Respondent to this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of February, 2014

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PART V – TABLE OF AUTHORITIES

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2. **Telecom Decision CRTC 2003-33**
3. **Telecom Decision CRTC 2005-72**
4. **Telecom Decision 2006-58**
5. **Telecom Regulatory Policy CRTC 2009-424**
6. **Broadcasting and Telecom Regulatory Policy CRTC 2009-430**
7. **Telecom Regulatory Policy CRTC 2009-657**
8. **Telecom Regulatory Policy 2011-46**
9. **Telecom Decision CRTC 2012-557**
10. **Telecom Order CRTC 2013-523**

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11. ***1392290 Ontario Ltd. v. Ajax (Town)***, 2010 ONCA 37
12. ***Acme (Village) School District No. 2296 v. Steele Smith***, [1933] S.C.R. 47
13. ***Apotex Inc. v. Merck & Co.***, 2011 FCA 329
14. ***Association internationale des commis du détail, Local 486 v. Québec (Commission des Relations de Travail)***, [1971] S.C.R. 1043
15. ***Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission)***, 2014 ABCA 28
16. ***Bell Canada v. Bell Aliant Regional Communications***, 2009 SCC 40
17. ***Bell Canada v. Canadian Telephone Employee's Assn***, 2003 SCC 36
18. ***Bell Canada v. Consumers' Association of Canada***, [1986] 1 S.C.R. 190
19. ***Boardwalk Equities Inc. v. Capital Health Authority***, 2005 ABQB 34
20. ***Brosseau v. Alberta (Securities Commission)***, [1989] 1 S.C.R. 301
21. ***Collett (appeal by Szilvasy) v. Reliance Home Comfort Limited Partnership***, 2012 ONCA 119, leave to appeal denied, [2013] S.C.C.A. No. 37
22. ***Conseil scolaire francophone de la Colombie-Britannique v. British Columbia***, 2013 SCC 42
23. ***D.D.S. v. R.H.***, 141 A.R. 44 (Alta. C.A.)
24. ***Delivery Drugs (c.o.b. Gastown Pharmacy) v. British Columbia (Deputy Minister of Health)***, 2007 BCCA 550

25. ***Dell Computer Corp. v. Union des consommateurs***, 2007 SCC 34

26. ***Dikranian v. Quebec (Attorney General)***, 2005 SCC 73

27. ***Doré v. Barreau du Québec***, 2012 SCC 12

28. ***Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin***, 2004 SCC 59

29. ***Griffin v. Dell Canada Inc.***, 2010 ONCA 29

30. ***Gustavson Drilling (1964) Ltd. v. Minister of National Revenue***, [1977] 1 S.C.R. 271

31. ***Hayward v. Hayward***, 2011 NSCA 118

32. ***Mandavia v. Central West Health Care Institutions Board***, 2005 NLCA 12

33. ***McColl-Frontenac Inc. v. Alberta (Minister of Environment)***, 2003 ABQB 303

34. ***Noble v. Principal Consultants Ltd. (Trustee of)***, 2000 ABCA 133

35. ***Normand Latif v. Canadian Human Rights Commission and R.G.L. Fairweather***, [1980] 1 F.C. 687 (F.C.A.)

36. ***Northwestern Utilities Ltd. v. Edmonton (City)***, [1979] 1 S.C.R. 684

37. ***Parklane Private Hospital Ltd. v. British Columbia (Attorney-General)***, [1975] 2 S.C.R. 47

38. ***Penny v. Bell Canada***, 2010 ONSC 2801

39. ***Re: Royal Canadian Mounted Police Public Complaints Commission***, [1991] 1 F.C. 529 (F.C.A.)

40. ***Re: Sanderson and Russell*** (1979), 24 O.R. (2d) 429 (Ont. C.A.)

41. ***R. v. Vine*** (1875), L.R. 10 Q.B. 195, (U.K. Div. Ct.)

42. ***Saskatchewan Power Corp. v. TransCanada Pipelines Ltd.***, [1989] 73 S.R. 247 (Sask. C.A.)

43. ***Upper Canada College v. Smith*** (1920), 61 S.C.R. 413

44. ***West v. Gwynne***, [1911] 2 Ch 1, (U.K. Court of Appeal)

45. ***Wheatland County v. Shaw Cablesystems Ltd.***, 2009 FCA 291

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47. R. Sullivan, "**Landlord and Tenent/Legislation**", Halsbury's Laws of Canada (Canada: LexisNexis Canada, 2012), section V.1(3)(a)

48. R. Sullivan, "**Statutory Interpretation**", 2nd Ed., (Toronto: Irwin Law, 2007)

APPENDIX A: STATUTES AND REGULATIONS

Telecommunications Act, S.C. 1993, c. 38

CANADIAN TELECOMMUNICATIONS POLICY	POLITIQUE CANADIENNE DE TÉLÉCOMMUNICATION
Objectives	*Politique*
7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives	7. La présente loi affirme le caractère essential des télécommunications pour l'identité et la souveraineté canadiennes; la politique canadienne de télécommunication vise à :
(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;	(a) favoriser le développement ordonné des télécommunications partout au Canada en un système qui contribue à sauvegarder, enrichir et renforcer la structure sociale et économique du Canada et de ses régions;
(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;	(b) permettre l'accès aux Canadiens dans toutes les régions — rurales ou urbaines —du Canada à des services de telecommunication sûrs, abordables et de qualité;
(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;	(c) accroître l'efficacité et la compétitivité, sur les plans national et international, des telecommunications canadiennes;
(d) to promote the ownership and control of Canadian carriers by Canadians;	(d) promouvoir l'accession à la propriété des entreprises canadiennes, et à leur contrôle, par des Canadiens;
(e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;	(e) promouvoir l'utilisation d'installations de transmission canadiennes pour les telecommunications à l'intérieur du Canada et à destination ou en provenance de l'étranger;
(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;	(f) favoriser le libre jeu du marché en ce qui concerne la fourniture de services de telecommunication et assurer l'efficacité de la réglementation, dans le cas où celle-ci est nécessaire;
(g) to stimulate research and development in Canada in the field of telecommunications and to encourage	(g) stimuler la recherche et le

innovation in the provision of telecommunications services; (h) to respond to the economic and social requirements of users of telecommunications services; and (i) to contribute to the protection of the privacy of persons.	développement au Canada dans le domaine des telecommunications ainsi que l'innovation en ce qui touche la fourniture de services dans ce domaine; (h) satisfaire les exigences économiques et sociales des usagers des services de télécommunication; (i) contribuer à la protection de la vie privée des personnes.
Conditions of service 24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.	*Conditions de commercialisation* 24. L'offre et la fourniture des services de télécommunication par l'entreprise canadienne sont assujetties aux conditions fixées par le Conseil ou contenues dans une tarification approuvée par celui-ci.
General powers 32. The Commission may, for the purposes of this Part, (a) approve the establishment of classes of telecommunications services and permit different rates to be charged for different classes of service; (b) determine standards in respect of the technical aspects of telecommunications applicable to telecommunications facilities operated by or connected to those of a Canadian carrier; (c) amend any tariff filed under section 25 or any agreement or arrangement submitted for approval under section 29; (d) suspend or disallow any portion of a tariff, agreement or arrangement that is in its opinion inconsistent with this Part; (e) substitute or require the Canadian carrier to substitute other provisions for those disallowed;	*Pouvoirs* 32. Le Conseil peut, pour l'application de la présente partie : (a) approuver l'établissement de categories de services de télécommunication et permettre que soient imposés ou perçus des tariffs différents pour chacune d'elles; (b) définir des normes concernant l'aspect technique des télécommunications applicable aux installations de telecommunication fournies ou liées à une entreprise canadienne; (c) modifier toute tarification déposée aux termes de l'article 25 ou tout accord ou entente visés à l'article 29; (d) suspendre ou refuser l'application de tout ou partie d'une tarification, d'un accord ou d'une entente qu'il juge incompatible avec la présente partie; (e) obliger l'entreprise en cause à remplacer les dispositions rejetées, ou y

(f) require the Canadian carrier to file another tariff, agreement or arrangement, or another portion of it, in substitution for a suspended or disallowed tariff, agreement, arrangement or portion; and (g) in the absence of any applicable provision in this Part, determine any matter and make any order relating to the rates, tariffs or telecommunications services of Canadian carriers.	procéder luimême; (f) obliger l'entreprise en cause à déposer, en tout ou en partie, une tarification ou un accord ou une entente en remplacement de dispositions rejetées ou dont l'application est suspendue; (g) en l'absence de disposition applicable dans la présente partie, trancher toute question touchant les tarifs et tarifications des enterprises canadiennes ou les services de telecommunication qu'elles fournissent.
Commission subject to orders and standards 47. The Commission shall exercise its powers and perform its duties under this Act and any special Act (a) with a view to implementing the Canadian telecommunications policy objectives and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with section 27; and (b) in accordance with any orders made by the Governor in Council under section 8 or any standards prescribed by the Minister under section 15.	*Conseil soumis aux normes et décrets* 47. Le Conseil doit, en se conformant aux décrets que lui adresse le gouverneur en conseil au titre de l'article 8 ou aux normes prescrites par arrêté du ministre au titre de l'article 15, exercer les pouvoirs et fonctions que lui confèrent la présente loi et toute loi spéciale de manière à réaliser les objectifs de la politique canadienne de télécommunication et à assurer la conformité des services et tarifs des enterprises canadiennes avec les dispositions de l'article 27.