Federal Court of Appeal | Cour d'appel fédérale

Date: 20230413

Docket: A-217-21

Citation: 2023 FCA 79

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

BETWEEN:

TELUS COMMUNICATIONS INC.

Appellant

and

FEDERATION OF CANADIAN MUNICIPALITIES and OTHERS

Respondents

Heard at Ottawa, Ontario, on December 12 and 13, 2022.

Judgment delivered at Ottawa, Ontario, on April 13, 2023.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: LOCKE J.A.
LEBLANC J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20230413

Docket: A-217-21

Citation: 2023 FCA 79

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

BETWEEN:

TELUS COMMUNICATIONS INC.

Appellant

and

FEDERATION OF CANADIAN MUNICIPALITIES and OTHERS

Respondents

REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] Mobile wireless telecommunications services are a key component of the everyday life of Canadians and an important driver of economic competitiveness. As noted by the Canadian Radio-television and Telecommunications Commission (CRTC or Commission) in its Notice of Consultation 2019-57, Canadians rely on these services to communicate with each other, for

entertainment, to conduct business, to interact with all levels of government, and to further their education.

[2] With the advent of fifth generation (5G) wireless networks, and given the importance of mobile wireless services, the CRTC undertook to review the associated regulatory framework to ensure that it remains relevant, that the needs of Canadians are met, and that the policy objectives set out in the *Telecommunications Act*, S.C. 1993, c. 38 (the Act) are being achieved. After inviting comments from stakeholders and holding public hearings, the CRTC issued *Review of mobile wireless services*, Telecom Regulatory Policy CRTC 2021-130 (CRTC Decision) on April 15, 2021. The decision is the result of a comprehensive review by the Commission of its regulation of wireless services under the Act.

[3] The CRTC Decision is quite comprehensive, being 128 pages long, and addresses three main issues: (1) competition in the retail mobile wireless service market; (2) the current regulatory framework for wholesale mobile wireless services, with a focus on wholesale mobile virtual network operator (MVNO) access service; and (3) the future of mobile wireless services in Canada, and how to reduce barriers to infrastructure deployment.

[4] This is the decision that gave rise to the appeal before us. This appeal, however, raises only two discrete issues: (1) whether wireless transmission infrastructure is excluded from the regulatory scheme established by the Act for access by carriers to highways and other public places for the placement and operation of telecommunications infrastructure (the access issue);

and (2) whether the CRTC can direct the national wireless carriers to provide seamless roaming (the roaming issue).

[5] After having carefully considered the appeal record as well as the written and oral representations of the parties, I have come to the conclusion that the CRTC Decision should be upheld. In my view, the CRTC did not err in determining that a proper interpretation of the words “transmission line” in sections 43 and 44 of the Act refers to physical wire and cables. Accordingly, I find that its jurisdiction does not extend to resolving disputes regarding access to municipal and other public infrastructure for the purposes of constructing, operating and maintaining mobile wireless infrastructure. Moreover, the CRTC’s decision to mandate the condition of seamless roaming in the provision of wholesale roaming services fell squarely within its power to impose conditions of service, and does not conflict with the conditions of spectrum licence determined by the Minister of Industry (the Minister) pursuant to the *Radiocommunication Act*, R.S.C. 1985, c. R-2.

[6] These are my reasons for so concluding.

I. Background

[7] In the mid-1990s, the Commission forbore, to a significant extent, from regulating the mobile wireless services offered by wireless carriers. While being of the view that the provision of wireless telecommunications constituted the provision of a “telecommunications service” within the meaning of the Act, and that Canadian carriers providing such services were subject to Commission regulation, the Commission was of the view that, pursuant to section 34 of the Act,

it was appropriate to refrain from exercising some or all of its powers. It came to that conclusion on the basis that there was sufficient competition to protect the interests of users, thereby enabling market forces to guide the sector's growth: see, for example, Telecom Decisions CRTC 94-15 and 96-14. This meant, among other things, that wireless carriers were not required to obtain prior Commission approval for the rates that they charged.

[8] As the retail mobile wireless service market grew through the late 1990s and early 2000s, three national wireless carriers emerged as the main and often only choices for Canadians: Bell Mobility Inc. (Bell), Rogers Communications Canada Inc. (Rogers), and TELUS Communications Inc. (Telus). The high cost of investment in network facilities, together with access to spectrum, were and still are significant barriers to market entry (CRTC Decision at paras. 95 and 101-102). Since then, targeted regulatory measures have reduced some of these barriers to entry, thus facilitating the emergence of new regional carriers. Some of these regulatory measures include the Minister setting aside spectrum licences for new or smaller carriers in spectrum auctions, and mandating spectrum licensees to provide wholesale roaming services at commercially negotiated rates in the conditions of licence.

[9] The Commission also monitored market developments and held public proceedings to consider a variety of regulatory measures to protect consumers and foster competition. In 2013, for example, it imposed a mandatory code of conduct on providers of retail mobile wireless services (see *The Wireless Code* (3 June 2013), Telecom Regulatory Policy CRTC 2013-271). In *Regulatory framework for wholesale mobile wireless services* (5 May 2015), Telecom Regulatory Policy CRTC 2015-177 (TRP 2015-177), the Commission mandated the provision of

wholesale roaming service by the national wireless carriers to competitors. At the time, the Commission found that there was insufficient evidence in the record to go further and to impose seamless roaming as a condition of service. The advantage of seamless roaming is significant for wireless telecommunications service users, as it involves, to quote the definition provided by the CRTC in the impugned decision (at para. 392), "handing off and receiving calls and data sessions to and from other networks without any interruption in service".

[10] Since TRP 2015-177, which established the current wholesale mobile wireless service regulatory framework, the competitive and technological environments surrounding the wireless service industry have evolved in many respects. Accordingly, the CRTC issued on February 28, 2019 Telecom Notice of Consultation CRTC 2019-57 for the purpose of initiating a broad review of mobile wireless services and their associated regulatory framework, to ensure that "(i) it remains relevant, (ii) the needs of Canadians are met, and (iii) the policy objectives set out in section 7 of the [Act] are being achieved" (*Review of mobile wireless services* (28 February 2019), Telecom Notice of Consultation CRTC 2019-57 at para. 3 (Notice of Consultation)).

[11] In the Notice of Consultation, the Commission noted that the mobile wireless service market is on the verge of a major transformation with the introduction of 5G wireless technology. Because that technology relies on the installation of a dense network of small cell antennas providing wireless coverage over a more limited geographical area (as opposed to the large macro cells placed on wireless tower infrastructure used for previous generations of wireless technology), the wireless carriers will be required to make significant investments in

network infrastructure and to negotiate with a variety of stakeholders to secure adequate access to fibre facilities, rights of way, and small-cell sites. Indeed, according to the evidence of the Federation of Canadian Municipalities (FCM), "[e]stimates that seem to be widely accepted indicate that providing coverage to the majority of the Canadian population will require 250,000 to 300,000 such installations" (Federation of Canadian Municipalities, Further Comments to Notice of Hearing 2019-57 Review of Mobile Wireless Services, 22 November 2019 at para. 8). This is obviously a much larger number than the 13,000 or so cell phone towers that currently provide services to Canadians, according to Industry, Science and Economic Development Canada (ISED) (Government of Canada, "Facts about Towers" (last modified (20 November 2018), online: *Industry, Science and Economic Development Canada* <https://ised-isde.canada.ca/site/spectrum-management-telecommunications/en/safety-and-compliance/facts-about-towers>).

[12] Needless to say, access to various types of physical infrastructure to install these numerous small cells will be required. These include light standards, lamp posts, bus shelters and other municipal structures situated on public land, and existing telecommunications wireline support structures and support structures owned by provincial energy utilities. Importantly, however, each of these small cells also has to be hard-wired into the carrier's wireline network to carry the data to other points, including to other antennas, so that it can reach wireless users elsewhere. To that extent, the 5G network is no different from the traditional cell phone antennas installed on tall towers and buildings over the last decade.

[13] The Notice of Consultation invited parties to provide comments on whether there was a need for any adjustments or improvements to the mandated wholesale roaming policy established in the 2015 Decision, stating that "as wireless technology develops and the market continues to evolve, there may be aspects of the Commission's existing wholesale roaming policy that may need to be modified or improved" (Notice of Consultation at para. 33). Parties were also invited to provide their views on whether any further regulatory measures are required to reduce barriers to the deployment of cellular infrastructure.

[14] Public hearings were held from February 18 to 28, 2020. Due to the Covid-19 pandemic, deadlines for the filing of final submissions were delayed. The Commission's decision was issued on April 15, 2021.

II. The impugned decision

[15] As previously mentioned, the decision is very comprehensive and covers a lot of ground. It is structured in four parts: (1) the state of competition in the retail market, which includes a market power analysis (CRTC Decision at paras. 28-157); (2) regulatory measures at the wholesale level, which include measures related to wholesale MVNO access service, wholesale roaming service and seamless roaming, and access to infrastructure (CRTC Decision at paras. 158-489); (3) regulatory measures at the retail level to support competition (CRTC Decision at paras. 490-600); (4) other issues raised by the parties during the proceeding (CRTC Decision at paras. 601-630).

[16] The key aspects of the decision for the purposes of this appeal are the paragraphs dealing with the roaming issue (CRTC Decision at paras. 392-411) and the access issue (CRTC Decision at paras. 423-489).

[17] As it did for other aspects of its decision, the Commission first summarized the positions of the parties. On the roaming issue, it noted that seamless roaming is important for regional wireless carriers because it enables them to offer a higher quality of service to Canadians and therefore to be more competitive. Shaw and Vidéotron, in particular, submitted that the absence of seamless roaming is the biggest barrier to their growth, particularly outside urban centres, and that dropped calls at the periphery of their networks was the main reason why their customers switch to the national wireless carriers' services. The national carriers and SaskTel, on the other hand, pointed to the significant technical and engineering obstacles that the design and implementation of seamless roaming would pose, and to the significant costs that it would involve.

[18] Having considered these submissions, the CRTC found that mandated seamless roaming would benefit both consumers, who would have fewer dropped calls, and competition since regional carriers would offer a higher quality of service. The CRTC noted that if prioritized, seamless roaming could be implemented faster than what was proposed by the national wireless carriers. Updates would be limited to cell sites at network border locations and technical information required to maintain seamless roaming could be exchanged using existing processes, significantly reducing the cost of implementation. In the end, the CRTC was of the view that

although cost estimates for implementing seamless roaming varied, none of the cost estimates outweigh the overall benefit of seamless roaming to competition and consumers.

[19] Given that market forces cannot be relied upon to ensure that seamless roaming is available to all carriers and their retail customers, the CRTC decided that mandating seamless roaming and making it subject to cost-based rates would be an efficient and proportionate means of furthering its policy objectives. It also considered that this functionality is not a new service but rather an additional condition under which the existing mandated wholesale roaming service must be offered. Accordingly, the CRTC directed the national carriers to file for approval tariffs for wholesale roaming service which include support for seamless roaming and to begin offering seamless roaming within one year of the date of its decision. The CRTC added that the additional costs involved in the implementation of seamless roaming could be reflected in the tariffed rates.

[20] As for access to infrastructure, the Commission grouped the parties' comments into four categories: (1) delays or denials associated with access to incumbent local exchange carrier (ILEC) support structures; (2) small cell attachments and existing ILEC support structure tariffs; (3) access to towers and sites; and (4) access to municipal infrastructure.

[21] Across Canada there are ILEC owned or controlled support structures. These include poles, which support aerial facilities such as steel wires which themselves support transmission facilities, and conduits, capable of containing communications facilities and are usually located beneath ground level. In Canada, the ILECs are Bell, Telus and SaskTel in Saskatchewan; Rogers is not an ILEC. Many wireless carriers reported difficulties in accessing ILEC support

structures, but the CRTC concluded that the evidence was insufficient to determine whether, or what, modifications to the ILEC regulations or tariffs would be appropriate. The evidence provided was anecdotal and without a better understanding of the reason for those denials, the CRTC determined it would be inappropriate to adopt specific regulatory measures at this time.

[22] As for small cell attachments and existing ILEC support structure tariffs, the CRTC rejected Telus' proposal to amend the existing support structure tariffs originally designed to facilitate wireless competition because attachments for mobile wireless services give rise to different issues and are different from Wi-Fi equipment. The CRTC determined that there was insufficient evidence before it to determine if small cells are sufficiently different from Wi-Fi deployments. Consequently, it could not determine if amendments to the existing ILEC tariffs are warranted.

[23] The Commission similarly determined that it was not necessary for it to take any additional action in relation to tower and site sharing. It noted that it had not been approached to resolve any dispute alleging undue preference or unjust discrimination with regard to access to towers or sites.

[24] Finally, the Commission determined that sections 43 and 44 of the Act do not grant it jurisdiction to adjudicate disputes involving access to public places to install mobile wireless transmission facilities. These provisions grant Canadian carriers access to "any highway or other public place for the purpose of constructing, maintaining or operating its transmission lines" (the

Act, s. 43(2)). They also grant the Commission powers to regulate carriers' access to public places and to regulate disputes between carriers and municipalities.

[25] That determination rested heavily on the Commission's interpretation of the term "transmission line" in the relevant statutory provisions. The Commission first noted that the term "transmission facility" is defined in section 2 of the Act as "any wire, cable, radio, optical or other electromagnetic system, or any similar technical system, for the transmission of intelligence between network termination points, but does not include any exempt transmission apparatus". That definition, in the Commission's view, shows that Parliament was aware of the possibility to transmit telecommunications wirelessly, and that a transmission facility would clearly include a radio apparatus such as a small cell for 5G wireless technology. Given that Parliament used the distinct and undefined term "transmission line" in sections 43 and 44, the Commission reasoned that it must mean something different. It further held that, "given the all-encompassing scope of the term "transmission facility", it is very likely that "transmission line" is meant to have a narrower meaning" (CRTC Decision at para. 482).

[26] The Commission then turned to dictionary definitions of "line" and "transmission line" and found that they were varied but contemplate for the most part a "physical and tangible pathway" (CRTC Decision at para. 483). Considering the importance of its conclusion on this topic, it is worth quoting from the CRTC Decision:

> 484. In light of the above, the Commission considers that, in using the term "transmission line", Parliament meant to capture "transmission cables" and "transmission wires", both of which are identified in the Act's definition of "transmission facility" as types of such facilities.
>
> 485. Far from frustrating Parliament's intent, an interpretation limiting transmission lines to transmission cables and wires appropriately recognizes the

> broader statutory scheme enacted by Parliament, including the scheme of the closely related *Radiocommunication Act*, which provides the Minister of Industry with the power to approve sites for the placement of radio apparatus, as set out in subsection 5(1) of that Act.

[27] Finally, although several parties argued that there is a need for a streamlined and expedited dispute resolution mechanism to settle disputes over rates, terms and conditions between municipalities and carriers, the CRTC determined that no further action was necessary or appropriate at this time. Even assuming that these issues were within the Commission's jurisdiction, it was of the view that existing policies and procedures were sufficient to address them.

III. Issues

[28] This appeal by Telus raises two issues:

A. Did the CRTC err in concluding that the term "transmission line" used in sections 43 and 44 of the Act does not include wireless telecommunications infrastructure, and therefore that it could not resolve disputes with municipalities and other public authorities relating to carrier access to highways and other public places?

B. Did the CRTC exceed its jurisdiction by imposing seamless roaming on the national carriers?

[29] Bell and Rogers, the two other national carriers, broadly support the position and arguments put forward by Telus, and added some of their own arguments.

[30] A group of regional wireless carriers (Bragg Communications Inc., Cogeco Communications Inc., Québecor Média Inc., Vidéotron Ltd. and Xplore Inc.), commonly represented before this Court, participated in this appeal as a respondent to support the decision of the CRTC with respect to seamless roaming. Along with Ice Wireless Inc. (Ice Wireless), a regional mobile wireless carrier that primarily operates in Canada's North, they submitted that the CRTC did not err in law and/or jurisdiction when it imposed the condition of service requiring the national wireless carriers to offer seamless roaming. Neither of these two respondents took a position on the access issue.

[31] Electricity Canada (EC) and the FCM responded only to the access issue and supported the CRTC's finding that its jurisdiction does not extend to resolving disputes regarding access to municipal and other public infrastructure for the purposes of constructing, operating and maintaining mobile wireless infrastructure. EC is the national industry association for the electricity industry in Canada and represents power utilities. The FCM is a national organization representing Canadian municipalities of all sizes, and is dedicated to advocating for municipalities on matters under federal jurisdiction.

[32] His Majesty the King in right of the province of British Columbia (BC) also made submissions in relation only to the access issue. Aside from supporting the position of the FCM and of EC with respect to the statutory interpretation of section 43 of the Act and the term "transmission line", the gist of BC's submissions are its concern that it would lose its current ability to enter into agreements with carriers seeking to install mobile wireless infrastructure on provincial rights of way and structures and to charge market rent to the carriers for this access.

BC is also concerned that if mobile wireless infrastructure falls within the Commission's jurisdiction, the Commission's policies would govern the access carriers have, rather than the province.

[33] Before dealing with all these arguments, I shall first address a jurisdictional issue raised by EC. Both in its written submissions and orally, counsel for EC argues that the CRTC's conclusion on the access issue is not subject to appeal because it is not a "decision" within the scope of section 64 of the Act, and is not the outcome of an adjudication over access but was the result of a policy consultation.

IV. The legislative framework

[34] To better understand the issues raised in this appeal and the arguments put forward by the parties, it is essential to have a good grasp of the legislative scheme governing telecommunication and radiocommunication in Canada. Equally important are the roles played by the CRTC when imposing conditions of service to Canadian carriers, and by the Minister in issuing and amending the conditions of licence authorizing carriers to use specific radiofrequency bands for the provision of their services, and in approving the location at which wireless facilities such as antennas may be situated.

[35] As the Supreme Court held in *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 S.C.R. 489 [*Reference re Broadcasting*] (at paras. 34 and 37), the *Broadcasting Act*, S.C. 1991, c. 11 the *Radiocommunication Act* and the *Telecommunications Act* are part of an "interrelated scheme";

while they have different aims, their subject matters will overlap in certain circumstances. As a result, persons regulated under one of the Acts may well be regulated under one of the other Acts as well.

[36] Broadly speaking, the *Telecommunications Act*'s main objective is the supervision of telecommunications services (voice and data) provided to the public throughout Canada and, as an accessory, the regulation of facilities-based telecommunications common carriers. The Act falls under the responsibility of the Minister of Innovation, Science and Economic Development, but for all intents and purposes, the primary responsibility for the implementation and administration of the Act falls to the CRTC.

[37] Pursuant to section 47 of the Act, the CRTC is required to consider the policy objectives set out in section 7 of the Act when exercising any of its powers:

47 The Commission shall exercise its powers and perform its duties under this Act and any special Act	**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 entreprises canadiennes avec les dispositions de l'article 27.
(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.

[38] These objectives are set out in section 7 of the Act, and include the following:

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 essentiel 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 télécommunication 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 télécommunications canadiennes;
…	…
(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 télécommunication et assurer l'efficacité de la réglementation, dans le cas où celle-ci est nécessaire;

…	…
(h) to respond to the economic and social requirements of users of telecommunications services; and	**h)** satisfaire les exigences économiques et sociales des usagers des services de télécommunication;

[39] Section 8 of the Act authorizes the Governor in Council to "issue to the Commission directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives". An order made under that section is binding on the Commission (the Act, ss. 11(1) and 47(*b*)). At the time the decision under appeal was issued, two directions given by the Governor in Council were particularly relevant. The first one, issued in 2006, directed the Commission, when relying on regulation, to use measures that satisfy four criteria, one of them being:

> 1(b)(iv) if they relate to network interconnection arrangements or regimes for access to networks, buildings, in-building wiring or support structures, ensure the technological and competitive neutrality of those arrangements or regimes, to the greatest extent possible, to enable competition from new technologies and not to artificially favour either Canadian carriers or resellers
>
> Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, S.O.R./2006-355

[40] The second direction, released in 2019, directs the CRTC to consider the extent to which its decisions "enable innovation in telecommunications services, including new technologies and differentiated service offerings": *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation*, S.O.R./2019-227, para. 1(*a*)(vi).

[41] Also of particular relevance for this appeal are the following definitions found in section 2 of the Act*:*

Canadian carrier means a telecommunications common carrier that is subject to the legislative authority of Parliament; (entreprise canadienne)	**entreprise canadienne** Entreprise de télécommunication qui relève de la compétence fédérale. (Canadian carrier)
telecommunications means the emission, transmission or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system; (télécommunication)	**télécommunication** La transmission, l'émission ou la réception d'information soit par système électromagnétique, notamment par fil, câble ou système radio ou optique, soit par tout autre procédé technique semblable. (telecommunications)
telecommunications facility means any facility, apparatus or other thing that is used or is capable of being used for telecommunications or for any operation directly connected with telecommunications, and includes a transmission facility; (installation de télécommunication)	**installation de télécommunication** Installation, appareils ou toute autre chose servant ou pouvant servir à la télécommunication ou à toute opération qui y est directement liée, y compris les installations de transmission. (telecommunications facility)
transmission facility means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system, for the transmission of intelligence between network termination points, but does not include any exempt transmission apparatus. (installation de transmission)	**installation de transmission** Tout système électromagnétique — notamment fil, câble ou système radio ou optique — ou tout autre procédé technique pour la transmission d'information entre des points d'arrivée du réseau, à l'exception des appareils de transmission exclus. (transmission facility)

[42] Parliament expressly empowered the CRTC to subject the provision of telecommunications services by a Canadian carrier to conditions (the Act, s. 24). There is no dispute that the national carriers – Telus, Bell and Rogers – are Canadian carriers and that wholesale roaming is a telecommunications service within the meaning of section 2 of the Act.

[43] To achieve the objectives of Canadian telecommunications policy, it is essential to ensure the efficient, widespread deployment of telecommunications infrastructure. To that effect, both the Act and its predecessor, the *Railway Act*, R.S.C. 1985, c. R-3 (ss. 327-330), establish a regulatory scheme governing access by carriers to highways and other public places. In particular, sections 43 and 44 of the Act provide carriers with a qualified right to access highways and other public places for the purposes of constructing, maintaining and operating their transmission lines. It is worth pointing out at this stage that the Act provides no definition for the words "transmission line", which replaced the narrower references to "telegraph or telephone lines" in the *Railway Act* (s. 327). The right to access highways and other public places for the construction of facilities is subject to the consent of the public authority with jurisdiction over the highway or public place to the construction. Where the carrier and public authority are unable to reach an agreement on the terms of access, the Commission may set the terms at the request of either party. The full text of these provisions reads as follows:

Entry on public property	**Accès aux lieux publics**
43(2) Subject to subsections (3) and (4) and section 44, a Canadian carrier or distribution undertaking may enter on and break up any highway or other public place for the purpose of constructing, maintaining or operating its transmission lines and may remain there for as long as is necessary for that purpose, but shall not unduly interfere with the public use and enjoyment of the highway or other public place.	**43(2)** Sous réserve des paragraphes (3) et (4) et de l'article 44, l'entreprise canadienne et l'entreprise de distribution ont accès à toute voie publique ou tout autre lieu public pour la construction, l'exploitation ou l'entretien de leurs lignes de transmission, et peuvent y procéder à des travaux, notamment de creusage, et y demeurer pour la durée nécessaire à ces fins; elles doivent cependant dans tous les cas veiller à éviter toute entrave abusive à la jouissance des lieux par le public.
Consent of municipality	**Approbation municipale**
(3) No Canadian carrier or distribution undertaking shall	**(3)** Il est interdit à l'entreprise canadienne et à l'entreprise de

construct a transmission line on, over, under or along a highway or other public place without the consent of the municipality or other public authority having jurisdiction over the highway or other public place.

distribution de construire des lignes de transmission sur une voie publique ou dans tout autre lieu public — ou au-dessus, au-dessous ou aux abords de ceux-ci — sans l'agrément de l'administration municipale ou autre administration publique compétente.

Application by carrier

(4) Where a Canadian carrier or distribution undertaking cannot, on terms acceptable to it, obtain the consent of the municipality or other public authority to construct a transmission line, the carrier or distribution undertaking may apply to the Commission for permission to construct it and the Commission may, having due regard to the use and enjoyment of the highway or other public place by others, grant the permission subject to any conditions that the Commission determines.

Saisine du Conseil

(4) Dans le cas où l'administration leur refuse l'agrément ou leur impose des conditions qui leur sont inacceptables, l'entreprise canadienne ou l'entreprise de distribution peuvent demander au Conseil l'autorisation de construire les lignes projetées; celui-ci peut, compte tenu de la jouissance que d'autres ont des lieux, assortir l'autorisation des conditions qu'il juge indiquées.

Access by others

(5) Where a person who provides services to the public cannot, on terms acceptable to that person, gain access to the supporting structure of a transmission line constructed on a highway or other public place, that person may apply to the Commission for a right of access to the supporting structure for the purpose of providing such services and the Commission may grant the permission subject to any conditions that the Commission determines.

Accès

(5) Lorsqu'il ne peut, à des conditions qui lui sont acceptables, avoir accès à la structure de soutien d'une ligne de transmission construite sur une voie publique ou un autre lieu public, le fournisseur de services au public peut demander au Conseil le droit d'y accéder en vue de la fourniture de ces services; le Conseil peut assortir l'autorisation des conditions qu'il juge indiquées.

Applications by municipalities and other authorities

Demande d'une municipalité ou autre administration publique

44 On application by a municipality or other public authority, the Commission may	**44** Sur demande d'une administration municipale ou autre administration publique, le Conseil peut :
(a) order a Canadian carrier or distribution undertaking, subject to any conditions that the Commission determines, to bury or alter the route of any transmission line situated or proposed to be situated within the jurisdiction of the municipality or public authority; or	**a)** soit obliger, aux conditions qu'il fixe, l'entreprise canadienne ou l'entreprise de distribution à enfouir les lignes de transmission qu'elles ont, ou projettent d'avoir, sur le territoire de l'administration en question ou à en modifier l'emplacement;
(b) prohibit the construction, maintenance or operation by a Canadian carrier or distribution undertaking of any such transmission line except as directed by the Commission.	**b)** soit ne leur en permettre la construction, l'exploitation ou l'entretien qu'en exécution de ses instructions.

[44] In *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476 [*Barrie*] the Supreme Court clarified that subsection 43(5) of the Act does not include power utilities distribution lines, and therefore does not grant the CRTC jurisdiction with respect to telecommunications companies' access to power poles belonging to power utilities undertakings.

[45] The *Radiocommunication Act*, on the other hand, focuses on the regulation of the equipment and activities that make use of the radio spectrum, as well as the allocation and management of the radio spectrum itself. It is implemented and administered primarily by Industry Canada, under the responsibility of the Minister.

[46] Paragraphs 5(1)(*a*)(i.1) and (*b*) of the *Radiocommunication Act* give the Minister the ability to issue licences authorizing carriers to use specific radiofrequency bands for the

provision of their services, including mobile wireless services (Industry Canada, Spectrum Management and Telecommunications: *Framework for Spectrum Auctions in Canada* (Issue 3: March 2011), s. 1). Pursuant to the *Radiocommunication Act*, the Minister may also fix and amend terms and conditions of licences:

5 (1) Subject to any regulations made under section 6, the Minister may, taking into account all matters that the Minister considers relevant for ensuring the orderly establishment or modification of radio stations and the orderly development and efficient operation of radiocommunication in Canada,	**5 (1)** Sous réserve de tout règlement pris en application de l'article 6, le ministre peut, compte tenu des questions qu'il juge pertinentes afin d'assurer la constitution ou les modifications ordonnées de stations de radiocommunication ainsi que le développement ordonné et l'exploitation efficace de la radiocommunication au Canada :
(a) issue	**a)** délivrer et assortir de conditions :
…	…
(i.1) spectrum licences in respect of the utilization of specified radio frequencies within a defined geographic area,	**(i.1)** les licences de spectre à l'égard de l'utilisation de fréquences de radiocommunication définies dans une zone géographique déterminée, et notamment prévoir les conditions spécifiques relatives aux services pouvant être fournis par leur titulaire,
…	…
(b) amend the terms and conditions of any licence, certificate or authorization issued under paragraph (a);	**b)** modifier les conditions de toute licence ou autorisation ou de tout certificat ainsi délivrés;

[47] In exercising those powers, the Minister "may" have regard to the objectives of the Canadian telecommunications policy set out in section 7 of the Act (*Radiocommunication Act*, s. 5(1.1)). This is to be contrasted with the CRTC, which "shall" exercise its powers under the Act with a view to implementing those same Canadian telecommunications policy objectives (the

Act, s. 47). Apart from the orderly establishment or modification of radio stations and the orderly development and efficient operation of radiocommunication in Canada (see the preamble of subsection 5(1) of the *Radiocommunication Act*), the Minister must also consider the objectives set out in section 5 of the *Department of Industry Act*, S.C. 1995, c. 1 in the exercise of his powers. They are mostly of an economic nature, as can be gathered from the text of that section:

5 The Minister shall exercise the powers and perform the duties and functions assigned by subsection 4(1) in a manner that will	**5** Le ministre exerce les pouvoirs et fonctions que lui confère le paragraphe 4(1) de manière à :
(a) strengthen the national economy and promote sustainable development;	**a)** renforcer l'économie nationale et promouvoir le développement durable;
(b) promote the mobility of goods, services and factors of production and of trade and commerce in Canada;	**b)** favoriser la circulation des biens, des services et des facteurs de production ainsi que le commerce intérieur;
(c) increase the international competitiveness of Canadian industry, goods and services and assist in the adjustment to changing domestic and international conditions;	**c)** accroître la compétitivité de l'industrie, des biens et des services canadiens sur le plan international et faciliter l'adaptation aux situations intérieure et internationale;
(d) encourage the fullest and most efficient and effective development and use of science and technology;	**d)** favoriser le plein essor de la science et de la technologie et encourager leur utilisation optimale;
(e) foster and promote science and technology in Canada;	**e)** favoriser la science et la technologie au Canada;
(f) strengthen the framework for the development and efficiency of the Canadian marketplace;	**f)** renforcer la structure nécessaire à l'essor et à l'efficacité du marché canadien;
(g) promote the establishment, development and efficiency of Canadian communications systems and facilities and assist in the	**g)** encourager la mise sur pied, le développement et l'efficacité des systèmes et installations de communications du pays et faciliter

adjustment to changing domestic and international conditions;	l'adaptation aux situations intérieure et internationale;
(h) stimulate investment; and	**h)** stimuler l'investissement;
(i) promote the interests and protection of Canadian consumers.	**i)** promouvoir les intérêts et la protection du consommateur canadien.

[48] Under the supervision of the Minister, therefore, Industry Canada regulates the use and allocation of radio frequency spectrum. To that end, it is guided by the *Spectrum Policy Framework for Canada* (Industry Canada, Spectrum Management and Telecommunications, DGTP-001-07: *Spectrum Policy Framework for Canada* (June 2007) [*Spectrum Policy Framework for Canada*]), which sets out a sole spectrum-specific general policy objective to "maximize the economic and social benefits that Canadians derive from the use of radio frequency spectrum" (*ibid* at p. 8).

[49] Paragraph 5(1)(*f*) of the *Radiocommunication Act* also gives the Minister the authority to "approve each site on which radio apparatus, including antenna systems, may be located, and approve the erection of all masts, towers and other antenna-supporting structures". This power, however, does not authorize the Minister to interfere with the property rights of third parties. In other words, the Minister does not have the power to require a public land owner to allow access to the site for the installation of radio facilities, or to adjudicate disputes with respect to such access, in contrast to the CRTC's power under section 43 of the Act. The *Radiocommunication Act* does not contain, for antennas, an equivalent to the right conferred on carriers by the Act to access municipal property to install "transmission lines". For antennas, access to each site – regardless of its owner, public or private – must be obtained through negotiation.

[50] This is reflected in the Minister's Client Procedures Circulars which prescribe the process and technical, safety and environmental requirements that must be followed for the installation and modification of antenna systems at any location (public or private) (Industry Canada, Spectrum Management and Telecommunications, Client Procedures Circular CPC-2-0-03: *Radiocommunication and Broadcasting Antenna Systems* (Issue 5: June 26, 2014), p. 3-5 [*Antenna Systems*]; Industry Canada, Spectrum Management and Telecommunications, Client Procedures Circular CPC-2-0-17: *Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements*, (Issue 2: March 2013) at p. 3-6, 11-13 [Conditions of Licence]).

[51] Antenna proponents must consult with local land use authorities and the public to "address reasonable and relevant concerns […] from both the land-use authority and the community they represent" regarding the proposed antenna site (*Antenna Systems* at p. 5). They must also comply with technical and other requirements established for antennas by the Minister. When parties are unable to resolve relevant and reasonable concerns regarding a proposed site, a party may ask the Minister to approve or disapprove the site. The Minister's decision, however, only determines the apparatus location. Telecommunication carriers must separately negotiate the terms and conditions of access to an approved site with the site owner. Only parties who already hold radio authorizations granted by the Minister are required to allow radio apparatus proponents access to their antenna sites and towers. Otherwise, spectrum licence holders are left to rely on the municipality's goodwill to expropriate the land it seeks to use for radio antennas, or on the Minister's power of expropriation: *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467 at para. 54 [*Châteauguay*].

[52] It is in this legislative context that the issues raised in this appeal must be resolved.

V. The jurisdictional issue

[53] As previously mentioned, EC argues that the CRTC's conclusion on the access issue is not subject to appeal because it is not a "decision" within the scope of section 64 of the Act. This Court has established that CRTC's regulatory policies set out policy frameworks and provide context for telecom orders or decisions, which in turn apply these policies to the facts found in a proceeding: see *Bell Canada v. British Columbia Broadband Association*, 2020 FCA 140, [2021] 3 F.C.R. 206 at para. 42 [*Broadband Association*], leave to appeal refused, 2021 CanLII 13272 (SCC), 2021 CanLII 13268 (SCC). And as previously found, such CRTC policy guidelines, frameworks and statements are not binding on the CRTC and are therefore outside the scope of appellate review: see, for example, *Bell Canada v. Canada (Attorney General)*, 2016 FCA 217 at paras. 26-29 [*Bell Canada*]. This Court similarly found in *Canadian Institute of Public and Private Real Estate Cos. v. Bell Canada*, 2004 FCA 243 [*Canadian Institute of Public and Private Real Estate Cos.*] that it did not have "jurisdiction to hear appeals from mere statements by the CRTC as to its potential jurisdiction in future cases" (at para. 3). This Court applied the same reasoning in the context of an appeal under subsection 31(2) of the *Broadcasting Act*, which parallels section 64 of the Act: *Bell Canada*. At issue in that case was a policy issued following submissions and a public hearing solicited by the CRTC on various topics including simultaneous substitution. The Court held that the regulatory policy was "clearly not justiciable", even though the CRTC used the word "determination". EC claims that the CRTC, in issuing its Telecom Regulatory Policy 2021-130, did exactly the same thing, undertook the same process as

in the simultaneous substitution, and made non-appealable policy guidance statements expressing its view on its own jurisdiction.

[54] EC further submits that the CRTC's decision was not the outcome of an adjudication over access but was the result of a policy consultation. The CRTC did not issue binding conditions or orders affecting the legal rights of Telus or anyone else. This jurisdictional barrier is not a mere formality because if this were an adjudication of rights, all the relevant parties would have participated and provided a more robust factual record.

[55] Section 64 of the Act states that "[a]n appeal from a decision of the Commission on any question of law or of jurisdiction" may be brought in this Court with leave (emphasis added). Section 2, in turn, defines a "decision" as including "a determination made by the Commission in any form" ("[t]oute mesure prise par le Conseil, quelle qu'en soit la forme") (emphasis added). On its face, this language is quite broad and would seem to encompass a large variety of pronouncements made by the CRTC. Indeed, the jurisdiction of the CRTC is not limited to the adjudication of disputes, and subsection 52(1) of the Act provides that it may determine any question of law or fact in the exercise of its powers and in the performance of its duties. The Commission can even make a determination on its own motion (the Act, s. 48). These determinations are binding, in contrast to guidelines and statements which are not binding on the Commission (the Act, s. 58).

[56] There is no doubt that mere guidelines having no binding effects on the parties do not constitute a decision. This is precisely what was at stake in *Canadian Institute of Public and*

Private Real Estate Cos., a case upon which EC heavily relied in support of its position. In that case, the CRTC had set out guidelines in a telecom decision to assist local exchange carriers and private owners of multi-dwelling units in their negotiations of access arrangements. The CRTC, however, had expressly declined to impose any orders or conditions on the owners of multi-dwelling units, and commented that it would be prepared to issue an order were it to determine that access had not been, or was not likely to be, provided on a reasonable basis. Interestingly, the CRTC itself stated that it did not consider it had made any decision and that there would be no decision until there was a specific fact situation adjudicated upon. In that context, this Court found that the CRTC's comments regarding multi-dwelling units were of no legal effect and did not constitute a decision.

[57] A similar conclusion was reached in the second decision of this Court upon which EC relies. In *Bell Canada*, the appellants were seeking to quash two broadcasting regulatory policies issued by the CRTC regarding simultaneous substitution. In its First Policy, the CRTC announced that it would continue to allow simultaneous substitution generally, but would disallow its use for specialty channels and the Super Bowl starting in the 2016-2017 season. It also stated that it would amend regulations to be able to remove simultaneous substitution privileges and require licensees to pay compensatory rebates for recurring errors in the simultaneous substitution process. In the Second Policy, the CRTC announced the enactment and coming into force of the regulations implementing penalties and rebates for simultaneous substitution errors which it had announced in the First Policy, and indicated that the elimination of broadcasters' simultaneous substitution rights for the Super Bowl would be implemented not

by regulation, as stated in the First Policy, but by an order made under paragraph 9(1)(*h*) of the *Broadcasting Act*.

[58] Relying on its previous decision in *Canadian Institute of Public and Private Real Estate Cos.*, the Court found that the two Policies, insofar as they purport to disallow simultaneous substitution for the Super Bowl effective in 2017, were in the nature of statements of intent to exercise statutory powers in the future and therefore did not qualify as decisions or orders within the meaning of subsection 31(2) of the *Broadcasting Act* (substantially to the same effect as s. 64(2) of the Act). The Court reasoned that the policy reform proposed by the Commission had "no direct, immediate or legal effect on the appellants unless and until they are formally implemented through regulation or order" (*Bell Canada* at para. 25), and that decisions and orders have to be final in nature to be considered by courts of law.

[59] Bell had argued that the Commission had not sought comments on the substantive decision that it made, but only on the text of the proposed distribution order regarding simultaneous substitution for the Super Bowl. After first noting that the Commission had already reversed its course and announced that simultaneous substitution would be eliminated from the Super Bowl, not through an amendment to the *Broadcasting Distribution Regulations*, S.O.R./97-555 but through an order pursuant to the *Broadcasting Act*, the Court had no difficulty rejecting Bell's argument at paragraph 31:

> While this is no doubt true, strictly speaking, it would not preclude the Commission from deciding not to pursue its course of action, or alternatively from altering the order to either broaden its scope (e.g., to capture other types of events) or to make it effective only at the expiry of the agreement between the NFL and Bell. The result of the consultation should not be prejudged, and the administrative process should follow its course before the Court is called upon to

> adjudicate what may well turn out to be a moot issue. This is not only more respectful of the specialized body put in place by Parliament to oversee the regulatory regime applying to a complex field of activity, but it is also a better use of scarce judicial resources.

[60] The impugned decision, at least to the extent of its findings with respect to seamless roaming and access to infrastructure, is very different from the policy decisions of the CRTC considered in the two cases described above. This is particularly obvious when considering seamless roaming, as is made clear from paragraph 410 of the CRTC Decision:

> 410. In light of the above, the Commission **directs** the national wireless carriers to (i) file for approval, within **90 days** of the date of this decision, tariffs for wholesale roaming service (wholesale roaming tariffs) with updated terms and conditions to support seamless roaming; and (ii) begin offering seamless roaming within **one year** of the date of this decision.
>
> (Emphasis in the original)

[61] There is no ambiguity whatsoever in these words. The decision of the Commission with respect to seamless roaming is final and has immediate and legal effect on the national wireless carriers.

[62] While the language of the Commission with respect to access to municipal infrastructure is not as prescriptive or forceful as it is for seamless roaming, its ultimate finding that sections 43 and 44 of the Act do not provide the Commission with jurisdiction to adjudicate disputes involving mobile wireless transmission facilities is no less definitive. There is no room left for ambiguity or to revisit the CRTC Decision at a later date. The following extracts from the CRTC Decision, in my view, make it clear that it is not just a policy statement or a guideline but that legal rights have been determined:

> 479. Ultimately, in light of the arguments made on the record and the applicable principles of statutory interpretation, the Commission considers that these statutory provisions do not provide the Commission with jurisdiction to adjudicate disputes involving mobile wireless transmission facilities. The Commission's conclusion largely turns on the use of the term "transmission line" in the relevant statutory provisions.
>
> 485. Far from frustrating Parliament's intent, an interpretation limiting transmission lines to transmission cables and wires appropriately recognizes the broader statutory scheme enacted by Parliament, including the scheme of the closely related *Radiocommunication Act*, which provides the Minister of Industry with the power to approve sites for the placement of radio apparatus, as set out in subsection 5(1) of the Act.
>
> 489. In light of all the above, the Commission determines that no further action is necessary or appropriate with respect to municipal access issues at this time. Insofar as these issues are within the Commission's jurisdiction, existing policies and procedures are sufficient to address them.

[63] On the basis of that language, I fail to see how the CRTC could later entertain an application by a carrier for an order to access a municipal structure for the purposes of constructing, operating and maintaining mobile wireless apparatus. There is nothing tentative in the wording of its decision, and there is no further step involved before the decision becomes effective as was the case in the earlier policy decisions which this Court determined not to be "decisions" for the purposes of section 64 of the Act. Moreover, the Decision is based on the CRTC's interpretation of the Act, not on the assessment of facts or the existence of a particular technology that could change or evolve in the future. In other words, the Decision is clearly definitive and is meant to be a definitive finding.

[64] The CRTC also had the benefit of a full record before coming to its decision, contrary to EC's submission. The Commission invited comments on the matters it intended to review and posed a number of specific questions to help inform parties' submissions. Participants in the

proceeding included telecommunications service providers, non-profit organizations representing consumer interests, various levels of government, industry organizations, and individual Canadians. Many of these parties also provided further comments and replied to representations made by other parties. The proceeding also included a public hearing, which took place from February 18 to 28, 2020. It is therefore fair to say that the Commission had all the necessary information to come to its conclusions on the issues that are now before this Court, and I fail to see how the record could have been more robust or how the Commission could have had the benefit of a wider range of submissions to inform its deliberation.

[65] For all of the foregoing reasons, I am therefore of the view that the CRTC's conclusion with respect to access and seamless roaming are "decisions" for the purpose of section 64 of the Act and can be the subject of the present appeal.

VI. Standard of review

[66] All the parties agree, and rightly so, that the standard of review applicable to a question of law or jurisdiction appealed under subsection 64(1) of the Act is correctness: see *Broadband Association* at paras. 49-54, 80-81; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 37 [*Vavilov*].

VII. Analysis

A. *Did the CRTC err in concluding that the term "transmission line" used in sections 43 and 44 of the Act does not include wireless telecommunications infrastructure, and therefore that it could not resolve disputes with municipalities and other public authorities relating to carrier access to highways and other public places?*

[67] Telus submits that the CRTC adopted a literal and static approach to interpretation which is inconsistent with the modern approach to statutory interpretation. Telus argues that the modern approach requires the Court to consider not only the meaning of "transmission line" in its grammatical and ordinary sense, but to do so harmoniously with the regulatory scheme, the object of the Act and the intention of Parliament. A dynamic and purposive approach is best suited to give effect to Parliament's intention, as exemplified by the extension of the word "telegraph" in paragraph 92(10)(*a*) of the *Constitution Act, 1867* to include "telephone" (see *Reference re Regulation and Control of Radio Communication* [1931] S.C.R. 541). Moreover, Telus submits that this Court has held that legislative intent is more significant to statutory interpretation than the grammatical and ordinary sense of a given phrase (*X (Re)*, 2014 FCA 249, [2015] 1 F.C.R. 684 at para. 71) and that statutory interpretation should be aligned with the legislative intent even when a literal approach could lead to a different interpretation.

[68] Telus emphasizes that technology has evolved since the Act was enacted and under a dynamic and purposive interpretation, upgrading existing wireline technology to the newer technology should be subject to the same statutory access process. The CRTC Decision means that if Telus wishes to attach small cells to its own poles and infrastructure, it has no recourse if it cannot reach an access agreement with a municipality. This interpretation, says Telus, frustrates Parliament's purposes and prevents the Commission from ensuring the technological and competitive neutrality of the regulatory regime.

[69] Telus also submits that the CRTC failed to realize that the ordinary meaning of a "line" is simply a path between two points and so a "transmission line" should be understood as a path for

the conveyance of intelligence, whether the communication is conveyed through wires or wirelessly. Telus argues that the CRTC erred in relying on “transmission facility” to exclude wireless technology from its interpretation of “transmission line” because a similar argument was rejected by the Supreme Court in interpreting the terms “communicate” and “transmit” in the *Copyright Act*, R.S.C. 1985, c. C-42: see *Entertainment Software Association v. Society of Composer, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 231, 2012 SCC 34 at paras. 76-77 [*Entertainment Software*]. Telus also claims that interpreting the access regime in the Act to encompass both wired and wireless infrastructure is more consistent with the Supreme Court’s guidance in *Barrie* than the CRTC’s removal of “wireless” from “transmission line”.

[70] Relying on parliamentary debates, Telus argues that the legislative history of the Act demonstrates an intention that it be interpreted and applied in a technology-neutral manner, and points to the definition of “telecommunications service”, which includes both wireline and wireless services, and to the provisions regulating various aspects of telecommunications, which apply without regard to the type of technology used.

[71] Finally, Telus submits that the result of the CRTC Decision is that no regulator has the authority to resolve access disputes for wireless equipment, which in turn will inhibit the orderly development of Canada’s telecommunications system contrary to the Act’s stated objective. Without the CRTC’s dispute resolution powers, there is a risk of arbitrary action by a municipality which may hinder the development of telecommunications infrastructure. Contrary to what the CRTC stated, the Minister’s power to approve a site under paragraph 5(1)(*f*) of the *Radiocommunication Act* does not include the power to require a public land owner to allow

access to the site or give the Minister the jurisdiction to adjudicate disputes, and therefore does not fill the gap left by the CRTC's interpretation.

[72] Bell and Rogers broadly support Telus' submissions and expand on some of them. Bell emphasizes, in particular, that the CRTC's interpretation of section 43 leaves a significant gap in the legislative scheme comprised of the Act, the *Broadcasting Act*, and the *Radiocommunication Act*. Whereas the Minister has the exclusive power to approve the sites for radio apparatus under paragraph 5(1)(*f*) of the *Radiocommunication Act*, the Minister is not authorized to interfere with the property rights of third parties. Thus, the Minister cannot require a public land owner to allow access to the site for the installation of radio facilities or to adjudicate disputes in that regard. The Minister is only empowered to impose as a condition of licence for radio authorization the obligation to facilitate the sharing of antenna towers and sites. Non-holders of radio authorizations, whether public or private, are not required to give apparatus proponents access to their property. The Minister's subsection 5(1) power is therefore not a substitute for section 43 of the Act, which grants Canadian carriers and distribution undertakings a limited property right to construct, operate or maintain transmission lines in public places and allows the CRTC to resolve disputes if a municipality or other public authority with jurisdiction over the public place refuses to consent on acceptable terms. Bell argues that by limiting section 43 to wireline facilities, the CRTC has created a vacuum since neither the CRTC nor the Minister has the power to require entry to public places to construct wireless facilities.

[73] In addition, Bell submits that the CRTC ignored the fact that the terms "Canadian carrier" and "distribution undertaking", also used in section 43, are defined to include wireless facilities

(see s. 2(1) of the Act and s. 2(1) of the *Broadcasting Act*). Accordingly, Parliament would have been explicit had it intended to limit section 43 to wireline facilities.

[74] Finally, Bell submits that the CRTC's interpretation is contrary to the principle of technological neutrality. This is one of the criteria that the Commission should satisfy when using its regulatory powers, pursuant to two Cabinet Directions: *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, S.O.R./2006-355 and *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition Affordability, Consumer Interests and Innovation*, S.O.R./2019-227. Paragraph 47(*b*) of the Act further states that the Commission "shall exercise" its powers in accordance with such orders.

[75] As for Rogers, it faults the CRTC for having adopted a narrow and static definition of the term "transmission line", without any analysis of the context and purpose of the provisions. It submits that the definitions of "line" are varied and inconclusive, as recognized by the Commission, and that transmission line can have many interpretations, the narrowest of which was adopted by the Commission. In the context of telecommunications services, Rogers submits that the line is used to refer to a path between two points. When used in conjunction with the word "transmission", it includes a path or connection for transmission of intelligence by any means and must encompass wireless transmission infrastructure.

[76] Second, Rogers submits that the technology-neutral regulatory framework intended by Parliament would be frustrated by the Commission's interpretation. The policy objectives do not

discriminate between wireline and wireless services. Rogers argues that access to highways and other public places on reasonable terms is essential to the development of Canada's telecommunications system. A purposive analysis of the Act provides evidence of Parliament's intent to include the entirety of the telecommunications transmission system in the regulatory scheme of sections 43 and 44. This Court previously rejected narrow interpretations of sections 42 to 44 of the Act's objectives which encourage the "efficient and orderly development of communications networks" (*Edmonton (City) v. 360 Networks Canada Ltd.*, 2007 FCA 106 at para. 64). Rogers submits that only its interpretation is consistent with the comprehensive and technology-neutral regulatory framework established by the Act.

[77] Rogers further argues that the dynamic principles of statutory interpretation support including wireless technology in the definition of transmission line. According to Rogers, the CRTC's interpretation of transmission line effectively freezes the scope of the provisions and makes them incapable of achieving their purpose today while a dynamic interpretation is wholly consistent with the statutory objectives and Parliamentary intent. Much like Telus, Rogers also submits that the Minister's authority under the *Radiocommunication Act* to approve specific sites for radio apparatus is no substitute for the regulatory scheme provided by sections 43 and 44 of the Act, since the Minister has no authority to prescribe the terms of access by wireless carriers to public highways and other public places when carriers and public authorities are unable to reach agreement on those terms.

[78] Having carefully weighed these arguments, I find that they are not persuasive for the following reasons.

[79] In trying to determine the true meaning of the expression “transmission line”, the Commission rightly turned to the ordinary and natural meaning of these words, but also to the surrounding context and the purpose of the provision (CRTC Decision at para. 480). This is in keeping with the teachings of the Supreme Court of Canada, which has reiterated this modern approach to statutory interpretation on a number of occasions, including in the context of section 43 of the Act: see *Barrie* at para. 20. The Supreme Court most recently summarized that approach in the following terms:

> A court interpreting a statutory provision does so by applying the “modern principle” of statutory interpretation, that is, that the words of a statute must be read “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd. (Re*), [1998] 1 S.C.R. 27, at para. 21 and *Bell ExpressVu Ltd. Partnership v Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.
>
> *Vavilov* at para. 117

[80] In *Barrie*, the Supreme Court had to determine whether the words “transmission line” in subsection 43(5) of the Act were broad enough, when properly interpreted, to give the CRTC jurisdiction over the power poles of provincially regulated electric power companies. To reach its conclusion that they were not, the highest Court considered (1) the grammatical and ordinary meaning of the words “transmission line” in the context of sections 43 and 44 of the Act; (2) other related provisions of the Act and of the *Radiocommunication Act*; and (3) the policy objectives of Parliament. In the following paragraphs, I will follow the same approach to ascertain whether the CRTC erred in finding that the same words do not encompass mobile wireless transmission facilities and therefore does not give wireless carriers a qualified right to

access highways and other public places for the purpose of installing their small cell attachments and other wireless apparatus.

(1) The grammatical and ordinary meaning of the words “transmission line”

[81] Relying on dictionary definitions, the CRTC found that the word “line”, when used in the context of telecommunications facilities, refers to a physical or tangible pathway, both in French and in English. In my view, that conclusion is the only correct one.

[82] Telus attempted to escape from this straightforward, common sense interpretation of the word “line” by relying on the creative (albeit distorted) notion that a line is merely a path between two points. A transmission line would therefore be a path for conveyance of intelligence, either through wires or wirelessly. Such an interpretation, in my humble opinion, stretches credibility.

[83] First of all, the construction proposed by Telus has the disadvantage of divorcing its proposed meaning of a line from its historical origin. The concept of a line was well known in the *Railway Act*, and clearly referred to physical pathways. Indeed, the authority to enter on, break up and open any highway or other public place finds its origin in section 327 of that Act, and was conferred on companies to construct, operate and maintain telegraph or telephone lines. These were clearly wired transmission facilities.

[84] Moreover, contrary to what Telus submits, an antenna does not create a linear path but a sphere. A 5G antenna, like any other large radio antenna, has a transmission area that radiates

from the antenna in every direction. Again, Parliament must be taken to know the difference between transmission along a one-dimensional line and the three-dimensional spherical pattern that radiates from an antenna.

[85] The common acceptance of a line as a physical and one-dimensional pathway is also more consistent with the wording of sections 43 and 44. Subsection 43(2), for example, speaks of "enter[ing] on and break[ing] up" any highway or public place for the purpose of constructing, maintaining and operating transmission lines. Installing wireless small cells apparatus hardly requires "breaking up" a highway or other public places. Similarly, subsection 43(3) speaks of constructing a transmission line on, over, under or along a highway or other public place, which is also more attuned to a tangible line than to a wireless device. In the same vein, the wording of paragraph 44(*a*) does not easily fit with Telus' proposed definition of "transmission line". Pursuant to that section, the Commission may order a Canadian carrier or distribution undertaking "to bury or alter the route of any transmission line". I fail to see how the spherical transmission area of a 5G antenna could be buried or rerouted.

[86] It is clear from this review of the wording of sections 43 and 44, of the dictionary definitions of "line" in the context of telecommunications, of the use of "line" in the *Railway Act* and of the mismatch between the notion of a line and wireless technology, that Telus' submission that a line is to be understood merely as a geometrical path between two points does not sit well with the common understanding of a transmission line, at least as it is used in the Act. In the absence of a statutory definition that particularizes the use of a word or expression, it is a well-

accepted canon of construction that the starting point of every interpretive exercise is the ordinary and well-understood meaning of such a word or expression.

(2) The internal and external context

[87] This construction of the word “line” in sections 43 to 44 of the Act is buttressed by the history of its enactment, and by the use of the same or similar expressions elsewhere in the Act and in the closely related *Radiocommunication Act.*

[88] When Parliament enacted the Act in 1993 to replace the *Railway Act*, it created the first full legislative scheme addressing telecommunications and made a number of changes not only to streamline the various regulations adopted under many different acts but also to modernize the regime and take into account the new technology. With respect to the municipal access framework in particular, all provisions relating to the relationship between carriers and municipalities were removed from the *Railway Act* and brought under the jurisdiction of the CRTC.

[89] Apart from removing some detailed prescriptions from the access framework (for example, the requirements that poles be “nearly as possible straight”, that they be painted in cities and towns, and that the company shall not unnecessarily cut down or mutilate any shade, fruit or ornamental tree), the only major change to the existing right of access regime was to extend its scope and replace telephone and telegraph lines with the current expression “transmission lines”. Parliament could have used broader language and moved away from the concept of a line had it wanted to incorporate wireless technology. This was clearly not an

oversight, because as noted by the CRTC, wireless technology was well known at the time. As a matter of fact, a "transmission facility" as defined in section 2 of the Act clearly includes the technologies that transmit telecommunications wirelessly. It refers not only to wire and cable, but also to radio, optical or other electromagnetic systems. In the *Radiocommunication Act*, radiocommunication or radio is defined as the "transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves", and therefore refers to the propagation of waves without a line. "Transmission line", on the other hand, is not defined in the Act and must be taken to be a subset of transmission facility.

[90] It is worth highlighting that the expression "transmission facility" is not the only one making explicit reference to the full range of transmission techniques. The definition of "telecommunications" (and of its many derivatives) also encompasses wireless transmission technology and infrastructure. It is also interesting to note that sections 42 (works ordered by the Commission) and 46 (expropriation by carrier) of the Act apply to all kinds of telecommunications facilities (which include transmission facilities), whereas sections 43 and 44 (which relate to the qualified right of access to municipal property) only apply to transmission lines. The same is true of section 45, which grants landowners the right to request the construction of drainage works or the laying of utility pipes "over, under or along a transmission line", and of subsection 67(1), which grants the Commission the right to make regulations with respect, among other things, to the height of transmission lines.

[91] The appellant has put great emphasis on the concept of "technological neutrality" and claimed that it was very much on Parliament's mind when drafting the Act. There is scant

evidence in the parliamentary debate in support of that submission. Be that as it may, this notion of technological neutrality finds its expression in the use of words like “transmission facility” and “telecommunications”, which are broadly defined so as to encompass all matters of technology. Once again, the expression “transmission line” is much narrower; one should resist the temptation to expand it beyond its ordinary meaning under the guise of a concept that finds its expression elsewhere in the Act.

[92] The appellant similarly contends that the words “transmission line” should be interpreted in a dynamic and evolving way, and claims that the meaning ascribed to these words by the CRTC is frozen in time. There is no doubt that legislation must be interpreted in light of changing circumstances. This is particularly true of constitutional and quasi-constitutional statutes, because they are meant to endure over time and are difficult to amend. That being said, care must be taken to refrain from amending legislation in the name of interpreting it. Navigating between these equally important concerns is obviously a delicate exercise.

[93] The Supreme Court provides some guidance in that respect. In *Perka v. The Queen*, [1984] 2 S.C.R. 232, 1984 CanLII 23 (at pp. 264-265) [*Perka*], for example, the Court started with the proposition that the words of a statute must generally receive the meaning they had at the time of enactment. As the Court recognized, this is not to say that all terms in all statutes must always be confined to their original meanings. Broad statutory categories and “open-textured” legislative language, for example, must be capable of growth to take into account changing circumstances. The Court has since cautioned that even where constitutional documents are involved, the starting point must always be the text of the provision: see *Quebec*

(Attorney General) v. 9147-0732 Québec Inc., 2020 SCC 32, 451 D.L.R. (4th) 367 at paras. 8-10; *British Columbia (Attorney General) v. Canada (Attorney General*), [1994] 2 S.C.R. 41, 1994 CanLII 81 at p. 88. In *Perka*, the Court explicitly cautioned against giving a technical term a new meaning that would stray from Parliament's intention at the time of enacting the statute:

> (…) But where, as here, the legislature has deliberately chosen a specific scientific or technical term to represent an equally specific and particular class of things, it would do violence to Parliament's intent to give a new meaning to that term whenever the taxonomic consensus among members of the relevant scientific fraternity shifted…
>
> *Perka* at p. 265. See also *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402 at para. 61; *Canada v. Cheema*, 2018 FCA 45, [2018] 4 F.C.R. 328 at para. 74

[94] In the case at bar, these principles support the interpretation given by the Commission to the words "transmission line". These terms are specific in nature and used in a technical context.

[95] Parliament must be presumed to have drawn the distinction between various transmission technologies on purpose. When Parliament decided to expand the specific types of communication lines covered in the *Railway Act* with the more generic notion of "transmission line", it could have gone further and captured all kinds of transmission techniques, wired and wireless. It chose not to do so, and carefully drew the distinction in the Act between transmission facilities and transmission lines. This was a conscious choice. The fundamental distinction between radio transmission through space (wireless) and transmission that relied on an artificial guide (wireline) was well known in 1993, and has not changed since. Courts must respect and implement that choice. As the Supreme Court stated in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (at para. 81), "when different

terms are used in a single piece of legislation, they must be understood to have different meanings".

[96] This presumption of consistent expression has been followed by the Supreme Court in *Barrie*. At issue in that case was whether the phrase "the supporting structure of a transmission line" in subsection 43(5) of the Act was broad enough to grant the CRTC authority over the power utilities' poles. The Supreme Court found that the wording of that section could not bear the broad meaning given to it by the CRTC and advanced by the Canadian Cable Television Association (CCTA). Noting that a transmission line carries electricity over a large distance with minimum losses, while distribution lines carry less than 50kVof electricity over short distances, the Court noted that the power poles to which the CCTA sought access were distribution lines, not transmission lines. It therefore sided with the utilities, on the premise that Parliament must be taken to have known of that distinction. As the Court stated, "[h]ad Parliament intended to submit the Utilities' power poles to the jurisdiction of the CRTC by means of s. 43(5), it would have employed the phrase "distribution line"" (at para. 25). The same reasoning obviously applies to the phrases "transmission line" and "transmission facility". Different expressions used in the same statute, especially those of a technical nature, must be read as having different meanings.

[97] The only authority upon which Telus attempts to rely for the opposite proposition is the dissenting opinion of Justice Rothstein in *Entertainment Software*. In that case, Justice Rothstein rejected the notion that the words "communicate" and "transmit", which are both used in the *Copyright Act*, must be intended to have different meanings because they are not used

interchangeably in that Act. In light of the context, he saw no reason why the meaning of both words could not overlap. However, the majority rejected Justice Rothstein's reasoning in that regard (at paras. 31 to 34). As stressed by EC, Telus' argument also misses the distinguishing fact that in *Entertainment Software*, the Court was dealing with two undefined words (to transmit and to communicate), whereas in the case at bar, one of the terms at issue ("transmission facility") is defined by the Act and includes the other, undefined expression ("transmission line"). In such a scenario, it is even more difficult to understand why Parliament would have relied on the tortured interpretation of an undefined term as proposed by Telus, when it could simply have used the broader, defined and dynamic term to reach the same conclusion. The inescapable conclusion is that Parliament did not intend to bring wireless facilities within the scope of sections 43 and 44.

[98] When interpreting the expression "transmission line" in sections 43 and 44 of the Act, one must also take into account the regulatory framework for the installation of antennas set out in the *Radiocommunication Act*. As we have seen earlier, these two Acts are closely interrelated and must be interpreted harmoniously.

[99] The *Radiocommunication Act* grants the Minister the power to approve sites for the placement of "radio apparatus". This expression is defined as including any device used for radiocommunication, including antennas (see ss. 2 and 5(1)(*f*)). It is abundantly clear that this legislative scheme applies only to wireless technology, since the definition of radiocommunication refers to electromagnetic waves "propagated in space without artificial guide" (s. 2). In other words, the Minister has an approval power over antenna sites (of any size);

no such approval is required for the siting of wireline sites. On the other hand, the *Radiocommunication Act* does not provide radio apparatus owners the equivalent to the right conferred on carriers by the Act to access municipal property to install their transmission lines. Access to each site approved by the Minister must be obtained through negotiation, regardless of the owner. This regime is well described by the Supreme Court in *Châteauguay* at paras. 6 to 23.

[100] This dual regime has been maintained since the enactment of the *Radiocommunication Act* in 1989, and there is no indication that Parliament intended at any time to do away with these parallel frameworks. Indeed, the definition of "radiocommunication" was left unchanged from the *Radio Act* (R.S.C., 1985, c. R-2), and the definition of "telecommunication", in which was found the only mention of wireline infrastructure in the *Radiocommunication Act*, was deleted in 1993 when the *Telecommunications Act* was adopted. Furthermore, Telus did not provide any principled basis to distinguish between small cell and large cell facilities in oral or written submissions. Both are wireless infrastructure, and must be handled as a ministerial siting approval issue, not as a qualified right of access subject to the supervision of the CRTC.

(3) The policy objectives of Parliament

[101] A good starting point for any discussion about the impact of policy objectives on the interpretation of statutes is the following caveat by the Supreme Court in *Barrie*. While recognizing that policy objectives may "help elucidate the purpose of the statutory regime as a whole and will often be relevant to the CRTC's decision making", the highest Court cautioned against over-reliance on this external source:

> The consideration of legislative objectives is one aspect of the modern approach to statutory interpretation. Yet, courts and tribunals must invoke statements of legislative purpose to elucidate, not to frustrate, legislative intent. In my view, the CRTC relied on policy objectives to set aside Parliament's discernable intent as revealed by the plain meaning of s. 43(5), s. 43 generally and the Act as a whole. In effect, the CRTC treated these objectives as power-conferring provisions. This was a mistake.
>
> *Barrie* at para. 42

[102] It is with these considerations in mind that I shall now turn to Telus' various arguments relating to policy objectives. Telus suggests in its Memorandum of Fact and Law that the CRTC must have jurisdiction over all telecommunications infrastructure regardless of technology if it is to fulfill its legislative mandate to modernize the regulation of telecommunication. Telus also relies on two Policy Directions from Cabinet (S.O.R./2006-355 and S.O.R./2019-227) for the proposition that the CRTC is required to ensure the technological neutrality of the regulatory regime. Quite apart from the fact that these two Policy Directions, when read carefully, do not lend themselves to the interpretation suggested by Telus, the short answer to Telus' submission is that policy objectives cannot supersede the clear language of the Act. But there is more.

[103] The overarching goal of the Act and of the *Radiocommunication Act* is set out in nearly identical terms: to facilitate the orderly development and efficient operation of telecommunications services and radiocommunication in Canada (see, respectively, para. 7(*a*) and s. 5(1)). Yet, Parliament chose to implement this objective through two parallel but distinct frameworks, differing in how municipal property can be accessed. In my view, this choice must be respected for a number of reasons.

[104] First of all, and as already explained above, the language of the Act is clear, and does not allow for an extension of sections 43 and 44 to wireless apparatus as suggested by Telus. To accept Telus' suggested broadening of these sections would ignore the careful and deliberate choice of words by Parliament and the carefully drawn lines of demarcation between the two regimes. Indeed, it would create an overlap between the respective jurisdictions of the Minister and of the CRTC, with the attendant risk of operational conflicts between the two statutes. As pointed out by the FCM in its factum (at para. 64), "[p]arliament would be deemed, on one hand, to prohibit the installation of antennas without authorization from the Minister while, on the other, granting carriers a right to install antennas within municipal rights-of-way with the CRTC acting as the arbiter in case of a dispute". This problem would be compounded by the unexplained and unsupported distinction that Telus' suggestion seems to make between large antennas and small antennas, the latter being the only one falling under the access regime supervised by the CRTC.

[105] It is also entirely legitimate for Parliament to take into consideration a constellation of factors, such as health, interference and capacity, in delineating the reach of the Act and in drawing the boundary between the powers of the Minister and the jurisdiction of the CRTC. While there is little evidence in the record with respect to these issues, it is a fair assumption that such considerations were on the mind of Parliament when carefully demarcating the two regimes and coming up with nuanced distinctions in terms of access to public and private spaces, and between wireline and wireless infrastructure. It is not for the courts to interfere with this line-drawing exercise.

[106] Another important consideration is the balancing of federal and provincial jurisdiction. It is beyond doubt that provinces have the constitutional authority to regulate local authorities such as municipalities and, to some extent, various public utilities, to facilitate telecommunications infrastructure expansion. As a matter of fact, several provinces across the country have adopted legislation to govern access to provincially regulated infrastructure for wireless and wireline equipment: see, for example, *Public Utilities Act*, R.S.N.S. 1989, c. 380, s. 77 (Nova Scotia); *Act Respecting Certain Public Utility Installations*, ch. I-13, s. 2 (Québec); *Utilities Commission Act*, R.S.B.C. 1996, c. 473, s. 70 (British Columbia). Ontario recently adopted a statute to deal explicitly with the expedited delivery of wireline broadband projects: *Building Broadband Faster Act*, 2021, S.O. 2021, c. 2, Sched. 1, s. 1.

[107] As one of the respondents in this appeal, the Government of British Columbia objected to an interpretation of "transmission line" that would bring wireless infrastructure within the ambit of sections 43 and 44 of the Act, on the ground that it would lose an important source of revenue. Pursuant to section 62 of British Columbia's *Transportation Act*, S.B.C. 2004, c. 44, any person who wishes to use provincial public highways must enter into an agreement with the Minister of Transportation and Infrastructure which may include the payment of a fee. The fees must be no less than market rent. For wireline telecommunications services, however, the Province is only entitled to compensation from carriers based on causal and direct costs, as a result of a CRTC decision involving the City of Vancouver (see Decision CRTC 2001-23 *Ledcor/Vancouver – Construction, operation and maintenance of transmission lines in Vancouver*). The CRTC subsequently adopted a model municipal access agreement, which reflects the principles enunciated in the *Ledcor* decision (Telecom Decision CRTC 2013-618).

[108] There is no doubt in my mind that Parliament could regulate access to municipal infrastructures and utility poles for the installation of mobile wireless infrastructure by carriers if it so chooses. The regulation of telecommunications undertakings (where they operate outside the limits of a province) and of radiocommunication is in pith and substance a matter of exclusive federal jurisdiction: see *In re Regulation and Control of Radiocommunication in Canada*, [1932] A.C. 304; *Capital Cities Comm. v. Canadian Radio-Television & Telecommunications Commission*, [1978] 2 S.C.R. 141; *Alberta Government Telephones v. Canadian Radio-Television & Telecommunications Commission*, 1989 CanLII 78, [1989] 2 S.C.R. 225; *Téléphone Guèvremont Inc. v. Québec (Régie des télécommunications)*, 1994 CanLII 130, [1994] 1 S.C.R. 878; *Châteauguay* at para. 42. Provincial legislatures have jurisdiction over municipalities, private lands, local infrastructure and land use planning, and their statutes may apply to aspects of federal undertakings so long as they do not regulate a primary federal aspect of these undertakings: *Construction Montcalm Inc. v. Minimum Wage Commission*, 1978 CanLII 18, [1979] 1 S.C.R. 754; *Bell Canada v. Québec (Commission de la Santé et de la Sécurité du Travail)*, 1988 CanLII 81, [1988] 1 S.C.R. 749.

[109] In a spirit of cooperative federalism, Parliament has seen fit not to legislate to the full extent of its constitutional authority. This is in keeping with the approach favoured by the Supreme Court to provide flexibility in the interpretation and application of the division of powers: see, for example, *Châteauguay* at paras. 37-39; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 at para. 23. Such an approach supports an interpretation of parallel federal and provincial legislation which allows for them to operate concurrently. Quoting

from its earlier decision in *Alberta (Attorney General) v. Moloney* (2015 SCC 51, [2015] 3 S.C.R. 327 at para. 27) [*Moloney*], the Supreme Court stated in *Reference re Pan-Canadian Securities Regulation* (2018 SCC 48, [2018] 3 S.C.R. 189 at para. 17) that this principle is based on the presumption that "Parliament intends its laws to co-exist with provincial laws".

[110] The experience of British Columbia (and of other provinces) illustrates the viability of such an approach and speaks to the legitimacy of the choice made by Parliament. Not only does it allow a provincial government to raise revenues for the installation of mobile wireless infrastructure on provincial rights of way and municipal structures, but there is no gap since the terms and conditions under which carriers may access utility poles and other transmission structures owned by BC Hydro to install their mobile wireless infrastructure is regulated by the BC Utilities Commission (*Utilities Commission Act*, R.S.B.C. 1996, c. 473, s. 70). It appears, therefore, that a system that respects the important role of each stakeholder pays off and is functional. In many respects, municipalities and public utilities regulators are in a better position than the CRTC to coordinate and maintain balance, safety and equitable access to their infrastructure.

[111] Indeed, the CRTC found as a fact that there is no evidence of municipalities impeding the roll out of 5G networks. At paragraph 475 of its Decision, the CRTC states:

> Parties did not provide persuasive evidence that municipalities systematically act as barriers to deployment. While certain wireless carriers described examples of delays they have encountered with respect to municipal approvals, this evidence does not demonstrate that there is a pattern of denial by municipalities that would require Commission intervention to address.

[112] This finding of fact, which is entitled to a high degree of deference and is not subject to appeal, should come as no surprise. After all, municipalities share a common goal with the carriers and know how important an improved connectivity is to the well-being of their constituents and the prosperity of their community. Ironically, the carriers' fear that the deployment of new technology could be at risk if the qualified right of access regime provided by sections 43 and 44 of the Act is not extended to mobile wireless transmission facilities, echoes the argument they made 20 years ago with respect to their ability to access electricity poles. At the time, the Supreme Court refused to buy the doomsday argument of the carriers that the only alternative to the CRTC's jurisdiction over power poles would be the erection of a province-wide duplicate infrastructure of cable television poles, and retorted that other avenues (contractual and regulatory) were available. The same answer is warranted today.

[113] If the past is the guarantor of the future, there is no reason to believe that the carriers and the municipalities will be unable to achieve mutually beneficial agreements to allow for the installation of small cells and other 5G equipment on municipal infrastructure. After all, the numerous wireless antennas that have been erected under the current legislative framework are all a testament to the cooperation between municipalities and carriers once the Minister has approved the location of an antenna, as noted by the Supreme Court in *Châteauguay* (at para. 73). The evidence before us is to the effect that the deployment of telecommunications infrastructure – both wireline and wireless – has proceeded apace and has not been significantly hampered or delayed as a result of municipal obstruction. In fact, the carriers have been hard-pressed to provide the Court with any evidence to substantiate their fear of adverse consequences

for the orderly development of 5G deployment or of arbitrary action by municipalities if the CRTC has no authority to resolve access disputes.

[114] It is also to be expected that Parliament would step in if the concerns of the carriers were to materialize. As a matter of fact, the federal government appointed an external panel – the Broadcasting and Telecommunications Legislative Review Panel – in 2018 with the mandate to review and recommend changes to Canada's communication legislative framework. Interestingly, Telus and the other carriers made representations to the effect that the Act should be amended to state that access rights apply to the construction, maintenance and operation of transmission facilities (Telus) or telecommunications facilities (Rogers) to ensure that wireless facilities are included in the access regime of sections 43 and 44: see *Review of the Canadian Communications Legislative Framework* – Submission of TELUS Communications Inc., (January 11, 2019) at pp. 27-32; see also, CRTC, Interventions - Public process number: 2019-57, *Telecom Notice of Consultation CRTC 2019-57 – Review of mobile wireless services: Rogers Communications Canada Inc. Intervention*, May 15, 2019, para. 438.

[115] In its final report, the Legislative Review Panel recommended that all access matters, for both wireless and wireline infrastructure, be placed under the jurisdiction of the CRTC, and that oversight of the radiocommunication and broadcasting antenna siting process should similarly be assigned by the Minister to the CRTC: Broadcasting and Telecommunications Legislative Review Panel, *Canada's communications future: Time to act*, January 2020, Recommendation 36. Parliament has yet to enact any statutory changes arising from the many recommendations of the Legislative Review Panel.

[116] I draw three inferences from this course of events. First, three years have elapsed since that recommendation was made and yet the government has not introduced in Parliament any amendment to the legislative framework governing Canadian telecommunications. This suggests that the government does not foresee any danger looming or any major obstacle on the road leading to the construction of a pan-Canadian 5G network. Second, it can safely be assumed that the expert members of the Legislative Review Panel were of the view that "transmission line" does not encompass wireless facilities and that sections 43 and 44 do not apply to the small cell antennas required to build a 5G network; otherwise there would be no need for a statutory amendment. Finally, if ever a change in the legislation is required, either because the current regime proves to be misadapted to the new technology or because of unforeseen commercial realities, Parliament will be best equipped to deal with the issue and better able than courts to strike the best compromise.

[117] For all of the foregoing reasons, I am therefore of the view that the CRTC did not err in its interpretation of the words "transmission line" and in finding that sections 43 and 44 of the Act do not provide it with the jurisdiction to adjudicate disputes involving mobile wireless transmission facilities.

B. *Did the CRTC exceed its jurisdiction by imposing seamless roaming on the national carriers?*

[118] For the better intelligence of what follows, it is important to understand what is at stake. In its Decision, the CRTC defines "wholesale roaming" as a wholesale service that "addresses wireless carriers seeking incidental RAN (radio access network) access to support their

customers when they travel outside the footprint of their carrier's network" (CRTC Decision at para. 182). In other words, wholesale roaming enables a customer of a wireless carrier to continue receiving mobile wireless service using the network of another wireless carrier when the customer is travelling outside the wireless service footprint of its own carrier. In its 2015 decision, the CRTC found the provision of wholesale roaming was an "essential service" within the meaning of its three-pronged "essentiality test": TRP 2015-177 at paras. 99-106.

[119] At the time of its 2015 decision, however, the CRTC found that there was insufficient evidence to impose "seamless roaming" as a condition of service. In light of the evolution of wireless technology and of the wireless service market, however, the CRTC determined in its 2021 decision that mandating the provision of seamless roaming would reduce barriers to entry into the market, help ensure affordable access to high-quality telecommunications services is available in all regions of Canada, and that it would be consistent with the objectives set out at paragraphs 7(*a*), (*b*) and (*c*) of the Act. The Commission defined "seamless roaming" as follows:

> Seamless roaming involves networks handing off and receiving calls and data sessions to and from other networks without any interruption in service. In the absence of such a capability, when a regional wireless carrier's subscriber moves outside that carrier's network footprint to an area served by a carrier from whom the regional wireless carrier has purchased a wholesale roaming service, the subscriber's call and data sessions are dropped. (CRTC Decision at para. 392)

[120] Telus submits that the CRTC's mandate to national carriers to provide seamless roaming exceeded its jurisdiction by effectively amending the Conditions of Licence issued by the Minister. The Conditions of Licence can only be amended by the Minister (para. 5(1)(*b*) of the *Radiocommunication Act*), and so the CRTC had no jurisdiction to mandate a conflicting condition. The Conditions of Licence expressly exclude seamless roaming (Conditions of

Licence at para. 38). According to Telus, the CRTC is therefore purporting to amend the Minister's Conditions of Licence by mandating seamless roaming. The Minister's powers under subsection 5(1) of the *Radiocommunication Act* are not subject to the Act or to the CRTC's decisions, conditions, or regulations. Telus further argues that the Minister is responsible for policy decisions respecting spectrum licence conditions because the Minister is given broad powers over telecommunications in the *Department of Industry Act* (para. 4(1)(*k*)). There is accordingly no legal basis for the CRTC to mandate seamless roaming.

[121] Telus also submits that the CRTC cannot impose conditions which conflict with the Conditions of Licence set by the Minister. Telus argues that the CRTC must exercise its powers within the larger framework, and respect the limits imposed by the interrelated statutes. Telus submits that currently there is an operational conflict because the two legislative regimes give different answers to the question of providing seamless roaming. Telus can only comply with both the Conditions of Licence and the CRTC Decision by "renouncing the protection" – i.e., the freedom not to provide seamless roaming – afforded by the Minister which is contrary to Supreme Court jurisprudence.

[122] Lastly, Telus argues that the CRTC's seamless roaming mandate also constitutes frustration of purpose because the parliamentary intent expressed in the *Radiocommunication Act* is that the Minister should have exclusive decisional authority to regulate and set the terms for spectrum licences. This purpose is frustrated by the CRTC exceeding its jurisdiction to amend the Conditions of Licence.

[123] Bell and Rogers broadly support Telus' arguments, and emphasize that the law does not permit the CRTC to impose tariff conditions which conflict with the operation or purpose of the *Radiocommunication Act* or the *Department of Industry Act*. In determining the conditions of licence, the Minister does not need to consider the same policy objectives as the CRTC; rather, it must turn its mind to the objectives set out in section 5 of the *Department of Industry Act*. In deciding not to require seamless roaming, the Minister focused on these objectives. Bell and Rogers argue that the CRTC disregarded the Minister's policy analysis in order to advance different policy objectives and therefore undermined the purposes of the *Radiocommunication Act* and the *Department of Industry Act*. Indeed, they argue that the CRTC is attempting to reintroduce the requirement of seamless roaming through the back door when the Minister specifically and deliberately rejected the requirement.

[124] In my view, these arguments must be rejected for several reasons. While it is no doubt true that the Minister is the only one who can amend the terms and conditions of a spectrum licence that has been issued pursuant to paragraph 5(1)(*b*) of the *Radiocommunication Act*, that section must be read in the broader context of the Act and of the *Department of Industry Act*. When read together, the relevant provisions of these three Acts do not lend themselves to an interpretation that would deprive the CRTC of its jurisdiction to regulate telecommunications services. On the contrary, the Minister and the CRTC each exercise their powers in pursuit of complementary objectives. When considered in this light, it is clear that the CRTC was not attempting to amend the Minister's Conditions of Licence in mandating seamless roaming, but was merely exercising its power within its own jurisdiction under section 24 of the Act.

[125] First of all, it cannot credibly be stated (as Telus would have it) that the Minister has plenary jurisdiction over telecommunications pursuant to paragraph 4(1)(*k*) of the *Department of Industry Act*. Subsection 4(1) expressly states that the Minister has plenary jurisdiction over telecommunications "not by law assigned to any other department, board or agency of the Government of Canada". The CRTC has been granted such jurisdiction by subsection 12(2) of the *Canadian Radio-television and Telecommunications Commission Act*, R.S.C. 1985, c. C-22, according to which it "shall exercise the powers and perform the duties vested (…) by the *Telecommunications Act*…". More precisely, section 24 of the Act explicitly gives the CRTC the ability to impose any conditions on the offering and provision of any telecommunications service by a Canadian carrier.

[126] It cannot reasonably be disputed that wholesale roaming is a telecommunications service as defined in section 2 of the Act because it is clearly a "service provided by means of telecommunications facilities". The Commission therefore acted within its jurisdiction when it directed the national carriers to provide wholesale roaming to other carriers in 2015. And pursuant to section 24 of the Act, it can also establish various terms and conditions on that service. As long as it is implementing the Canadian telecommunications policy objectives set out in section 7 of the Act, the CRTC has the power to impose "*any* condition on the provision of a [telecommunication] service": *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40 at para. 36 (emphasis in the original).

[127] This is precisely what the Commission did when it mandated the national carriers to provide wholesale roaming services. For example, the Commission determined that wholesale

rates for wholesale roaming would be established using its Phase II costing approach (TRP 2015-177 at para. 139). Similarly, the Commission prohibited wholesale roaming providers from preventing wireless carriers from disclosing the identity of their wholesale roaming providers to current or potential customers (TRP 2015-177 at para. 148). The seamless roaming condition imposed in its 2021 Decision is merely one more of these conditions.

[128] There is nothing incongruous or out of the ordinary in having an activity, a person or a legal entity being regulated by two or more authorities, even at the same level of government. In *Reference re Broadcasting* (at para. 37), the Supreme Court recognized that the subject matters of the *Broadcasting Act* and the *Copyright Act* will overlap in places even though they pursue different aims. The same can obviously be said of the Act, of the *Radiocommunication Act* and of the *Department of Industry Act*.

[129] The Minister, through the *Department of Industry Act*, the *Radiocommunication Act* and the *Radiocommunication Regulations* is responsible for spectrum management in Canada. Pursuant to subparagraph 5(1)(*a*)(i.1) of the *Radiocommunication Act*, the Minister determines what frequencies may be used, by whom and for what purposes. In the management of this finite public resource, the Minister is guided by the *Spectrum Policy Framework for Canada*. The sole policy objective identified in that document is "[t]o maximize the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource" (*Spectrum Policy Framework for Canada* at p. 8). The core duties of the Minister and his Department are therefore to develop policies and processes for the spectrum resource, with a view to ensuring effective management of the radio frequency spectrum resource (Industry Canada, Spectrum Management

and Telecommunications, DGSO-001-13: *Revised Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing* (March 2013) at para. 4).

[130] The Minister's powers are therefore confined to the operation of radiocommunication, while the CRTC is tasked with the regulation of telecommunications services. In exercising his powers, he may take into account all matters that he considers relevant "for ensuring the orderly establishment or modification of radio stations and the orderly development and efficient operation of radiocommunication in Canada" (*Radiocommunication Act*, s. 5(1)). Radiocommunication, defined in the *Radiocommunication Act* as the "transmission, emission or reception of signs, signals, writing, images sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3,000 GHz propagated in space without artificial guide", is only one of the means by which signals can be transmitted. As such, it is a subset of telecommunications, defined in the Act as "the emission, transmission or reception of intelligence by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system".

[131] In short, a careful examination of the whole legislative scheme governing radiocommunication and telecommunications in Canada shows that the Minister and the CRTC exercise different powers over different types of entities and for different purposes. These powers are complementary and sometimes overlap, and the fact that the Minister and the CRTC may reach different conclusions on a specific topic is by no means a sign that one is encroaching upon the jurisdiction of the other. It is rather because they arrive at their respective conclusions from different perspectives, with a view to implementing different policy objectives.

[132] What, then, of the argument that the CRTC imposed a condition under the Act that conflicts with the Conditions of Licence established by the Minister under the *Radiocommunication Act*? As previously mentioned, Telus claims that there is a conflict between the Conditions of Licence issued by the Minister and the CRTC Decision since the former do not require it to provide seamless communications hand-off, whereas the latter does require such service. While Telus acknowledges that it could comply with both the Conditions of Licence and the CRTC Decision, it says it could only do so by "renouncing" the freedom purportedly granted spectrum licensees to not provide seamless roaming. In my view, Telus' argument is based on an incorrect and overly broad understanding of the notion of legislative conflict.

[133] We must first start with the presumption that legislation passed by the same order of government does not contain contradictions or inconsistencies. Overlapping is not sufficient; it is only when overlapping provisions cannot stand together, either because they are in operational conflict or because their purposes are incompatible, that a conflict will be found. The Supreme Court has been quite explicit on that subject, even though its use of language has not always been consistent. In *Lévis (City) v. Fraternité des policiers de Lévis Inc.* (2007 SCC 14, [2007] 1 S.C.R. 591 at para. 47), Bastarache J. (with the unanimous support of his colleagues on this point) wrote that "legislative coherence is presumed", and that "an interpretation which results in conflict should be eschewed unless it is unavoidable". He then gave the following examples of what it means for two statutes to be in conflict:

> Thus, a law which provides for the expulsion of a train passenger who fails to pay the fare is not in conflict with another law that only provides for a fine because the application of one law did not exclude the application of the other (*Toronto Railway v. Paget* (1909), 42 S.C.R 488 (S.C.C.)). Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results.

> A law, for example, which allows for the extension of a time limit for filing an appeal only before it expires is in direct conflict with another law which allows for an extension to be granted after the time limit has expired (*Massicotte v. Boutin*, [1969] S.C.R. 818).

[134] The Supreme Court reiterated this restrictive approach to conflict in *Thibodeau v. Air Canada* (2014 SCC 67, [2014] 3 S.C.R. 340 [*Thibodeau*]). In that case, the appellant contended that there was a conflict between the *Carriage by Air Act*, R.S.C. 1985, c. C-26, which incorporated the *Montreal Convention* and purported to preclude an award of damages for a breach of the *Official Languages Act*, R.S.C., 1985, c. 31 (4th Supp.), while subsection 77(4) of the *Official Languages Act* permits the court to grant an appropriate and just remedy for a breach, including damages. Reiterating that legislation passed by Parliament is presumed not to contain contradictions or inconsistencies unless provisions "are so inconsistent that they are incapable of standing together" (*Thibodeau* at para. 89), the Court stated:

> 92. The legal framework that governs this question is not complicated. First, courts take a restrictive approach to what constitutes a conflict in this context. Second, courts find that there is a conflict only when the existence of the conflict, in the restrictive sense of the word, cannot be avoided by interpretation. Overlap, on its own, does not constitute conflict in this context, so that even where the ambit of two provisions overlaps, there is a presumption that they both are meant to apply provided that they can do so without producing absurd results. This presumption may be rebutted if one of the provisions was intended to cover the subject matter exhaustively…
>
> See also *Thibodeau* at paras. 98-99 and 110

[135] Applying this strict interpretation of the notion of conflict, I fail to see how the Conditions of Licence and the Commission's seamless roaming condition can be found to be conflicting. Indeed, Telus itself acknowledges in its Memorandum of Fact and Law that "in theory [it] can comply with both schemes by providing seamless roaming in accordance with the

CRTC decision" (at para. 67). This admission is well taken. It is clear that Telus, by offering seamless roaming, would not be offending the terms and conditions of its licence, which does not require seamless roaming but does not prohibit it either. Indeed, the Minister has stated that licensees may offer seamless roaming as an outcome of negotiations between licensees (Conditions of Licence at para. 38).

[136] Telus retorts that the Minister's Conditions of Licence were meant to be an exhaustive declaration of the applicable regulations with respect to wholesale roaming, and that complying with the CRTC's seamless roaming condition could only come at the price of renouncing the freedom the Minister purportedly granted spectrum licensees to not provide seamless roaming. Telus relies for that proposition on two decisions of the Supreme Court of Canada, *Moloney* and *British Columbia (A.G.) v. Lafarge Canada Inc.* (2007 SCC 23, [2007] 2 S.C.R. 86 [*Lafarge*]).

[137] In the first of these two cases, the conflict involved a provision of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, a federal statute, and a provision of Alberta's *Traffic Safety Act*, R.S.A. 2000, c. T-6. Interestingly, the concept of conflict between legislation of different levels of government is the same as that between legislation of the same level of government: either there is an operational conflict (it is impossible to comply with both laws), or the operation of the provincial law frustrates the purpose of the federal enactment (*Moloney* at para. 19). Pursuant to subsection 178(2) of the former statute, an order of discharge released the bankrupt from all claims provable in bankruptcy and therefore prevented creditors from enforcing their claims. The latter, on the other hand, provided that a victim of an accident could apply for compensation to the Administrator under the provincial regime in the event that an uninsured

driver does not pay for damages ordered by judgment. The Registrar could then suspend the debtor's driver's licence until the judgment debt is satisfied or discharged, "otherwise than by a discharge in bankruptcy" (*Moloney* at para. 45). For the majority, this was a clear case of operational conflict:

> 63. One law consequently provides for the release of all claims provable in bankruptcy and prohibits creditors from enforcing them, while the other disregards this release and allows for the use of a debt enforcement mechanism on such a claim by precisely excluding a discharge in bankruptcy. This is a true incompatibility. Both laws cannot operate concurrently (…), "apply concurrently" (…) or "operate side by side without conflict" (…). The facts of this appeal indeed show an actual conflict in operation of the two provisions. This is a case where the provincial law says "yes ("Alberta can enforce this provable claim"), while the federal law says "no" ("Alberta cannot enforce this provable claim"). The provincial law gives the province a right that the federal law denies, and maintains a liability from which the debtor has been released under the federal law. This conflict can hardly be characterized as "indirect" as my colleague suggests (…). Nor can I characterize as merely "implicit" the clear prohibition in s. 178(2) against enforcing provable claims that have been discharged. It is not in dispute that s. 178(2) is a prohibitive provision; considering the meaning of the words "order or discharge" and "releases", what the provision "exactly" prohibits is the enforcement of discharged provable claims. There is no other "possible ramification" in terms of what this section prohibits.

[138] In the case at bar, the Minister did not provide that licensees were protected from being required to offer seamless roaming in all circumstances, nor did he prohibit the imposition of such a condition. The Minister must be presumed to know that the CRTC can impose "any condition" on the offering and provision of telecommunications services, pursuant to section 24 of the Act. Had the Minister been of the view that he had jurisdiction to impose conditions with respect to seamless roaming, and had he intended to prohibit licensees from offering seamless roaming, he could have made it explicit in the terms and conditions of the licence. In the absence of such a clear prohibition, I do not think it can be argued there is an operational conflict in the sense that the two schemes cannot operate side by side.

[139] The *Lafarge* decision also involves a conflict between legislation of two different levels of government, this time between a federal statute and a municipal by-law. Lafarge had obtained approval from the Vancouver Port Authority (VPA) for a new facility to be built on land acquired by the VPA from the City of Vancouver. However, a group of ratepayers objected to the construction and filed a petition in the Supreme Court of British Columbia on the basis that the City had declined to exercise its jurisdiction and to require Lafarge to obtain a valid development permit. The Lafarge project did not comply with the City's by-law, which imposes a 30-foot height restriction. Writing for the majority, Justices Binnie and LeBel found that this was an operational conflict, because if the ratepayers had succeeded in persuading the City to seek an injunction to stop the Lafarge project from going ahead without a city permit, the judge could not have given effect both to the federal law and the municipal by-law. The first would entail dismissing the application, while the second would have led to the granting of the injunction.

[140] Unfortunately, the analysis of the majority on the operational conflict issue is quite terse and does not expand much as to why the two legislations were in conflict beyond what is captured in the preceding paragraph. What is striking, however, is that we have a complete prohibition in one enactment and a permission in the other. This is plainly different from the situation that we have in the case at bar, where the Minister's condition does not prohibit seamless roaming but merely declares that it is not required. In fact, the Department of Industry expressly stated in its *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2GHZ Range* (November 2007) that its policy decisions in that respect "are without prejudice or inference as to any existing CRTC tariffs,

proceedings, future determinations or findings by the CRTC or the Competition Bureau" (at p. 4). Accordingly, the cases upon which Telus relies to support its argument of an operational conflict between the Minister's Conditions of Licence and the Commission's seamless roaming condition are not persuasive and miss the mark. They can both apply, their concurrent application does not lead to an absurd result, and there is no indication that the Conditions of Licence were intended to be an exhaustive declaration of the applicable law with respect to wholesale roaming.

[141] Telus' contention that the Commission's seamless roaming condition frustrates Parliament's intent because it purports to overrule the Minister on matters addressed in the Conditions of Licence is no more convincing. As already noted, the Minister and the Commission act in furtherance of different yet complementary objectives, and while mandating seamless roaming might not be required to further the policy objectives for which the Minister is responsible, it might nevertheless be appropriate to achieve the policy objectives that the CRTC is mandated to implement. Contrary to Telus' submission, it is the interpretation that would prevent the Commission from exercising its jurisdiction by imposing conditions on the offering of telecommunications service that would frustrate the intent of Parliament. Wholesale roaming is undisputedly a telecommunications service pursuant to section 2, and, as noted by Ice Wireless in its factum (at paras. 56-61), this was made clear with the adoption of section 27.1 of the Act as part of the *Economic Action Plan 2014 Act, No. 1*, S.C. 2014, c. 20. That new provision established caps on the wholesale rates that Canadian carriers could charge to other Canadian carriers for wholesale roaming services, but stated that any rate established by the Commission would prevail. The Commission did adopt such rates in TRP 2015-177 and by Order in Council

the Governor General repealed section 27.1 of the Act shortly thereafter. Considering that the Minister's Conditions of Licence provide that wholesale roaming is to be provided pursuant to commercially negotiated rates, this is clear evidence that Parliament always intended the Commission to have concurrent jurisdiction with respect to the regulation of wholesale roaming. I would also add that the Court can take judicial notice of the fact that the Minister did not seek to intervene in this matter to insulate his jurisdiction from the Commission's Decision.

[142] For all of the above reasons, I am therefore of the view that the Commission did not exceed its jurisdiction and that its seamless roaming condition does not conflict with the Minister's Conditions of Licence. The appeal should be dismissed with costs.

"Yves de Montigny"
J.A.

"I agree.
George R. Locke J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-217-21
STYLE OF CAUSE:	TELUS COMMUNICATIONS INC. v. FEDERATION OF CANADIAN MUNICIPALITIES and OTHERS
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 12 AND 13, 2022
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	LOCKE J.A. LEBLANC J.A.
DATED:	APRIL 13, 2023

APPEARANCES:

Catherine Beagan Flood Naiara Toker Michael Ryan Ashley Haines	FOR THE APPELLANT
Stéphane Emard-Chabot John Mark Keyes	FOR THE RESPONDENT FEDERATION OF CANADIAN MUNICIPALITIES
Brandon Kain Adam Goldenberg	FOR THE RESPONDENT BELL MOBILITY INC.
Peter Ruby Michael Wilson	FOR THE RESPONDENT ELECTRICITY CANADA
Freya Zaltz	FOR THE RESPONDENT HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

Christian S. Tacit Stewart Cattroll	FOR THE RESPONDENT ICE WIRELESS INC.
Eric Bédard Joshua Bouzaglou	FOR THE RESPONDENTS BRAGG COMMUNICATIONS INC., COGECO COMMUNICATIONS INC., QUÉBECOR MÉDIA INC., VIDÉOTRON LTD. AND XPLORE INC.
Gerald Kerr-Wilson Paul Burbank	FOR THE RESPONDENT, ROGERS COMMUNICATIONS CANADA INC.

SOLICITORS OF RECORD:

Blake, Cassels & Graydon LLP Toronto, Ontario MHR Law LLP Didsbury, Alberta	FOR THE APPELLANT
Sicotte Guilbault LLP Ottawa, Ontario	FOR THE RESPONDENT FEDERATION OF CANADIAN MUNICIPALITIES
McCarthy Tétrault LLP Toronto, Ontario	FOR THE RESPONDENT BELL MOBILITY INC.
Goodmans LLP Toronto, Ontario	FOR THE RESPONDENT ELECTRICITY CANADA
British Columbia Ministry of Attorney General Vancouver, British Columbia	FOR THE RESPONDENT HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA
Tacit Law Ottawa, Ontario	FOR THE RESPONDENT ICE WIRELESS INC.

Woods LLP Montréal, Québec	FOR THE RESPONDENTS BRAGG COMMUNICATIONS INC., COGECO COMMUNICATIONS INC., QUÉBECOR MÉDIA INC., VIDÉOTRON LTD. AND XPLORE INC.
Fasken Martineau Dumoulin LLP Ottawa, Ontario	FOR THE RESPONDENT, ROGERS COMMUNICATIONS CANADA INC.