Federal Court of Appeal | Cour d'appel fédérale

Date: 20220907

Docket: A-22-20

Citation: 2022 FCA 152

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
LEBLANC J.A.

BETWEEN:

BCE INC., BELL CANADA, BELL EXPRESSVU INC. and BELL EXPRESSVU LIMITED PARTNERSHIP

Applicants

and

QUÉBECOR MÉDIA INC., TVA GROUP INC., CONSEIL PROVINCIAL DU SECTEUR DES COMMUNICATIONS DU SYNDICAT CANADIEN DE LA FONCTION PUBLIQUE, YVES BERNIER, and YVAN ALLARD

Respondents

Heard by online video conference hosted by the Registry on April 4, 2022.

Judgment delivered at Ottawa, Ontario, on September 7, 2022.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LEBLANC J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20220907

Docket: A-22-20

Citation: 2022 FCA 152

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
LEBLANC J.A.

BETWEEN:

BCE INC., BELL CANADA, BELL EXPRESSVU INC. and BELL EXPRESSVU LIMITED PARTNERSHIP

Applicants

and

QUÉBECOR MÉDIA INC., TVA GROUP INC., CONSEIL PROVINCIAL DU SECTEUR DES COMMUNICATIONS DU SYNDICAT CANADIEN DE LA FONCTION PUBLIQUE, YVES BERNIER, and YVAN ALLARD

Respondents

REASONS FOR JUDGMENT

PELLETIER J.A.

I. Introduction

[1] BCE Inc., Bell Canada, Bell ExpressVu Inc. and Bell ExpressVu Limited Partnership (collectively Bell) apply for judicial review of a decision (CRTC 2019-427) of the Canadian

Radio-television and Telecommunications Commission (the Commission) in which the latter found that Bell had given an undue preference to its French-language discretionary sports service, RDS, and subjected the respondents' TVA Sports service to an undue disadvantage (the Decision or the Undue Preference Decision). TVA Sports is a service produced by TVA Group Inc., which is owned and controlled by Québecor Média Inc. (both of which are referred to collectively as Québecor).

[2] Bell argues that the Undue Preference Decision is unreasonable because the fairness of its packaging was settled in a final offer arbitration in 2018. Packaging refers to the way in which a broadcasting distribution undertaking (BDU) offers a programming service to its subscribers, either as part of a pre-assembled package or *à la carte*. In this case, the dispute centers on Bell's decision to put TVA Sports in its higher cost packages, Meilleur and Mieux, rather than in its least expensive, most popular package, Bon, which includes RDS.

[3] Bell frames its argument in terms taken from the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*]. It alleges that the Decision is unreasonable because it contains a number of logical errors and because the Commission failed to respect factual and legal constraints in its exercise of its delegated powers. Essentially, Bell argues that the fairness of its packaging was settled in a 2018 final offer arbitration between it and Québecor in which the Commission accepted Bell's final offer, so that the Commission was precluded from reconsidering the issue of packaging under the guise of a complaint alleging that it gave itself an undue preference.

[4] For the reasons that follow, I would dismiss Bell's application for judicial review with costs.

II. The facts

[5] Bell and its associated companies operate both BDUs and programming undertakings (PUs). In simple terms, BDUs distribute broadcasts and other content by means of cable systems, satellite systems or streaming on the internet while PUs produce content (called programming services) for distribution by the BDUs. RDS is a product of Bell's own PU and is carried on Bell's BDU. Québecor owns the PU that produces TVA Sports, which is also carried on Bell's BDU. In 2014 and 2017, Bell and Québecor could not agree on the rate to be paid by Bell for distributing TVA Sports on its BDUs. In each case they resorted to final offer arbitration (FOA) before the Commission, a process initiated by Bell in late 2014 and by Québecor in late 2017. These processes produced two decisions in which the Commission accepted Bell's offers: Broadcasting Decision CRTC 2015-182 (the 2015 FOA Decision) and Broadcasting Decision CRTC 2018-17 (the 2018 FOA Decision). Both are material to the dispute which is the subject of this application for judicial review.

[6] The Commission derives its dispute resolution mandate from the *Broadcasting Act*, S.C. 1991, c. 11 (the Act) and the *Broadcasting Distribution Regulations*, SOR/97-555 (the Regulations). Paragraph 10(1)(*h*) of the Act provides that:

10 (1) The Commission may, in furtherance of its objects, make regulations	10 (1) Dans l'exécution de sa mission, le Conseil peut, par règlement :
…	[…]

(h) for resolving, by way of mediation or otherwise, any disputes arising between programming undertakings and distribution undertakings concerning the carriage of programming originated by the programming undertakings;	h) pourvoir au règlement — notamment par la médiation — de différends concernant la fourniture de programmation et survenant entre les entreprises de programmation qui la transmettent et les entreprises de distribution;

[7] Sections 12 to 15 of the Regulations deal with dispute resolution. Section 12 provides that:

12 (1) If there is a dispute between the licensee of a distribution undertaking and the operator of a licensed programming undertaking or an exempt programming undertaking concerning the carriage or terms of carriage of programming originated by the programming undertaking — including the wholesale rate and the terms of any audit referred to in section 15.1 — one or both of the parties to the dispute may refer the matter to the Commission.	12 (1) En cas de différend entre, d'une part, le titulaire d'une entreprise de distribution et, d'autre part, l'exploitant d'une entreprise de programmation autorisée ou exemptée au sujet de la fourniture ou des modalités de fourniture de la programmation transmise par l'entreprise de programmation — y compris le tarif de gros et les modalités de la vérification visée à l'article 15.1 —, l'une des parties ou les deux peuvent s'adresser au Conseil.

[8] In addition, the Commission has issued Broadcasting and Telecom Information Bulletins dealing with the mechanics of its dispute resolution practice. The Bulletin which was relevant to these two final offer arbitrations was issued on November 28, 2013 as Bulletin CRTC 2013-637.

[9] The two final offer arbitrations form part of the background for this application because Bell's ultimate position in the application for judicial review is that the 2018 FOA Decision was a final and binding decision on the rate to be paid for TVA Sports (and implicitly on the fairness of its packaging) which the Commission cannot revisit under the guise of deciding an undue

preference complaint. As a result, it will be useful to touch upon these two final offer arbitrations between Bell and Québecor.

[10] In late 2014, Bell and Québecor could not agree on a rate to be paid for the carriage of TVA Sports. Bell asked the Commission to accept this question in its final offer arbitration process. Québecor agreed with this course of action. The Commission ultimately accepted Bell's offer, but in doing so made several observations about Québecor's offer which, as we will see, are relevant to Québecor's 2018 offer.

[11] In late 2017, at the conclusion of the term set in the 2015 FOA Decision, Québecor approached the Commission for a second final offer arbitration with respect, once again, to the rate to be paid for the distribution of TVA Sports. Bell supported the request. On October 18, 2017, the Commission advised the parties that it accepted the FOA request and that it would decide "the rate for the linear distribution of TVA Sports by Bell in the francophone market": 2018 FOA Decision at para. 3.

[12] There was a Commission policy in place at the time touching upon dealings between BDUs and PUs, Broadcasting Regulatory Policy CRTC 2015-438 (the *Wholesale Code*). The *Wholesale Code* is intended to ensure that subscribers have greater choice and flexibility in the programming services they receive, that programming services are diverse, available and discoverable on multiple platforms, and that negotiations between programming undertakings and BDUs are conducted in a fair manner. The *Wholesale Code* covers various aspects of the

relationship between BDUs and PUs. Of particular interest in this case is section 6 which provides as follows:

> 6. In negotiating a wholesale rate for a programming service based on fair market value, a programming undertaking, BDU or exempt digital media undertaking shall take into consideration the following factors, where applicable:
>
> a. historical rates;
>
> b. penetration levels, volume discounts and the packaging of the service;
>
> c. rates paid by unaffiliated BDUs for the programming service;
>
> d. rates paid for programming services of similar value to consumers, taking into consideration viewership;
>
> e. the number of subscribers that subscribe to a package in part or in whole due to the inclusion of the programming service in that package, taking into consideration viewership;
>
> f. the retail rate charged for the service on a stand-alone basis; and
>
> g. the retail rate for any packages in which the service is included.

[13] In its 2018 FOA Decision, the Commission advised the parties that it had assessed the proposed rates "in relation to the following key factors on fair market value applicable in this case":

> - historical rates;
>
> - penetration levels, volume discounts, and the packaging of the service;
>
> - rates paid by unaffiliated BDUs for the programming service; and
>
> - rates paid for programming services of similar value to consumers, taking into consideration viewership.
>
> 2018 FOA Decision at para. 25

[14] The Commission noted that it had also taken into account the public policy objectives of ensuring that the risks and rewards are shared between the BDUs and the PUs, striking a fair balance between allowing BDUs to provide their subscribers with more choice and flexibility, and ensuring reasonable and predictable levels of revenue for PUs. In this case, the Commission identified historical rates, viewing trends and programming expenditures, as well as rates paid for services of similar value to subscribers as factors that had a stronger probative value in terms of identifying the value of the service in issue.

[15] On the issue of viewing trends, the Commission found that TVA Sports viewership had recently trended upwards, but that this trend was mitigated by the volatility of its viewership. The significant improvement in viewership in 2016-2017 was offset by a decrease in 2015-2016 from a higher level of viewership in a prior year, leading the Commission to find that TVA Sports' historic viewership trends supported Bell's proposed rate.

[16] The Commission also observed that while TVA Sports had made significant programming investments during the 2014-2015 period – a 279 % increase from the previous year – increases in programming expenditures in subsequent years were limited. Thus, historical programming expenditure data also supported Bell's proposed rate.

[17] As for the comparison between TVA Sports and services of similar value to subscribers, the Commission noted that while RDS, the most comparable service, had lost viewership in the previous year, it still had more viewers than TVA Sports. Notwithstanding the narrowing gap between the two services, the Commission found that RDS appeared to have stronger and more

stable viewership overall. The Commission took this as indicative of the value placed on that service by viewers. Consequently, Bell's proposed rate was considered to be more reasonable than Québecor's in relation to this criterion.

[18] The Commission found that the factors related to volume discounts and the rates paid by unaffiliated BDUs supported the conclusion that Québecor's proposed rates were more reasonable. However, the Commission also found that the unaffiliated BDUs were not comparable to Bell in terms of subscriber levels so that the rate paid by these BDUs was a less critical factor.

[19] The Commission found that both offers allowed Bell to provide its subscribers choice and flexibility. Since Bell's subscriber levels were increasing while TVA Sports' penetration on Bell had remained fairly constant since January 2013, the Commission found that TVA Sports' revenue from Bell was likely to increase rather than decrease under either offer. In response to Québecor's claim that Bell's proposed rates would not permit TVA Sports to obtain sufficient and reasonable revenues, the Commission found that the difference between the two offers was unlikely to make a significant difference to the viability of TVA Sports over the contract term. In addition, it was not convinced that Québecor's percentage of revenue from Bell was unreasonable given the proportion of viewers it delivered.

[20] Based on this, the Commission found that both offers were consistent with the relevant public policy objectives.

[21] In light of the relevant fair market value factors it examined and their probative value, as well as the public policy factors it considered, the Commission found that the evidence did not support Québecor's proposed rate increase. Consequently, it chose Bell's offer.

III. The decision under review

[22] Approximately one year after the release of the Commission's 2018 FOA Decision, Québecor filed an undue preference complaint against Bell. The following thumbnail sketch of the procedural facts is taken from the Decision:

> 3. TVA Sports is a national, French-language discretionary service devoted to sports, with an emphasis on professional Canadian sports. The service launched in September 2011 and Bell began distributing the service to its subscribers in December 2011.
>
> 4. RDS, for which a broadcasting licence was granted in 1987, is a national, French-language discretionary service devoted to sports. RDS was carried on the basic service of a majority of the BDUs in the French-language market until 2015. In October 2011, Bell Media launched RDS2, a second French-language discretionary service devoted to sports. According to an agreement between TVA and Bell, TVA Sports was originally packaged in the same bundle as RDS2.
>
> 5. In accordance with Broadcasting Regulatory Policy 2015-96 and the *Broadcasting Distribution Regulations* (the Regulations) which require BDUs to offer a small basic service package, Bell offers a small basic service that does not include RDS or TVA Sports.
>
> 6. Since 1 March 2016, RDS has been part of the Bell's Bon, Mieux and Meilleur packages, and is offered on an *à la carte* basis, in build-your-own-packages, and in grandfathered packages (i.e., packages that existed before the implementation of Broadcasting Regulatory Policy 2015-96). TVA Sports is offered in Mieux and Meilleur packages, as well as à la carte or in build-your-own-packages.
>
> …
>
> 8. Québecor argued that Bon, the package that includes RDS, is much more highly penetrated than Mieux and Meilleur, the packages that include TVA

> Sports. Further, RDS continues to benefit from the grandfathering of its previous distribution on the basic service. It submitted that this disadvantages TVA Sports.
>
> Undue Preference Decision at paras. 3-6, 8

[23] The Commission then set out the respective positions of the parties. Of particular interest is its summary of Bell's response to Québecor's complaint:

> 14. …[Bell] stated that the initial affiliation agreement between TVA and Bell obligated Bell to package TVA Sports with RDS2 [a second sports service from Bell's PU], not RDS. Subsequent agreements granted Bell packaging flexibility with no requirement to package TVA Sports with RDS. [Bell] added that the packaging is compliant with the Wholesale Code, set out in the appendix to Broadcasting Regulatory Policy 2015-438. [Bell] submitted that the Wholesale Code does not afford the same packaging protections to vertically integrated entities such as Québecor as they do [*sic*] for independent services.
>
> 15. [Bell] also indicated that the breadth of sports programming offered by the two services, their respective viewership as well as their respective market shares are significantly different and that, accordingly, the relative value of the two services are not comparable. [Bell] submitted that TVA Sports has very little programming that is unique to the station, does not hold exclusive rights to big-ticket events it broadcasts and that the majority of its big-ticket programs are available on widely penetrated English-language channels.
>
> 16. According to [Bell] repackaging TVA Sports to Bon would be a reversion to micro-regulation. This would have a significant impact on flexibility, affordability and consumer choice since the cost of Bon would have to be increased even for subscribers who do not wish to watch TVA Sports. [Bell] added that subscribers already have several options for accessing TVA Sports: they can add the service *à la carte* or create a custom package to include the service. [Bell] indicated that a significant number of its subscribers already choose one of these options.
>
> 17. In regard to the objectives of the Act, [Bell] submitted that it has been operating in accordance with the Act, in particular with sections 3(1)(t)(ii) and 3(1)(t)(iii), by providing reasonable terms for the carriage, packaging and retailing of TVA Sports. [Bell] indicated that its offer complies with the contractual agreements for the service.
>
> 18. Finally, [Bell] indicated that the Commission has already considered the issue at the heart of this complaint, during the 2018 final offer arbitration process regarding the distribution of TVA Sports. [Bell] submitted that during this process, the Commission examined a number of factors, including penetration levels, volume discounts and the packaging of the service. Therefore, according to

> [Bell], the Commission issued a final and binding determination in Bell's favor in this matter and Québecor is now trying to achieve what it could not through final offer arbitration.
>
> Undue Preference Decision at paras. 14-18

[24] A relevant element in this summary is that Bell raised, as one ground among many in opposing Québecor's undue preference complaint, that packaging was the subject of a final and binding determination.

[25] The Commission began its analysis by setting out the substantive issues which it had to consider:

> a) Has the matter raised by Québecor already been resolved?
>
> b) Is there a preference or a disadvantage?
>
> c) If so, is the preference or disadvantage undue?
>
> Undue Preference Decision at para. 28

[26] On the first issue, the Commission considered that Bell was conflating the analyses for final offer arbitration and undue preference complaints. The Commission explained that it examines distinct factors in each process and these factors are not comparable. Final offer arbitration is conducted on the basis of relevant fair market value factors. There are no such criteria for analyzing undue preference allegations. As a result, packaging, the main issue in the complaint, was not a factor that it considered in the 2018 FOA Decision.

[27] The Commission then set out what constituted a preference, that is, a dissimilar treatment of comparable entities. The first question to be addressed, then, was whether the two services

were comparable. The Commission noted that they both offer similar content, that is, a diverse range of sports programming including broadcast rights for major league sports and popular sporting events. In addition, both offer programs of a similar format such as sports commentary and news programs. Both services are marketed to the same target audience: sports fans. Given the similarity in their programming, the Commission thought it likely that subscribers considered the services to be similar and in competition with each other. In addition, it noted that both RDS and TVA Sports are discretionary services that are subject to the same standard licence conditions.

[28] The Commission did not think it necessary to take into account the differences between the two services in terms of viewership and market share, since it was clear from the record before it that the two services were comparable.

[29] The next question the Commission considered was whether there was dissimilar treatment of the two services. It began by noting Bell's claim that its packaging complied with the *Wholesale Code* but commented that Bell's increased packaging flexibility did not absolve it of its responsibilities under section 9 of the Regulations which proscribes undue preferences. The Commission noted that RDS was included in all of Bell's discretionary packages including Bon, which, by virtue of being Bell's most popular package, has the highest penetration. Mieux and Meilleur packages which include TVA Sports are more expensive and have lower penetration. Since the two services are comparable, the Commission concluded that, given the significant differences in packaging, Bell's treatment of TVA Sports is dissimilar from its treatment of RDS and subjects TVA Sports to a disadvantage.

[30] The last step in the Commission's analysis consisted of determining whether the disadvantage was undue. In its view, this determination required consideration of whether the disadvantage had a material adverse impact on Québecor and whether the disadvantage has had or will have an impact on the achievement of the statutory objectives.

[31] In considering the impact of the disadvantage on Québecor, the Commission found that the exclusion of TVA Sports from the Bon package deprived it of a substantial number of subscribers and several million dollars a year of subscription and advertising revenues. The Commission noted that Bell had the onus of demonstrating that the disadvantage was not undue but that it did not provide the data which could have refuted Québecor's projected revenue loss. However, Bell did provide information on the number of Bon subscribers who added TVA Sports to their package on an *à la carte* basis or in a build-your-own package. This allowed the Commission to conclude that the number of subscribers who did not do so deprived Québecor of hundreds of thousands of dollars per month of unrealized subscriber revenue while those who did added to Bell's revenue. The Commission pointed out that sports services rely on revenue from distribution to fund the acquisition of expensive broadcast rights. The additional revenue which Bell received from these additional TVA Sports purchasers gave Bell a competitive advantage in securing distribution rights for sports programs.

[32] The Commission then dealt with the effect of Bell's packaging on the policy objectives of the *Broadcasting Act.* Bell, for its part, argued that it complied with subparagraphs 3(1)(*t*)(ii) and (iii) of the Act, which provide as follows:

(t) distribution undertakings	t) les entreprises de distribution :
…	…
(ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,	(ii) devraient assurer efficacement, à l'aide des techniques les plus efficientes, la fourniture de la programmation à des tarifs abordables,
(iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and	(iii) devraient offrir des conditions acceptables relativement à la fourniture, la combinaison et la vente des services de programmation qui leur sont fournis, aux termes d'un contrat, par les entreprises de radiodiffusion,

[33] Québecor underlined TVA Sports' important contribution to Canadian programming, whether in Canadian programming expenditures or by broadcasting Canadian content. Québecor alleged that Bell's practices did not give priority to Canadian programming, as provided in subparagraph 3(1)(*t*)(i) of the *Broadcasting Act*, nor did it provide reasonable terms for its carriage, packaging and retailing of TVA Sports, as required by subparagraph 3(1)(*t*)(iii).

[34] Bell responded that many big ticket events broadcast by TVA Sports were also broadcast by English-language services which proved, it said, that English-speaking subscribers in Quebec did not need to subscribe to TVA Sports. Québecor argued that, in the absence of TVA Sports, French-speaking sports fans would be deprived of French-language broadcasts of major sporting events, which was not in the public interest.

[35] On the strength of the record before it, the Commission found that TVA Sports met the needs of sports fans by broadcasting diverse Canadian programming of interest to Canadians and

that the disadvantage created by Bell's undue preference prevented TVA Sports from fully contributing to the objectives of the *Broadcasting Act*.

[36] As a result, the Commission found that Bell's packaging of TVA Sports subjected it to an undue disadvantage and conferred an undue preference on RDS. The Commission ordered Bell to remedy the situation by including TVA Sports in the same program offering as RDS and reporting back to it by a given date.

IV. Statement of issues

[37] Since Bell previously sought leave to appeal the Commission's decision on a question of law or jurisdiction pursuant to subsection 31(2) and was refused leave, a question which arises now is whether it can bring an application for judicial review of the same decision. Bell flagged this as a preliminary issue and it will therefore be dealt with in my analysis.

[38] A second preliminary issue is whether the dismissal of Bell's application for leave means that the issues raised in that application are not questions of law and can therefore be raised in this application for judicial review, presumably as questions of mixed fact and law. This question arises because of Bell's plea that the Commission did not respect the legal constraints that limited its exercise of delegated power. Since issue estoppel and abuse of process by re-litigation are, on their face, legal doctrines, the question arises as to whether Bell can invoke them in this application.

[39] The jurisprudence of this Court on applications for leave to appeal holds that in order to obtain leave the applicant must establish an arguable case that the decision in issue was based on an error of law or jurisdiction: *CKLN Radio Incorporated v. Canada (Attorney General)*, 2011 FCA 135, 418 N.R. 198 at para. 6; *Lukács v. Swoop Inc.*, 2019 FCA 145, 305 A.C.W.S. (3d) 500 at para. 15; *Lufthansa German Airlines v. Canadian Transportation Agency*, 2005 FCA 295, 346 N.R. 79 at paras. 8-9; *Krishnapillai v. Canada*, 2001 FCA 378, [2002] 3 FC 74 at paras. 10-11 [*Krishnapillai*]; *Radio India (2004) Ltd. v. Canada (Radio-Television and Telecommunications Commission)*, 2006 FCA 253 at para. 1. In *Krishnapillai*, this Court decided, at paragraph 11 of its reasons, that:

> Neither a decision granting leave nor a decision denying leave may be said to be a decision on the merit of any given issue. I have yet to see either type of decision successfully invoked as authority for the proposition that the issues raised in a leave application have been actually decided one way or the other.

[40] It follows from this that the dismissal of an application for leave to appeal does not decide that a question raised in the application is not a question of law (or jurisdiction). While that is certainly one possibility, there are others, notably that the Court was not satisfied that an arguable case has been shown, that the facts did not support the issue or that the stated question of law was not dispositive of the appeal: *Krishnapillai* at para. 10.

[41] It may be possible for a party to raise, as a question of mixed fact and law in an application for judicial review, a question which was raised as a question of law in its unsuccessful application for leave to appeal. However, since the dismissal of the application for leave does not necessarily decide that the question in issue is not one of law, the onus is on the party raising the same question in a subsequent application for judicial review limited to

questions of fact and questions of mixed fact and law to show that it is, in fact, a question of fact or mixed fact and law.

[42] Turning now to Bell's statement of issues, Bell's memorandum of fact and law quotes extensively from the Supreme Court's decision in *Vavilov* in which the Supreme Court continued its development of administrative law. In *Vavilov*, the Supreme Court identified certain kinds of errors which make a decision unreasonable, a teaching which Bell appears to have taken to heart.

[43] But it is not sufficient to simply point to errors in a tribunal's reasons; the errors must be material to the outcome:

> When resolving challenges to an administrative decision, courts must also consider the *materiality* of any alleged errors in the decision-maker's reasoning. Under reasonableness review, an error is not necessarily sufficient to justify quashing a decision. Inevitably, the weight of an error will depend on the extent to which it affects the decision. An error that is peripheral to the administrative decision-maker's reasoning process, or overcome by more compelling points advanced in support of the result, does not provide fertile ground for judicial review.
>
> *Vavilov* at para. 300

Absent an assessment of materiality, disappointed litigants would have an incentive to engage in a "line-by-line treasure hunt for error" so as to be in a position to argue that the decision was unreasonable based on the sheer volume of errors, however trivial. There appears to be an element of this in Bell's approach to this case.

[44] Bell summarized, at paragraph 39 of its memorandum of fact and law, its view of the issues in this case:

> The s. 18.1(4)(d) ground of review captures the CRTC's conduct here. The CRTC: (a) made an erroneous finding of fact, i.e. that packaging was not a factor considered in the 2018 FOA Decision; (b) arrived at that finding in a perverse and capricious manner, employing reasoning that was internally incoherent and that disregarded the relevant factual and legal constraints; and (c) based its decision to hear and ultimately allow Québecor's Complaint on that erroneous finding.

[45] Bell seeks to show that the errors which it enumerates are material by alleging that the Commission only heard Québecor's undue preference complaint because of them. This is an oblique reference to the legal constraints which Bell pleads later in its memorandum.

[46] Later in its argument, Bell identifies two classes of errors which make the Commission's decision unreasonable. In the first class, Bell ties the internally incoherent reasoning error it identified previously to the indicia of unreasonableness set out at paragraphs 102 and 104 of *Vavilov*: logical fallacies such as an absurd premise and an unfounded generalization, and the absence of a coherent line of reasoning.

> (a) [The Commission] relies on the absurd premise that there are no criteria for analyzing undue preference allegations such as those used in FOA proceedings;
>
> (b) [The Commission] makes the unfounded generalization that the factors examined in the 2018 FOA and the Undue Preference Decisions are not comparable; and
>
> (c) [The Commission's] ultimate conclusion that packaging was not considered in the 2018 FOA Decision cannot follow from the line of analysis it provided.
>
> Bell's memorandum of fact and law at para. 45

[47] Bell's second class of errors relates to its argument that the Commission did not respect relevant legal and factual constraints. Bell's itemization of these constraints can be summarized as follows:

> Factual constraints: Bell's submissions in the undue preference proceedings and Québecor's concessions in the FOA proceedings.
>
> Legal constraints: subsection 31(1) of the *Broadcasting Act* and the doctrines of issue estoppel and abuse of process by re-litigation.

[48] It should be apparent that a tribunal can make an unreasonable decision without necessarily falling into one of the types of errors listed by the Supreme Court. The categories of unreasonableness are not closed. As a result, attempts to shoehorn alleged errors into *Vavilov* categories may be misguided, as they were here, and may simply obscure a more coherent explanation of the unreasonableness of a tribunal's decision. To be sure, the *Vavilov* categories of error will, in many cases, provide a concise way of describing certain types of error but they do not form a mandatory template for identifying unreasonableness.

[49] If one sets aside Bell's categorization of the Commission's alleged errors, its argument can be stated in two propositions. The first proposition is that the 2018 FOA Decision and the Undue Preference Decision decide the same question. Bell argues that the Commission erred in fact in not recognizing this congruence. The second proposition is that, in light of this congruence, the Commission ought to have invoked the doctrine of issue estoppel or abuse of process and declined to engage in the re-litigation of the same question under the guise of an undue preference complaint. Whether or not this plea is available to Bell in this application remains to be seen, given the apparent invocation of legal error.

[50] When the two groups of errors are viewed together, it appears that the questions raised under the heading of logical errors are material to the question of whether the two decisions

decided the same question. It is this connection which make those questions material, not their alleged illogicality.

[51] As a result, I would state the issues to be decided in this application as follows:

> A. Is Bell entitled to bring an application for judicial review after having been denied leave to appeal the Decision?
>
> B. Did the 2018 FOA Decision and the Undue Preference Decision decide the same question?
>
> C. If so, did the Commission err in failing to apply the legal doctrines which seek to prevent re-litigation of decided questions between the same parties?
>
> D. Did the Commission err in not taking into account the factual constraints that limited its exercise of delegated power?

[52] Since the issues in this application do not fall within the limited exceptions to the presumptive reasonableness standard of review, that standard applies to these issues.

V. Analysis

A. *Is Bell entitled to bring an application for judicial review after having been denied leave to appeal the Decision?*

[53] This issue arises because of the combined effects of subsection 31(2) of the *Broadcasting Act* and sections 18.5 and 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[54] Bell applied for leave to appeal the Decision pursuant to subsection 31(2) of the *Broadcasting Act*, which provides that an appeal from a Commission decision lies to this Court, with leave, upon a question of law or jurisdiction. In its motion for leave, Bell indicated that the Commission erred in law in failing to apply the doctrine of issue estoppel arising from the 2018

FOA in which, Bell argued, the same issue between the same parties was finally determined. Bell also argued that the Decision encourages a multiplicity of proceedings and was an abuse of process by litigation. Bell's final argument was that the Commission failed to consider whether Québecor's complaint of undue preference was a collateral attack on the 2018 FOA Decision. Bell's motion for leave to appeal was dismissed. In keeping with this Court's usual practice, no reasons were given for the dismissal.

[55] Bell candidly disclosed in its application for leave that it was also bringing an application for judicial review in the event that its motion for leave was dismissed or, if leave was granted, that its subsequent appeal was dismissed. Given that its application for leave to appeal was dismissed, Bell is now pursuing its application for judicial review.

[56] In bringing its application, Bell relies upon paragraph 28(1)(*c*) of the *Federal Courts Act*, which provides that this Court has jurisdiction to hear and determine applications for judicial review "made in respect of … the Canadian Radio-television and Telecommunications Commission". Bell acknowledges that its right to judicial review is limited by section 18.5 of the *Federal Courts Act*, reproduced below, which is made applicable to this Court by subsection 28(2) of the same Act:

18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal	18.5 Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance

made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act. (my emphasis)	d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi. (Je souligne)

[57] Bell concedes that it cannot plead that the Commission's decision is unreasonable on questions of law or jurisdiction. Those questions can be appealed to this Court and so, an application for judicial review on those grounds is precluded by section 18.5 of the *Federal Courts Act*. While the distinction between questions of law and questions of mixed fact and law is easily stated, it is not as easily applied: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1 at para. 35.

[58] The issue of the scope of the right to judicial review in these circumstances was addressed by this Court in *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161 [*Best Buy*], a case in which an application for judicial review was brought notwithstanding the right of appeal on questions of law under section 68 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.). The Court was unanimous on the disposition of the appeal but split on the question of whether the section 18.5 limitation excluded applications for judicial review on questions of fact. The minority reasons argued that there was no such right because the exclusion of questions of fact from the scope of an appeal signaled that Parliament intended to protect findings of fact from appeal or review. The majority (on this issue) held that a complete bar of judicial review would not be consistent with the rule of law, citing the Supreme Court's decisions in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 and *Vavilov* (see *Best Buy* at para. 112). As

a result, the question of Bell's ability to bring its application for judicial review, though on limited grounds, has been settled in its favour.

B. *Did the 2018 FOA Decision and the Undue Preference Decision decide the same question?*

[59] Since this issue turns on the Commission's reasons in its 2018 FOA and Undue Preference Decisions, it will be useful to briefly review the Supreme Court's teachings about tribunal reasons as set out in *Vavilov*.

[60] The Supreme Court's guidance is found at paragraphs 91-95 of its reasons. The Supreme Court began by reminding reviewing Courts that tribunal reasons should not be assessed against the standard of perfection. Tribunals do not necessarily resort to the same legal techniques that courts do. The concepts and language they use will often be highly specific to their fields of experience and expertise and their institutional context, which may impact both the form and content of their reasons.

[61] The Supreme Court emphasized the use of specialized knowledge by decision makers, as demonstrated in their reasons. Sensitivity to a tribunal's demonstrated expertise may reveal to a reviewing court that conclusions (or reasoning) that are puzzling or counterintuitive on their face may nevertheless accord with the purposes and practical realities of the relevant administrative regime. This demonstrated experience and expertise may also explain why a given issue is treated in less detail than it would perhaps be in a judicial decision.

[62] The Supreme Court went on to remind reviewing courts that the decision maker's reasons must be assessed in light of the context in which they were rendered. Relevant considerations include the evidence before the decision maker, the submissions of the parties, the tribunal's publicly available policies or guidelines that informed the decision maker's work, as well as past decisions of the tribunal. This context may throw light on aspects of the decision maker's reasoning process that are not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Other considerations which may shed light on the decision maker's reasons may include the fact that opposing parties may have made concessions that made particular issues non-contentious or the fact that the decision maker followed a well-established line of the tribunal's case law that was not challenged during the proceedings. The fact that an individual decision maker may have adopted an interpretation set out in the tribunal's public interpretive policy is equally relevant in assessing the quality of the latter's decision.

[63] All of this to say that the Commission's decisions are not to be read without reference to the Commission's practices and procedural guidelines. It is also worth noting that the Commission often deals with sophisticated litigants, like Bell and Québecor, who are very knowledgeable with respect to its policies and procedures. In this case, the Commission has a Broadcasting and Telecom Information Bulletin CRTC 2013-637 which deals with "Practices and procedures for staff-assisted mediation, final offer arbitration and expedited hearings". Similarly, the *Wholesale Code* deals with the factors which assist in the determination of the fair market value of a service. These documents shed light on the Commission's analysis. The conclusion to be drawn from the Supreme Court's comments about tribunal reasons is that they

cannot be read as though all relevant considerations must be addressed within the four corners of the decision itself.

[64] In particular, the Commission does not have to explain to the parties what they already know. For that reason, the Commission's decisions in these cases were brief. The Commission's reasons reflect the fact that it is writing for sophisticated parties who have access to its procedural and substantive documentation.

[65] That said, the issue raised by Bell is whether the 2018 FOA Decision and the Undue Preference Decision deal with the same question. As noted earlier, Bell raised this very issue with the Commission in the course of the undue preference complaint process. In answer to Québecor's complaint, Bell's final argument on this issue was the following:

> Irrespective of our comments on the merits of [Québecor's] allegation of undue preference, it is our view that the issues raised by them in this Application have already been determined by the Commission. Indeed, this Application is a thinly disguised attempt to reverse the Commission's FOA decisions and achieve what it could not through the FOA process. It is also an attempt to overturn the Federal Court of Appeal's decision when it denied [Québecor] leave to appeal.
>
> More specifically, in [the 2018 FOA decision], the Commission examined TVA Sports' volume penetration when determining the rates proposed by Bell TV were reasonable. In this regard, we reiterate that it was TVA Sports who demanded the fixed wholesale rate structure as part of the terms of reference of the FOA, with the full knowledge of how Bell TV was packaging TVA Sports. This was considered by the Commission and subsequently determined not to be a core issue.
>
> In particular, the Commission examined the final offers of the parties based on the following key factors of fair market value:
>
> - historical rates;
>
> - **penetration rates, volume discounts and the packaging of the service**;
>
> - rates paid by unaffiliated BDUs for the programming service; and

> - rates paid for programming services of similar value to consumers, taking into consideration viewership.
>
> As a result, the Commission has considered the exact issue at the heart of this dispute and issued a final and binding determination in Bell's favour on the matter.
>
> Application record at 245-246 (emphasis in original)

[66] The Commission responded to Bell's argument as follows:

> The Commission considers that [Bell] is confounding the analyses for a final offer arbitration and for an undue preference complaint. The Commission examined distinct factors in each process, and these factors are not comparable. The analysis of a final offer arbitration is conducted on the basis of fair market value factors deemed relevant to the arbitration case. There are no such factors for analyzing undue preference allegations. Therefore, in the final offer arbitration to which [Bell] refers, packaging was not a factor considered by the Commission, whereas it is the main issue in the present case.
>
> Undue Preference Decision at para. 31

[67] When one examines Bell's argument before the Commission, one sees that Bell construes the 2018 FOA Decision as showing that, having found that Bell's rate offer was reasonable, the Commission must also be taken to have found that Bell's packaging of TVA Sports was fair, *i.e.*, did not unduly disadvantage TVA Sports. The Commission responded by rebutting Bell's claim that it had settled the question of the fairness of Bell's packaging by pointing out that the arbitration was concerned with fair market value while the undue preference complaint was not. In its analysis of Québecor's complaint, the Commission structured its analysis around three questions:

- Are the services comparable? The Commission found that they were.
- Is there dissimilar treatment? The Commission found that there was.
- Is the preference or disadvantage undue? The Commission found that it was.

[68] These questions are not of the same nature as those considered in a fair market analysis in a final offer arbitration.

[69] Final offer arbitrations undertaken by the Commission are conducted according to the Commission's Broadcasting and Information Bulletin CRTC 2013-637. The Bulletin stipulates that final offer arbitration is available only for disputes that are exclusively monetary. The parties must advise the Commission of the matters for which a determination is requested. If the Commission accepts the application for final offer arbitration, it advises the parties of the matters upon which it will make a determination. The parties' submissions to the Commission for the arbitration must be in reference to the matters that the Commission will determine.

[70] When the Commission accepted the application for the final offer arbitration leading to the 2018 FOA Decision, it advised the parties that it would determine "the rate for the linear distribution of TVA Sports by Bell in the francophone market": 2018 FOA Decision at para. 3.

[71] When the Commission rendered its decision, it wrote:

> In light of the relevant factors examined relating to fair market value and the public policy objectives, and taking into account their probative value, the Commission finds that the evidence does not support the rate increase proposed by Québecor. Accordingly, consistent with sections 3(1)(i)(i) and 3(1)(t)(iii) of the Act, section 12(9) of the Regulations and paragraph 25 of the Bulletin, the Commission **selects Bell's offer**.
>
> 2018 FOA Decision at para. 36 (emphasis in original)

[72] It is clear from the Bulletin and from the text of the 2018 FOA Decision itself that it was a rate decision. The issue was the rate that Bell was to pay Québecor for the right to carry TVA

Sports (“the rate for the linear distribution of TVA Sports by Bell”). That was the matter upon which the parties were to make submissions. The selection of one offer over the other was to be made by reference to certain applicable fair market value factors. The Commission resolved the issue by choosing Bell’s final offer rather than Québecor’s offer on the basis that the evidence did not support Québecor’s proposed rate increase.

[73] On the other hand, the issue in the undue preference complaint was whether Bell had abused its position as a distributor of programming services by giving itself (more precisely, its own PU) an undue preference at the expense of another PU. The Commission set out the criteria for its analysis, which turned on the similarity between RDS (Bell’s own service) and TVA Sports (Québecor’s service) and Bell’s treatment of the two. The treatment in question was the packaging of TVA Sports as compared to that of RDS. In the end, the Commission found that Bell had unduly disadvantaged TVA Sports and ordered Bell “to remedy the situation and include TVA Sports in the same program offering as RDS, and report back to the Commission on a new packaging structure that would neither unduly disadvantage TVA Sports nor unduly prefer RDS”: Undue Preference Decision at para. 62. The fact that the Commission’s conclusion on undue preference may have implications for the rate payable to Québecor (“a new packaging structure that would [not] unduly disadvantage TVA Sports”) does not make the decision a rate decision.

[74] It is true that the Commission said in the 2018 FOA Decision that it had “examined the final offers in relation to the following key factors on fair market value applicable in this case”, which included packaging: 2018 FOA Decision at para. 25. But it is also true that in paragraph

27 of that same decision, the Commission wrote that it had determined that "historical rates, viewing trends and programming expenditures, as well as the rates paid for services of similar value to subscribers are factors that have a stronger probative value when identifying the value of the service". Finally, it is also true that there was no further reference to packaging in the Commission's analysis of which of the two offers before it was more reasonable. In the circumstances, the Commission was not wrong to say in the Undue Preference Decision that packaging had not been considered in the 2018 FOA Decision. It was mentioned but it was not considered in the sense that it formed part of the Commission's reasoning process.

[75] As a result, the question of whether or not the Commission considered packaging in the 2018 FOA Decision does not assist Bell in showing that the Undue Preference Decision decided the same question.

[76] It is apparent from the decisions themselves and the context in which they were made that they deal with two different questions.

[77] The error at the root of Bell's complaint is that it equates the selection of an offer for the price to be paid for a service (on the basis of fair market value factors) with the fair or reasonable packaging of that service. Bell comes to this conclusion on the basis of its opinion that the same factors were considered in the 2018 FOA Decision and the Undue Preference Decision, which is not the case. Even if the same factors were considered in both cases, this would not mean that the same question was decided in the two decisions. A homeowner can use water test strips to test the water in the backyard swimming pool and the water from the kitchen tap. The same factors

are considered in both cases (pH, alkalinity, chlorination) but that does not mean that the pool water is safe to drink or that the tap water is safe for swimming. The issue is not whether the same factors were considered but the purpose for which they were considered.

[78] Bell's error is apparent in paragraph 87 of its memorandum of fact and law:

> For the reasons already given, it is clear that the fairness and reasonableness of Bell's packaging of TVA Sports relative to RDS was expressly considered by the CRTC in the 2018 FOA Decision. However, even if it was not, it was necessarily and implicitly determined by the CRTC when it approved Bell's final offer, which proposed a flat fee based on its existing packaging of TVA Sports that did not include any adjustments to address the difference in how RDS was packaged (e.g. for subscriber penetration or volume discounts).

[79] Bell's position is at odds with the Commission's rationale for selecting Bell's offer, which was that "the evidence does not support the rate increase proposed by Québecor": 2018 FOA Decision at para. 36.

[80] As a result, Bell is mistaken when it says that the Commission implicitly determined the fairness and reasonableness of Bell's packaging of TVA Sports when it approved Bell's final offer. The Commission's selection of Bell's offer simply means that the Commission found it more reasonable than Québecor's, in light of the fair market value factors which it considered. The Commission's selection of an offer is not based on a comparison between that offer and the fair market value of a service, otherwise determined. The selection is based upon a comparison of two offers, neither of which can be presumed to reflect the fair market value of a service since it is in the BDU's interest to undervalue the service just as it is in the PU's interest to overvalue it.

[81] As a result, the Commission's selection of Bell's offer did not decide anything about the appropriateness of Bell's packaging nor could it. The Commission was limited to deciding the specific monetary question which the parties put to it and which it agreed to hear.

[82] As a result, I conclude that the Commission did not decide the same question in the 2018 FOA and the Undue Preference Decisions. The first selected one of two offers for the rate to be paid by Bell while the other decided that Bell's packaging of TVA Sports unduly disadvantaged it. These are not the same question.

C. *If so, did the Commission err in failing to apply the legal doctrines which seek to prevent re-litigation of decided questions between the same parties?*

[83] Given that I do not agree that the 2018 FOA Decision and the Undue Preference Decision decided the same question, the issues that Bell raises as legal constraints do not apply. Specifically, the statutory provisions and legal doctrines designed to assure the finality of decisions, that is, subsection 31(1) of the *Broadcasting Act* and the doctrines of collateral attack, issue estoppel and abuse of process by re-litigation, are inapplicable to the Commission's decision to hear Québecor's undue preference complaint since the complaint did not seek to re-litigate an issue which the Commission decided in its 2018 FOA Decision.

[84] Given that these doctrines do not apply, it is not necessary for me to decide if Bell could invoke them in this application since its right to bring an application for judicial review is limited. I would point out though that Bell cannot escape the burden of bringing itself within its limited right of review simply by framing legal questions as legal constraints. Nowhere in its

discussion of legal constraints did Bell attempt to show that it was not raising legal questions but questions of mixed fact and law.

D. *Did the Commission err in not taking into account the factual constraints that limited its exercise of delegated power?*

[85] Bell argues that the Commission ignored the evidence before it and that it gave virtually no consideration to Bell's argument that it had previously decided the very question in issue in the undue preference complaint.

[86] I have already addressed Bell's argument as to finality and the Commission's response. While the response is perhaps more laconic than Bell would have liked, it is responsive to Bell's argument and it is not unreasonable. The Commission simply pointed out that different criteria applied in both cases and that those criteria were not comparable. The clear inference is that different questions were being decided. There is nothing unreasonable about the Commission's treatment of Bell's submissions.

[87] Bell points to Québecor's submissions before the Commission in the 2018 FOA Decision, arguing that Québecor conceded that "any undue disadvantage or preference would be resolved by the 2018 FOA hearing": Bell's memorandum of fact and law at para.74. With respect, this is an egregious misstatement of Québecor's position, which was that the acceptance of its offer would resolve any disadvantage arising from Bell's packaging of TVA Sports. Since Québecor's offer was not accepted, the disadvantages remained unresolved.

[88] The passages from Québecor's pleadings upon which Bell relies were a response to the position taken by the Commission in the 2015 FOA Decision. In that decision, the Commission outlined the difficulties presented by Québecor's offer. In particular, it wrote at paragraph 35 of that decision:

> In addition, in regard to public policy objectives relating to flexibility with packaging and consumer choice, the Commission considers that Québecor's offer could limit Bell's ability to continue offering TVA Sports to its subscribers using the current distribution model (pre-assembled/build-your-own) and thus offer maximum choice to consumers. According to Québecor's offer, in order to have the same rate as Videotron in the distribution of TVA Sports, Bell should either provide the service as part of its basic service and substantially increase penetration, or increase the number of its subscribers in the market served, which could be difficult, if not impossible, to do. If such an increased penetration rate or the increase in subscriber numbers were not achieved, the rate increase that would result could put additional pressure on retail rates for packages including TVA Sports.

[89] In its argument for the 2018 final offer arbitration, Québecor argued that it had considered the Commission's comments and had taken them to heart.

> 7- Il est important de noter que l'offre finale de TVA Sports s'inspire grandement des déterminations de la Décision et applique ces enseignements à la lettre.
>
> ...
>
> 9- Deuxièmement, en ce qui concerne le taux de pénétration, les remises sur la quantité et les tarifs payés par les EDR non liées pour le service de programmation, nous expliquerons comment notre offre finale tient compte de la taille de Bell, du taux de pénétration, de la forfaitisation et du volume d'abonnés de TVA Sports, et la façon dont l'offre de TVA Sports favorise Bell au niveau du nombre d'abonnés et des marchés desservis.
>
> …
>
> 11- Quatrièmement, en ce qui concerne les objectifs de politique publique à l'égard de la souplesse d'assemblage et du choix des consommateurs, l'offre de TVA Sports ne limite aucunement la capacité de Bell de continuer à offrir TVA Sports à ses abonnés selon son modèle de distribution actuel (forfaits préassemblés/sur mesure) et, ainsi, d'offrir un maximum de choix aux consommateurs. Bien au contraire, Bell n'aura pas besoin d'augmenter le taux de

> pénétration du service ou de déplacer TVA Sports dans un autre forfait afin de jouir du tarif préférentiel accordé dans notre offre finale. En effet, malgré un très bas taux de pénétration et un volume d'abonnés de moitié moindre par rapport à son plus proche compétiteur, #Confidentiel#Confidentiel#Confidentiel# … #Confidentiel#. Par conséquent, ces tarifs n'exerceront pas de pression accrue sur les tarifs au détail des forfaits comprenant TVA Sports.
>
> Mémoire de Groupe TVA Inc – Arbitrage de l'offre finale
> Dossier de la demanderesse aux pages 157-158

[90] It is clear from these and other passages that Québecor asked for final offer arbitration in 2018 because it was convinced that it had fashioned an offer that addressed all the issues raised by the Commission in its 2015 FOA Decision. Nowhere did Québecor say that the 2018 final offer arbitration would resolve any undue preference allegations regardless of the outcome. Québecor's position was that the acceptance of its offer would address the issues it had raised about packaging. But, as noted earlier, the Commission did not accept Québecor's offer because the evidence did not support it.

[91] As a result, the factual constraints which Bell identified were not, in reality, factual constraints. The Commission addressed Bell's concerns reasonably in its Decision.

VI. Conclusion

[92] On the basis that the 2018 FOA Decision and the Undue Preference Decision did not decide the same question, that the legal constraints which Bell alleges are inapplicable in the circumstances and that the factual constraints upon which Bell relies were not in fact constraints

upon the Commission's decision making, I would dismiss the application for judicial review with costs to the corporate respondents.

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

"I agree
Yves de Montigny J.A."

"I agree
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-22-20
STYLE OF CAUSE:	BCE INC. et al. v. QUÉBECOR MÉDIA INC. et al.
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	APRIL 4, 2022
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. LEBLANC J.A.
DATED:	SEPTEMBER 7, 2022

APPEARANCES:

Steven Mason Isabelle Vendette	FOR THE APPLICANTS
Neil A. Peden	FOR THE RESPONDENTS QUÉBECOR MÉDIA INC. AND GROUPE TVA INC

SOLICITORS OF RECORD:

McCarthy Tétrault LLP Montréal, Quebec	FOR THE APPLICANTS
Woods LLP Montréal, Quebec	FOR THE RESPONDENTS QUÉBECOR MÉDIA INC. and GROUPE TVA INC.