

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

VIDÉOTRON LTÉE, VIDÉOTRON (RÉGIONAL) LTÉE and CF CABLE TV INC.

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

AND BETWEEN:

CANADIAN ASSOCIATION OF BROADCASTERS, GROUPE TVA INC., CTV TELEVISION INC.,
THE SPORTS NETWORK INC., 2953285 INC. (o.b.a. DISCOVERY CHANNEL CANADA),
LE RÉSEAU DES SPORTS (RDS) INC., THE COMEDY NETWORK INC., 1163031 ONTARIO INC.
(o.b.a. OUTDOOR LIFE NETWORK), CANWEST MEDIAWORKS INC., GLOBAL TELEVISION
NETWORK QUEBEC LIMITED PARTNERSHIP, PRIME TV, GENERAL PARTNERSHIP, CHUM
LIMITED, CHUM OTTAWA INC., CHUM TELEVISION VANCOUVER INC. and
PULSE24 GENERAL PARTNERSHIP

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

THE ATTORNEY GENERAL OF QUÉBEC

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**FACTUM OF THE APPELLANTS, CANADIAN ASSOCIATION OF
BROADCASTERS, ET AL.**

PART I - OVERVIEW

1. The following issues are raised in this appeal and require a determination by this Court:
 - Are Part II Fees, levied by the Canadian Radio-television and Telecommunications Commission (CRTC) by way of s. 11 of the *Broadcasting Licence Fee Regulations (Regulations)*, fees or are they taxes?
 - If they are taxes, the Federal Court of Appeal has ruled that s. 11 of the *Regulations* is *ultra vires* s.11 of the *Broadcasting Act (Act)*;

- If the Part II Fees are an illegal tax, are the Appellants entitled to return of the monies they have paid pursuant to this illegal provision? If so, for what period?
- If necessary, should the Appellants be permitted to amend their statement of claim to seek a declaration for recovery of all fees paid since the inception of the Part II fee regime in 1997 to 2006, when the last payments were made?¹

2. At the request of the Respondent, the Court has stated the following Constitutional Question:

1. Are the levies paid by the licensees, pursuant to section 11 of the *Broadcasting Licence Fee Regulations*, 1997, SOR/97-144 a tax within the meaning of s. 53 of the *Constitution Act, 1867*?

1. Les droits qui sont versés par les titulaires de licences conformément à l'article 11 du *Règlement de 1997 sur les droits de licence de radiodiffusion*, DORS/97-144, constituent-ils une taxe pour l'application de l'art. 53 de la *Loi constitutionnelle de 1867*?

Reference: Order of Chief Justice McLachlin dated March 20, 2009, Appeal Record, Vol. III, Tab 20.

3. The Appellants submit that Part II Fees are a tax and that the Constitutional Question should be answered in the affirmative. At the request of the Respondent, the Federal Court has already determined that if these levies are found to be a tax, they are not authorized by section 11 of the *Act*. The Court of Appeal, affirming a decision of Hugessen, J. of the Federal Court, has ruled that the power in section 11 of the *Act* to prescribe a fee does not authorize the imposition of a tax. Therefore, the Corporate Appellants and the members of the Appellant Association are entitled to the return of the monies that the government has illegally collected.

Reference: Decision of Hugessen, J., September 9, 2005, Appeal Record Vol. II, Tab 13, pg. 127; aff'd July 6, 2006, Letourneau, Noël & Evans, J.J.A, Appeal Record, Vol. II, Tab 15, p. 146.

4. At trial, the Federal Court found that the Part II Fees were a tax, and therefore unlawful,² because of the following findings of fact:

¹ The Crown has not required the payment of Part II fees since November of 2006.

² The Trial Judge suspended his declaration of invalidity for a period of 9 months, presumably to allow the Crown time to take remedial action, if so advised. It has not done so.

[17] ... Part I Licence Fees require broadcasting licensees to contribute to the CRTC's regulatory costs on a pro-rated basis, which is calculated on the basis of their respective gross revenues less the applicable exemption. [...]

[19] Part II Licence Fees are levied in addition to Part I Licence Fees. Broadcasters required to pay Part II Licence Fees must pay the CRTC an annual charge equivalent to 1.365% of the amount by which a broadcasting undertaking's gross revenues from broadcasting activities exceed the applicable exemption level. [...]

[21] Part II Licence Fees are entirely deposited into the Consolidated Revenue Fund (CRF), and Part II Licence Fees do not go into a specified purpose account within the CRF.

5. The Trial Judge also relied upon admissions by the Respondent that:

- a) the intent for the Part I/Part II Licence Fee structure, as stated in Public Notices CRTC 1996-149 and 1997-32, was to create a system that would result in approximately the same amount of fees payable on an industry-wide basis as had been collected by the Previous Fee, over a period of three years;
- b) when Part II Fees were introduced, the CRTC had not conducted any studies to determine what the market value of the privilege of holding a broadcasting licence might be;
- c) when Part II Fees were introduced, the CRTC had not conducted any studies to determine what the market value of the privilege of using Broadcasting Spectrum might be.

6. The Trial Judge concluded:

[146] The Crown states that Part II Licence Fees represent a "fair return" for the alleged value of the "privilege". However, the concept of a "fair return" assumes the Crown has quantified that value and assessed it as reasonable. When the *Regulations* were enacted, there were no studies upon which the CRTC based the imposition of a 1.365% charge upon gross revenues, so it is clear that the Crown cannot demonstrate that the CRTC assessed the charge in order to establish a reasonable nexus between the Part II Licence Fees and the value of the alleged privilege. Even as late as 2006, the government is still trying to determine what the value of this "privilege" might be.

Reference: Trial Judgment, Appeal Record, Vol. I, Tab 3, p. 34-35, 83.

7. At no time did the Respondent plead that the fees were used to fund the Canadian Broadcasting Corporation ("CBC") or lead any evidence as to the costs of the CBC or the costs of implementing Canada's broadcasting policy objectives as set out in s.3 of the *Act*.

8. The Trial Judge refused to declare that the Appellants were entitled to return of the fees paid, however his decision was made prior to this Court's ruling in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3 (*Kingstreet*).

Reference: Trial Judgment, Appeal Record, Vol. I, Tab 3, p. 97-100.

9. He also refused to allow the Appellants to amend their statement of claim relating to the term of recovery, as discussed below.

Reference: Order of Justice Shore dated November 20, 2006, Appeal Record, Vol. I, Tab. 2, p. 10.

10. The Federal Court of Appeal allowed the Respondent's appeal, reversed the Trial Judge, and found that the Part II Fees are not taxes. The Court of Appeal did not rule on the request to amend the statement of claim or on the issue of recovery.

Reference: Reasons for Judgment of the Federal Court of Appeal dated April 28, 2008, (Appeal Judgment), Appeal Record, Vol. I, Tab 5.

The Evidence at Trial and the Trial Judgment

11. Pursuant to s. 11 of the *Act*, the CRTC has made regulations establishing classes of licenses and schedules of fees. These Regulations establish two types of fees. Sections 7 through 10 deal with Part I Fees. Section 11 deals with Part II Fees. It is Part II Fees that are in issue in this appeal.

Reference: *Broadcasting Act, 1991*, c. 11; *Broadcasting Licence Fee Regulations*, SOR/97-144.

(i) Part I Fees Recover CRTC's Costs of Regulating Broadcasting

12. The purpose of Part I Fees is to fully recover the regulatory and administrative costs incurred by the CRTC with respect to broadcasting. Part I Fees are based on a formula which takes into consideration the estimated costs of the CRTC, as well as the revenues of broadcasters. Broadcasting licensees contribute Part I Fees to the CRTC's regulatory costs on a pro-rated basis, based on their respective gross revenues less the applicable exemption. For the years 1997-98 to 2005-06 Part I Fees amounted to over \$206 million.

13. Part II Fees are charged over and above the Part I Fees and are simply deposited into the Consolidated Revenue Fund. For the same period, 1997-98 to 2005-06 Part II Fees amounted to over \$791 million.

Reference: Licence Fees Rate Comparison (Trial Exhibit D-1), Appeal Record, Vol. XVI, Tab 88, p. 74; Agreed Statement of Facts, para 43,52,53 Appeal Record, Vol. II, Tab 12, p. 100, 103-104; Trial Judgment, para 19-21, Appeal Record, Vol. I, Tab 3, p. 35; see also letter re: CRTC “Cost Recovery Roundtable”, Appeal Record, Vol. 18, Tab 98, p. 24.

(ii) Intent Expressed at Implementation of the Part I/Part II Fee Regime

14. In recent years, the CRTC has claimed that there is a “three-fold rationale” for Part II Fees, which is also part of the Respondent’s defence of the levy:

- (i) to earn a fair return for the Canadian public for access to, or exploitation of, a publicly owned or controlled resource (i.e. broadcasters’ use of the broadcasting spectrum);
- (ii) to recover Industry Canada costs associated with the management of the broadcasting spectrum; and
- (iii) to represent the privilege of holding a broadcasting licence for commercial benefit.

Reference: CRTC 2005-2006 Estimates (Part III – Report on Plans and Priorities), Appeal Record, Vol. XV, Tab 75, p. 100. See also para 1(c) & (d) of the Respondent’s Statement of Defence (To Amended Amended Statement of Claim, T-2277-03), Appeal Record Vol. 11, Tab 8, p. 32-34; paras 31-36 of the Respondent’s Amended Statement of Defence, T-276-04, Appeal Record Vol. 11, Tab 9, p. 43-44.

15. However, the Trial Judge found that the evidentiary record before the Court did not establish that the intent of Part II Fees, when the *Regulations* were enacted in 1997, was to impose charges for this “three-fold rationale”.

Reference: Trial Judgment, paras 120-126, Appeal Record, Vol. I, Tab 3 p. 71-76.

16. The Trial Judge thoroughly reviewed the evidentiary record. He noted that the CRTC’s Public Notice 1996-149 stated that, effective April 1, 1996, the Treasury Board had granted the CRTC vote-netting authority, whereby the CRTC was authorized to apply revenues it collected towards costs directly incurred for broadcasting activities. The Notice proposed amendments

which ultimately led to the *Regulations* establishing the Part I / Part II Fee regime effective April 1, 1997.

17. Public Notice 1996-149 stated that “[t]he intent of the revised fee structure is to create a system that, in relation to the existing fee structure³, would result in approximately the same amount of fees payable on an industry-wide basis, over a period of three years.” In Public Notice 1997-32, a similar statement was made that the CRTC’s intent in drafting the proposed new regulations was to create a system that would result in approximately the same amount of fees payable as were collected under the existing fee structure for a three year period. There was no reference to any “three-fold rationale”, only the statement in Public Notice 1996-149 that the fee “...includes the costs of regulating the broadcasting spectrum”.

Reference: Trial Judgment, paras 38-42, Appeal Record, Vol. I, Tab 3, p. 39-41; Agreed Statement of Facts, paras 61-66, Appeal Record, Vol. II, Tab 12, p. 106-107.; Public Notice 1996-149, Appeal Record, Vol. XI, Tab 44, p. 188; Public Notice 1997-32, Appeal Record, Vol. XI, Tab 46, p. 202.

18. Indeed, Public Notice 1997-32 stated, “the Commission is satisfied that the new Fee Regulations address the primary reason for their development, namely, to respond to the Treasury Board’s decision granting the Commission vote-netting authority...” [emphasis added]

19. The Trial Judge reviewed the documentary evidence in respect of the articulation of the “three-fold rationale” since the enactment of the *Regulations*, and noted that neither of the Respondent’s factual witnesses (Ms. Roy and Mr. Traversy) testified as to the intent of the Part II Fee regime when the *Regulations* were enacted in 1997. The Trial Judge held that the Respondent led no evidence of internal CRTC discussions or of discussions with Treasury Board to support its contention regarding the “three-fold rationale”. He found that the “three-fold rationale” for Part II Fees was only developed well after the *Regulations* had been enacted, and he inferred that it was only developed to respond to complaints by broadcasters and this legal action.

Reference: Trial Judgment, para 126, Appeal Record, Vol. I, Tab 3, p. 75-76.

³ The existing regulations required an annual licence fee based on the revenue of the undertaking. The minimum fee was \$25 plus 1.8% of the amount by which revenues exceeded specific exemption amounts. All amounts collected were deposited to the Consolidated Revenue Fund.

20. As noted above, Public Notice CRTC-149 published when the Part I/Part II Fee structure was introduced referred to two objectives:

- To create a system that, in relation to the existing fee structure, would result in approximately the same amount of fees payable on an industry-wide basis, over a period of three years (Part I & Part II); and
- Includes the costs of regulating broadcasting spectrum.

Reference: Public Notice CRTC 1996-149, Appeal Record, Vol. XI, Tab 44, p. 186-188.

21. In its Estimates for 1997-99, the CRTC noted that under the “old” fee regime “...a portion of the fees collected by the CRTC are also allocated to cover expenses of Industry Canada for services provided through its Spectrum Management and Regional Operations Activity...”. The only reference to the “new” fee regime is to Part I Fees and their use to finance the CRTC operating expenses in relation to the regulation of the broadcasting industry.

Reference: CRTC Estimates, 1997-97, Appeal Record Vol. XIII, Tax 67, p. 169.

22. Thereafter, in its Estimates for 1998-99, and 1999-2000, the only reference to the purpose of Part II Fees was that they are “...allocated to cover the expenses of Industry Canada for services provided through its Spectrum Management and Regional Operations Activity...”. In the 2000-2001 Estimates there is no reference to a purpose.

Reference: CRTC Estimate, 1998-99, 1999-2000, 2000-2001, Appeal Record, Vol. XIV, Tab 68, p. 27, Tab 69, p. 68, Tab 70.

23. In the 2001-2002 CRTC Estimates, for the first time, the “three part rationale” for Part II Fees suddenly appeared. For the first time there was reference to the purpose of the Part II Fees being for the “privilege of using broadcasting spectrum”; and the “privilege of holding a broadcasting licence for commercial benefit”.

Reference: CRTC Estimates, 2001-2002, Appeal Record, Vol. XIV, Tab 71, p. 125.

24. The evidence suggests that this sudden identification of new purposes was in response to the fact that the legality of Part II Fees was under scrutiny on several fronts as a result of the

decisions of this Court in the *Eurig Estate* case in 1998 and in *Westbank* in 1999.

Reference: *EurigEstate (Re)*, [1998] 2 S.C.R. 565 at paras 15 & 21 [“*Eurig*”]; *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134 at para 22 [“*Westbank*”].

25. Broadcasters had been concerned about the legality of Part II Fees for some time. In June of 2001 the CRTC, which had been receiving complaints and concerns from broadcasters regarding Part II Fees, was planning to raise the matter with officials at the Department of Heritage. In January of 2002, the Canadian Association of Broadcasters wrote to the Treasury Board asking for a repeal of Part II Fees on the basis that they were in fact illegal taxes.

Reference: Memorandum to Yazmine Laroche, Department of Heritage, June 15, 2001, Appeal Record, Vol. XV, Tab 80, p. 174; CAB letter to the Treasury Board President, January 24, 2002, Appeal Record, Vol. XVIII, Tab 101.

26. On June 11, 2003, the Standing Committee on Canadian Heritage issued its Report entitled *Our Cultural Sovereignty: The Second Century of Canadian Broadcasting* in which it states that it believed “...Part II licence fees paid by broadcasters and distributors may not be reasonable”. The government responded that the Department of Canadian Heritage would examine the issue of Part II Fees in a “timely manner”. It has not.

Reference: The Government of Canada’s Response to the Report of the Standing Committee on Canadian Heritage, *Our Cultural Sovereignty: The Second Century of Canadian Broadcasting*, Appeal Record, Vol. XIX, Tab 105, p. 64.

27. In October of 2003, the Standing Joint Committee for the Scrutiny of Regulations, which had been studying the issue of fees, tabled a report on Broadcasting Licence Fees and expressed its concern that Part II Fees exhibited many of the criteria of a tax as identified by this Court in *Eurig*.

Reference: Third Report of the Standing Joint Committee for the Scrutiny of Regulations, Appeal Record, Vol. XV, Tab 81, p. 178 & 179.

28. The Trial Judge also undertook a thorough review of the evidence in support of the factors in this alleged “three-fold rationale” and concluded that there was no support for it.

(iii) Use of Broadcasting Spectrum

29. The Trial Judge reviewed the various types of broadcasting undertakings licensed by the CRTC, finding that they included traditional radio and television broadcasting undertakings, Pay and Specialty (P&S) undertakings, conventional cable undertakings, Satellite Direct to Home (“DTH”) undertakings, Multi-Point Distribution System (“MDS”) undertakings, and Network undertakings. He found that only licensees whose broadcasting licence may be identified by reference to a specific call sign, for example “CJOH-TV” or “CFRA Radio”, utilize a transmitter operating in Broadcasting Spectrum as the primary means for signal distribution.

30. He found that the bulk of Part II Fees are paid by broadcasters who do not use broadcasting spectrum. These include pay and specialty services and the cable and DTH distribution undertakings who, from 1997-98 to 2005-06, paid \$633 million of the \$791 million total (80%).

31. He also noted that the Respondent led no evidence as to what a “fair return” would be or to justify the levy being set at 1.365% of gross revenue as opposed to some other level.

Reference: Trial Judgment, paras 27 - 37 and paras 131-139, Appeal Record, Vol. I, Tab 3, p. 37-39; Licence Fees Rate Comparison (Trial Exhibit D-1), Appeal Record Vol. XVI, Tab 88, p. 74.

(iv) Industry Canada’s Management of Broadcasting Spectrum

32. At paragraphs 24-26, the Trial Judge discussed Industry Canada’s management of electromagnetic spectrum, including spectrum allocated for broadcasting over the airwaves (“Broadcasting Spectrum”).

33. In addition to the fact that the bulk of Part II Fees are paid by broadcasters who do not use spectrum, there is no correlation between Part II Fees and Spectrum management costs. The annual revenues collected by the CRTC as Part II Fees for the years 1997-98 to 2004-05 total some \$512.4 million while the estimated costs incurred by Industry Canada for its management of Broadcasting Spectrum for these same years, total only \$91 million⁴.

Reference: Agreed Statement of Facts, paras 53 and 59, Appeal Record, Vol. II, Tab 12, p. 103-105; Trial Judgment, para 25, Appeal Record, Vol. I, Tab 3, p. 36-37; CAB

⁴ There was no evidence regarding spectrum management costs after 04-05.

letter to Treasury Board, January 24, 2002, Appeal Record, Vol. 18, Tab 101, p. 106.

(v) *The Privilege of Holding a Broadcasting Licence*

34. At trial, and on appeal, the Respondent asserted that Part II Fees may be regarded as a proxy for the value or benefit licensees obtain from a broadcasting licence. However, the Trial Judge found that the Respondent did not provide a quantifiable value of any “privilege” of broadcasting for commercial benefit which would assist the Court in determining whether there is a reasonable nexus between this value and the amounts collected as Part II Fees. Nor did the Respondent provide any justification for setting the levy at 1.365% of gross revenue, other than an attempt to maintain the revenue levels of the old regime. The Respondent’s expert, Peter Lyman, expressly admitted that he had not calculated any explicit value for a broadcasting licence. The Respondent admitted the CRTC had not conducted any studies to determine what the market value of the privilege of holding a broadcasting licence might be when Part II Fees were introduced in 1997, or since.

Reference: Trial Judgment, paras 146-147, Appeal Record, Vol. I, Tab 3, p. 83-84; Agreed Statement of Facts, paras 46-53, 57 & 58, Appeal Record, Vol. II, Tab 12, p. 101-105.

35. The Respondent’s expert, Dustin Chodorowicz, argued that Part II Fees could be seen as the extraction of “economic rent” for the “privilege” of holding a broadcasting licence. However, he acknowledged that economic rent attributable to any “privilege” associated with holding a broadcasting licence and/or using Broadcasting Spectrum is often extracted by governments through taxes. He conceded that the authorities he was relying on agreed that the extraction of economic rent is accomplished by governments through the imposition of taxes.

Reference: Trial Judgment, paras 152-154, Appeal Record, Vol. I, Tab 3, p. 83-84; Evidence of Dustin Chodorowicz, November 23, 2006, p. 837, 1. 2-9, Appeal Record, Vol. VII, Tab 24, p. 18.

36. Indeed, the evidence was overwhelming that the extraction of economic rent is accomplished through the imposition of taxes. In Australia, a regime cited by Mr. Chodorowicz, section 5 of the *Television Licence Fees Act, 1964* provides:

- (i) Subject to subsection (2), there is payable to the Commonwealth by a licensee, **by way of tax** in respect of the licence, fees in accordance with sections 6, 6A and 6B. [emphasis added]

This regime levies the tax as a percentage of the gross earnings in respect of the licence.

Although called a fee, the legislation recognizes that it is clearly a tax.

Reference: Australia Television Services Licence Fees Act 1964 (Trial Exhibit D-4), Appeal Record, Vol. XVI, Tab 90, p. 82.

37. Similarly, a paper by Richard M. Bird of the Department of Economics, University of Toronto, cited by Mr. Chodorowicz, discusses three types of tax. One of these is a tax on economic rent, or pure profits.

Reference: Bird, Richard. "Why Tax Corporations." Working paper 96-02. Prepared for the Technical Committee on Business Taxation. December 1996 (Trial Exhibit D-4), Appeal Record, Vol. XVI, Tab 91, p. 100; see also Applied Microeconomics, Appeal Record, Vol. XVI, Tab 92, p. 126.

38. The Trial Judge also found that the Court was provided with extensive evidence, including the evidence of John Traversy, that any "privilege" associated with holding a broadcasting licence has already been paid for by a broadcaster in numerous ways apart from Part II Fees. These include the CRTC's imposition of conditions of licence on a Broadcasting Undertaking:

- (i) to broadcast a minimum amount of Canadian content;
- (ii) to make contributions to funds for the production of Canadian content; and
- (iii) to make contributions to funds for other projects.

Reference: Trial Judgment, para 149-151, Appeal Record, Vol. I, Tab 3, p. 84-85; Evidence of John Traversy, November 21, 2006, Appeal Record, Vol. V, Tab 22, p. 173-187.

(vi) Part II Fees Do Not Serve a Regulatory Purpose

39. The Trial Judge also noted that the Respondent had not demonstrated that Part II Fees have any regulatory purpose.

40. Again, the Respondent's own witness, John Traversy, admitted that a broadcaster that pays Part II Fees cannot use those funds for contributions towards Canadian content, Canadian

programming, development of Canadian talent, or any similar activities which would contribute to Canada's broadcasting policy objectives. Mr. Traversy also acknowledged that when a reduction of Part II Fees was proposed as a possible incentive to encourage and reward the production of more English-language Canadian television drama, the CRTC did not adopt the proposal. The Trial Judge found this was an acknowledgement that Part II Fees are collected for "general revenue purposes".

Reference: Trial Judgment, paras 95 and 107, Appeal Record, Vol. I, Tab 3, p. 62, 65-66; Evidence of John Traversy, November 21, 2006, pp. 524-527, Appeal Record, Vol. V, Tab 22, p. 196-199; Exhibit P-6, Broadcasting Public Notice CRTC 2004-32, dated May 6, 2004, paras 12 and 62-64, Appeal Record, Vol. XVI, Tab 84, pp. 3, 10.

41. In response to the Respondent's expert witnesses, the CAB Appellants submitted the expert evidence of Dr. Gerry Wall. Dr. Wall explained the process followed by the CRTC when it receives a licence application. The CRTC expects applicants to list their proposed contributions. The licensing process is akin to a "bidding war" where the applicants have to make an assessment, when they apply for a licence, as to what they are willing to offer up by way of financial and other commitments.

42. Accordingly, Dr. Wall testified the CRTC extracts much of the value that might be attributed to a licence through these commitments. These include, at the time of licensing, contributions to local and regional programming production, expenditure levels on Canadian content and the promotion and development of Canadian talent. They also include specific financial contributions which are required at the time of a transfer of ownership or control of the licence. From June 1999 to March 2006 these payments amounted to over \$500 million.

Reference: Trial Judgment, paras 95 and 156, Appeal Record, Vol. I, Tab 3, p. 62, 86; Evidence of Gerry Wall, November 24, 2006, pp. 1074-1075, Appeal Record, Vol. VII, Tab 25, p. 260-261; Expert Report of Gerry Wall, paras 12-29, Appeal Record, Vol. VIII, Tab 26, p. 7-13.

43. Dr. Wall's expert report also pointed out how the Respondent's arguments failed to recognize that much of the value or benefit allegedly associated with holding a licence results from the efforts of broadcasters themselves. The mere fact of holding a licence does not spontaneously result in the generation of gross revenues upon which Part II Fees can be levied.

Dr. Wall testified that the value of a broadcasting licence is attributable to several factors, including the creativity and entrepreneurial skills of owners and managers, exogenous factors that affect the markets for services provided by licence holders and the marketing and promotional efforts of a licensee to build up a brand and profile.

44. He concluded that, rather than supporting the objectives of the *Broadcasting Act* or facilitating some broader regulatory purpose, Part II Fees likely have a detrimental effect upon the very regulatory scheme which the Respondent relies upon in support of its case. The Trial Judge accepted the evidence of Dr. Wall, that Part II Fees are effectively a “leakage” from the Canadian broadcasting system.

Reference: Trial Judgment, paras 8 & 95, Appeal Record, Vol. I, Tab 13, p. 32, 62.

45. There was absolutely no evidence that Part II Fees are used to fund the CBC or the implementation of any policy objective articulated in s.3 of the *Act*. They are simply deposited into the Consolidated Revenue Fund like any tax.

(vii) Conclusion – Part II Fees are a Tax

46. The Trial Judge applied the factors enunciated by this Court in *Lawson, Eurig* and *Westbank*, and subsequently affirmed in *620 Connaught*⁵, and concluded that Part II Fees are taxes.

47. In particular, he found that there was no evidence to support a conclusion that Part II Fees are used to finance the regulatory scheme or that there is a nexus or relationship between the amount of the fees and the costs of the regulatory scheme. He found that the levies do not have a regulatory purpose. There was no evidence that they regulate behaviour or otherwise benefit the regulatory scheme.

Reference: Trial Judgment, paras 98-118, Appeal Record, Vol. I, Tab 3, p. 63-69; *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357 at 363 [“*Lawson*”]; *Eurig, supra*, at paras 15 & 21; *Westbank, supra*, at para 22; *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131 [“*620 Connaught*”].

⁵ These factors have been endorsed again by this Court in *Confédération des syndicats nationaux v. Canada (A.G.)*, 2008 SCC 68 [“*CSN*”]

Court of Appeal

48. The Court of Appeal issued three separate judgments, all reversing, for different reasons, the conclusion of the Trial Judge. Justice Ryer concluded that the fees are less than the costs of the regulatory scheme because the regulatory scheme at issue included all of the costs of implementing the government's broadcasting policy objectives as set out in s.3 of the *Act*, not just the regulatory mandate of the CRTC. Justices Pelletier and Letourneau found that the *Lawson/Eurig/Westbank/620 Connaught* factors do not apply when a levy is charged for a benefit or a privilege.

Reference: Appeal Judgment, Appeal Record, Vol. I, Tab 5.

(i) *Ryer JA*

49. Justice Ryer purported to apply the fifth indicium of the test enunciated by this Court in *Westbank* and *620 Connaught* (the regulated person either benefits from, or causes the need for, the regulation). He found that broadcasters benefit from the regulation of broadcasting by noting that, "it is sufficient to observe that access to the Canadian broadcasting system is limited and those with such access are shielded, to some considerable extent, from competition, especially from large foreign broadcasting concerns." He found that the "benefit is delivered by the Commission through the licensing provisions which are primarily found in sections 9 and 22 of the *Act*."

Reference: Appeal Judgment, para 64; *Westbank*, para 28; *620 Connaught* paras 25 & 36.

50. However, he did not limit the identification of the relevant regulatory scheme to the regulation of broadcasting through the licensing provisions of the *Act*. Notwithstanding the evidence at trial that Part II Fees are a "leakage" from the broadcasting system, and the Respondent's pleaded justification for Part II Fees, Justice Ryer identified the regulatory scheme at issue as the entirety of the Canadian broadcasting system. Accordingly, the costs to be considered would be all of the costs that are incurred in fulfilling the policy objectives and other requirements of the *Act*, including the activities of all those participating in the system and the operating costs of the CBC.

Reference: Appeal Judgment, paras 59 – 61, Appeal Record, Vol. I, Tab 5, p. 149-150.

51. Not only did he identify the regulatory scheme as the entirety of the Canadian broadcasting system, but he also developed the concept of a “soft linkage” when there is no demonstrable attempt or effort to match the revenues obtained from the levy to the total costs of the regulatory scheme. The “soft linkage” approach merely requires that the total costs of the regulatory scheme exceed the amount of the levy, and nothing else.

Reference: Appeal Judgment, para 70, Appeal Record, Vol. I, Tab 5, p. 153-154.

52. Having identified the regulatory scheme as “the entire Canadian broadcasting system”, he determined that the relevant costs of the regulatory scheme are those that relate to the fulfillment of the policy objectives of the *Act*, not just those relating to the regulatory activities of the CRTC. He acknowledged that the Respondent had the onus of demonstrating what those costs are, and that the Respondent did not present any evidence with respect to additional regulatory costs. However, he undertook his own inquiries and determined that appropriations to the CBC are a matter of public record, as part of the *Appropriation Acts*. Since funding of the CBC exceeded the amount of Part II Fees collected during the claims period, he concluded:

[82] In my view, the argument that the Part II Fees must be specifically traceable to regulatory costs incurred in a regulatory scheme cannot be accepted. It is sufficient that the Part II Fees, which arise in the regulatory scheme embodied in the Act and the Regulations, are deposited into the Consolidated Revenue Fund and that costs of a lesser or equivalent amount, which are incurred in that regulatory scheme, such as appropriations to the Canadian Broadcasting Corporation, are withdrawn from the Consolidated Revenue Fund. [...]

Reference: Appeal Judgment, para 82, Appeal Record, Vol. I, Tab 5, p. 159.

53. In the alternative, while he recognized that there was no evidence whatsoever as to the value of the benefit that a broadcaster might receive from a licence, he accepted the Respondent’s argument that a revenue-based licence fee may be seen as a reasonable proxy for the value of the privilege or benefit that the licensee receives. He did not address the issue of what percentage of gross revenue a fee should represent, merely noting that a fee based on a percentage of gross revenue will increase or decrease as the revenue of the licensee increases or decreases.

Reference: Appeal Judgment, para 91, Appeal Record, Vol. I, Tab 5, p. 162-163.

54. He also adopted the notion, expounded by Justices Pelletier and Letourneau, that the marketplace, not Parliament, was the appropriate venue for the adjudication of the issue of whether the levies were too high or not.

Reference: Appeal Judgment., para 95, Appeal Record, Vol. I, Tab %, p. 164.

(ii) Pelletier JA

55. Justice Pelletier did not apply the tests developed by this Court in cases such as *Westbank* and *620 Connaught* to distinguish between a tax and a fee. He focused on the argument that in exchange for the payment of the Part II Fee, the right to broadcast is obtained. Notwithstanding that this is identical to the situation in *620 Connaught* where, in exchange for the payment of the fee, the right to sell alcohol was obtained, he determined that there was no fee versus tax issue. His reasoning can be summed up as follows:

[110] [...] because there is no deprivation of property by compulsion of law, the question of democratic accountability does not arise. Money voluntarily paid to the government in exchange for a commercial right or for property is not a tax.

[111] [...] The fact remains that in return for payment of the fees, the payor acquires or maintains the right to engage in a highly regulated, highly sheltered industry with a significant potential for economic gain. No one is bound to acquire a licence; those who feel the fees are too high are free to go into some other line of business, or to sell their licence on such terms as the regulatory scheme permits.

Reference: Appeal Judgment, paras 110 & 111, Appeal Record, Vol. I, Tab 5, p. 170.

(iii) Létourneau JA

56. Justice Letourneau also approached the matter from a different perspective than that enunciated by this Court in *Westbank* and *620 Connaught*. In fact, he rejected that analysis and the need for any nexus between the fee and the regulatory scheme, or any linkage to the regulatory scheme when the charge is levied for a benefit or a privilege. He also adopted the view that a charge for a licence cannot be a tax and that market forces would intervene if the levy became too high.

Reference: Appeal Judgment, paras 103 & 104, Appeal Record, Vol. I, Tab 5, p. 167.

PART II-QUESTIONS IN ISSUE

57. Are the levies paid by the licensees, pursuant to section 11 of the *Broadcasting Licence Fee Regulations*, 1997, SOR/97-144 a tax within the meaning of s. 53 of the *Constitution Act, 1867*?
58. If they are taxes, the Federal Court of Appeal has ruled, and the Attorney General accepts, that s. 11 of the *Regulations* is *ultra vires* s.11 of the *Broadcasting Act (Act)*.
59. If the Part II Fees are an illegal tax, are the Appellants entitled to return of the monies they have paid pursuant to this illegal provision? If so, for what period?
60. If necessary, should the Appellants be permitted to amend their statement of claim to seek a declaration for recovery of all fees paid since the inception of the Part II fee regime in 1997 to 2006, when the last payments were made?

PART III-ARGUMENT

Introduction

(i) Overview

61. The Respondent argued that Part II Fees are levied for the purposes set out in the “three-part rationale” discussed above. However, the purposes of obtaining a “fair return” for the privilege of using broadcasting spectrum or for the privilege of holding a broadcasting licence for commercial benefit were not the purposes articulated by the CRTC when the *Regulations* were enacted.
62. In addition, as the Respondent’s own witness testified, taxes are often used to extract the value of any privilege associated with entry into a regulated activity.
63. In any event, s. 11 does not authorize the charging of a fee for a privilege.
64. As the Federal Court and Federal Court of Appeal have already ruled in their decisions in respect of the Preliminary question of Law stated by the Respondent, if Part II Fees are a tax,

they are *ultra vires* s. 11 of the *Act* which only authorizes the imposition of fees.

Reference: Decision of Hugessen, J., September 9, 2005, Appeal Record Vol. II, Tab 13, pg. 127; aff'd July 6, 2006, Letourneau, Noël & Evans, J.J.A, Appeal Record, Vol. II, Tab 15, p. 146.

65. This case is, therefore, similar to the issue in *Eurig*, where this Court determined that s. 5 of the *Administration of Justice Act* only authorized the imposition of a fee. The probate levies in question were in fact and in law a tax, and therefore *ultra vires* the authority in s. 5.

Reference: *Eurig, supra*, at para 38 & 39.

66. As this Court stated in *Eurig*:

“In our system of responsible government, the Lieutenant Governor in Council cannot impose a new tax *ab initio* without the authorization of the legislature. As Audette J. succinctly stated in *The King v. National Fish Co.*, [1931] Ex. C.R. 75, at p. 83, “[t]he Governor in Council has no power, *propria vigore*, to impose taxes unless under authority specifically delegated to it by Statute. the power of taxation is exclusively in Parliament.”

The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. In so doing, it ensures parliamentary control over, and accountability for, taxation.”

Reference: *Eurig* at para 31 & 32

67. More recently, this court has again stressed the importance of the distinction between taxes and regulatory changes in *CSN*.

Reference: *CSN* at para 81-96

(ii) The Fee vs. Tax Test - Lawson/Eurig/Westbank/620 Connaught Factors

68. It has been well settled by this Court that the framework to be used to identify whether a levy is a tax (the “*Lawson/Eurig/Westbank/620 Connaught* factors”) is whether it is: 1) compulsory and enforceable by law; 2) imposed under the authority of the legislature; 3) levied by a public body; 4) intended for a public purpose; and 5) has no reasonable nexus between the quantum charged and the cost of the service provided or the regulatory scheme it is intended to

support.

Reference: *Lawson* at p. 363; *Eurig* at paras 15 & 21; *Westbank* at para 22; *620 Connaught* at paras 25 & 36

69. It is only the fifth factor which is in question in this case. What is the regulatory scheme, and is there a reasonable nexus between it and the quantum charged?

70. The decisions of Justices Pelletier and Letourneau also raise the issue of whether the *Lawson/Eurig/Westbank/620 Connaught* factors are even applicable in a case such as this.

(iii) Errors by the Federal Court of Appeal

71. It is submitted that the Court of Appeal has significantly misapprehended the nature of the fee versus tax debate and misconstrued and misapplied the *Lawson/Eurig/Westbank/620 Connaught* test. Justice Ryer was in error in identifying the relevant regulatory scheme as the entire Canadian broadcasting system and the relevant costs as being all of the costs that are incurred in fulfilling the policy objective and other requirements of the *Act* and the *Regulations*, including the operating costs of the CBC.

72. Justices Pelletier and Letourneau were in error in determining that the *Lawson/Eurig/Westbank/620 Connaught* analysis is not applicable in the case where a levy is charged for a licence which conveys the right to engage in a commercial activity.

What is the Extent of the Regulatory Scheme?

73. In *620 Connaught*, this Court confirmed that a regulatory charge is normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected must be used to finance the regulatory scheme or to alter individual behaviour. In the latter instance, the fee may be, “set at a level designed to proscribe, prohibit or lend preference to the behaviour...”

Reference: *620 Connaught* para 20, citing *Westbank* at para 29, referring to *Ottawa-Carleton (Regional Municipality) By-law 234-1992 (Re)*, [1996] O.M.B.D. No. 553 (QL) at para 122, and *Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General)* (1997), 144 D.L.R. (4th) 536 (N.S.S.C.) paras 26 & 43 (aff’d (1997), 151 D.L.R. (4th) 575 (N.S.C.A.), leave to appeal refused, [1997] 3 S.C.R. vii).

74. Part II Fees are clearly not user fees and they are clearly not used to finance the costs of the CRTC's regulatory activities, as the government admits that those costs are fully covered by the Part I Fees.

75. The government has never argued that the fees are intended to proscribe, prohibit or lend preference to certain conduct. Indeed, the evidence was that Part II Fees do not contribute either to the CRTC's regulatory mandate or to the overall implementation of broadcasting policy objectives. The evidence was that these fees result in a "leakage" out of the system and reduce the amount of money available to broadcasters to undertake commitments to objectives such as local programming or Canadian content objectives.

Reference: See paragraphs 39-45 above.

76. The Appellants submit that the approach in *Westbank* and in *620 Connaught* is the proper analysis, but that Justice Ryer erred in his application of that analysis and in his conclusion that the relevant regulatory scheme in this case includes the costs to the government of implementing Canada's broadcasting policy objectives generally, including the costs of funding the CBC.

77. The regulatory scheme for the purpose of the fee versus tax analysis cannot reasonably be the entire Canadian broadcasting system. The situation in this case is analogous to that in *620 Connaught*. At paragraph 35 of his decision in that case, Justice Rothstein recognized that if the regulatory scheme is very broad, it may not be sufficiently related to the persons being regulated. He adopted the analysis of Justice Evans in the Court of Appeal decision where he declined to attribute the fees charged in that case to the operations of the Department of Canadian Heritage at large, or even to the administration of the entire system of national parks. Both this Court and the Court of Appeal limited the regulatory scheme in that case to only the regulation of Jasper Park.

Reference: *620 Connaught Ltd. v. Canada (Attorney General)*, [2007] 2 F.C.R. 446 at paras 44 & 45.

78. The entire Canadian broadcasting system, including funding of the operations of the CBC and the implementation of the broad broadcasting policies enunciated in the *Act*, is not sufficiently related to the persons being regulated in this case. Indeed, it is also important to note

that in *Barrie Public Utilities v. Canadian Cable Television Assn.* this Court stated that (as a matter of law) it would be a “mistake” to treat the objectives laid out in statutes as power-conferring provisions.

Reference: *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, at para 42.

79. Justice Ryer acknowledged that the regulatory scheme that benefits broadcasters is found in the licensing function of the Commission. It is this licensing function that confers the benefit on a licence holder. He makes this clear at paragraph 92 of his reasons. He made no finding that broadcasters benefit from the broader Canadian broadcasting policy and he failed to even acknowledge the evidence, as discussed above at paragraphs 38 and 41 to 44, of the Respondent’s own witness, Mr. Traversy, and of Dr. Wall that these Part II Fees are not only not connected to, but actually detract from, the implementation of broadcasting policy objectives such as Canadian content requirements and development of Canadian programming and talent.

Reference: Appeal Judgment, para 92, Appeal Record, Vol. I, Tab 5, p. 163.

80. He also failed to acknowledge that the Canadian broadcasting scheme, created through the various policies and regulations described, results in a public benefit to Canadian society as a whole, and not merely a private benefit to individual broadcasting licensees carrying on operations for an alleged commercial benefit within that regulatory scheme. Some of the policies and regulations cited by the Respondent are funded by contributions from licensees themselves, not just the Respondent. As the evidence shows, these policies and regulations, the funding requirements placed on broadcasters and the conditions of licence imposed on them result in an increase in the costs incurred by licensees and a reduction of market opportunities that might otherwise be available to them. Evidence at trial showed that many individual licensees in fact lose money and have not been profitable, but may nevertheless pay Part II Fees, because they are imposed upon gross revenues.

Reference: Cross Examination of R. Pittman, November 23, 2006, Appeal Record Confidential Vol. I, Tab 2, p. 43, 44.

81. Part II Fees are levied in the context of the licencing function of the CRTC, which is but one mechanism by which the government has chosen to implement its broadcasting policy. As is

clear from subparagraph 9(1)(b)(i) of the *Act* the licencing function is intended to allow the CRTC to impose conditions on licencees for that purpose. The Commission also issues licences to the CBC in accordance with subparagraph 9(1)(b)(ii). The conditions that may be imposed in licences issued to the CBC are intended to ensure that the CBC meets its separate programming objectives as set out in paragraphs 3(1)(l) and (m) and section 46 of the *Act*.

82. The obligations and the objectives of the CBC are separate from those of broadcasters generally.

Reference: *Broadcasting Act*, para 3 (1) (l) (m), subpara 9 (1) (b) (i) & (ii), s. 46

83. In this case it is submitted that the relevant regulatory scheme is the licencing function of the CRTC as set out in Part II of the *Act*. Section 9 of the *Act* provides for the creation of licences and the terms and conditions that the CRTC may impose by way of the licensing function. Section 11 provides for regulations to establish categories of licences and to set fees for licences. This licencing activity is separate and distinct from the activities of the CBC, which are set out in Part III of the *Act*

***La Presse* is not Determinative of the Issues Before the Court Today**

84. At paragraphs 60-61, and again at paragraph 78, Justice Ryer relies heavily on the decision of the Exchequer Court in *La Presse* for support of his view that a broad view of the regulatory scheme, particularly the funding of the operational costs of the CBC, is justified. It is submitted that his reliance on *La Presse* is misplaced.

- (i) Although the Exchequer Court did refer to the income required by Radio Canada (CBC), there is significant doubt as to whether that is what was meant. All of the evidence cited by the Exchequer Court prior to this conclusion relates to the costs of regulating transmission activities, by all users of radio frequencies, not just public broadcasters, by the Department of Transport;
- (ii) In any event, there is absolutely no basis for concluding that the regulatory schemes in place in 1936, when the CBC was created, or in 1960, at the time of the *La Presse* decision have any bearing on the regulatory scheme that is in issue in this case.

Reference: *Procureur Général du Canada c. La Compagnie de Publication La Presse, Ltée*, [1967] S.C.R. 60 and *La Compagnie de Publication La Presse Ltée c. Procureur Général du Canada*, [1964] Ex. C.R. 627 (together “*La Presse*”).

(i) The Evidence in *La Presse*

85. It does not appear that any evidence was led in the *La Presse* case as to the costs of operating the CBC. Certainly, the Exchequer Court did not cite any.

86. The Appellants submit that *La Presse* does not stand for the proposition that the regulatory scheme that should be looked at to determine if these Part II Fees are really a tax, "...should be considered to encompass the activities that are being regulated, that is to say, the activities of all those participating in the Canadian Broadcasting system."

Reference: Appeal Judgment, para 59, Appeal Record, Vol. I, Tab 5, p. 149.

87. Support for this broad view cannot be found in *La Presse*. The regulatory schemes are very different, as described below, and the evidence before the Court did not relate to the costs of the CBC. The costs cited in the evidence were those for the administration of the Board of Broadcast Governors [Bureau des gouverneurs] and the Ministry of Transport for its radio frequency management, regulation and supervision activities.

(ii) The Regulatory Schemes are very Different

The 1936 Regime

88. In 1936, Broadcasting was governed by the *Canadian Broadcasting Act, 1936*. Section 3 created the Canadian Broadcasting Corporation, [Société Radio-Canada] (CBC). Sections 21 and 22 provided that no private station was to operate in Canada without the permission of the CBC, and that they were to act in accordance with regulations made by the CBC. In other words, the CBC performed functions similar to those performed today by the CRTC.

89. Section 14 provided that the Minister of Transport was to deposit to the account of the CBC "the moneys received from licence fees in respect of private receiving licences and private station broadcasting licences after deducting from the gross receipts the costs of collection and administration, such costs being determined by the Minister from time to time".

90. The issuance of private receiving licences and private station broadcasting licences was governed by the *Radiotelegraph Act, 1913*, administered by the Minister of the Naval Service.

Section 10(a) authorized the making of regulations prescribing a tariff of fees for such licences. In 1936, the relevant regulations were the *Radio Regulations, 1933*, as amended.

91. There is no basis to conclude that the payment of these fees was intended to offset the operating costs of the CBC as opposed to the costs incurred by the CBC as the regulator.

The Regime in Effect at the Time of *La Presse*

92. Broadcasting in 1960 was governed by the *Broadcasting Act* of 1958, S.C. 1958, c. 22. Broadcasting was regulated by the Board of Broadcast Governors [Bureau des gouverneurs de la radiodiffusion] (Board). Licences to establish a broadcasting station were issued under the *Radio Act, 1938* R.S.C. 1952, c. 233 by the Minister of Transport. There was no provision in the *Broadcasting Act* authorizing the Board to levy fees or issue licences. By virtue of section 12 of the *Broadcasting Act, 1958*, the Board had to hold hearings and approve the issuance of a licence under the *Radio Act, 1938* by the Minister of Transport.

93. Section 33 provided that funding of the CBC was through its operating income and Parliamentary appropriations for capital purposes.

94. The *Radio Act, 1938*, the legislation at issue in *La Presse*, governed the issuance of broadcasting licences by the Minister of Transport. Section 3(a) provided for the prescribing of fees to be paid for licences. The legislation was silent as to what would happen to licence fees.⁶

95. The fees in issue in *La Presse* were prescribed by the *General Radio Regulations* of 1960 which had changed the fee structure from a flat fee, based on gross revenue, as found in the 1958 *General Radio Regulations, Part I* to a percentage, based on gross revenue.

Conclusion on the Regulatory Scheme Issue

96. It is submitted that the decision of this Court in *620 Connaught* is dispositive of the issue in this case. In *620 Connaught* the regulatory scheme was the regulation of Jasper Park because

⁶ In fact, by the time of the *La Presse* case, a provision in the *Radio Act, 1938* which had allowed the Governor in Council to pay a portion of the fees collected in respect of licences for private receiving stations to any person or department for services rendered in connection with the issuance of such licences had been eliminated. See s. 3(1)(b) of the *Radio Act, 1938*, S.C. 1938, c. 50 and ss. 2 and 9 of *An Act to Amend the Radio Act, 1938*, S.C. 1952-53, c. 48. There was never a comparable provision allowing the allocation of fees collected by the Department of Transport for broadcasting licences.

there was a close relationship between the Appellants' business and the regulation of the Park. They benefited from the regulation and their commercial activities in the Park caused the need for the regulation.

97. This Court expressly rejected an indirect relationship, which is essentially the same as the "soft linkage" approach which Justice Ryer had to develop in order to identify the entire Canadian broadcasting system and the costs of implementing Canada's broadcasting policy, including the operational costs of the CBC, as the regulatory scheme and regulatory costs at issue.

98. Similarly this Court has emphasized again, in *CSN* that,

"Revenue collection [by way of a fee] must be related to the regulation or must in itself have a regulatory purpose of influencing the behaviour of the persons concerned (*Westbank*, at para 44)

Reference: *CSN* at para 72, Part II Fees have no regulatory purpose.

The Fee for a Privilege Argument

(i) The Respondent's New Purpose

99. The Respondent asserts that the Part II Fees are fees and not taxes by pointing to statements of their purpose, particularly the "three part rationale", which were only developed after the Regulations had been passed, and their constitutional validity questioned.

Reference: CRTC Estimates, 2001-2002, Appeal Record, Vol. XIV, Tab 71, p. 125.

100. This Court has clearly established that the purpose attributable to legislation when it is judicially considered is only that which was intended by those who enacted it, prior to its passage. "Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable." Although certain shifts in the emphasis accorded to different aspects of the purpose are permissible, a law can only be justified on the basis of the purpose for which it was enacted. A purpose assigned to a law at a later date by those in charge of applying it is not to be considered in justifying a purported exercise of authority granted by

the law.

Reference: *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at paras 93-98, *R. v. Butler*, [1992] 1 S.C.R. 452.

101. Prior to the enactment of Part II fees in 1997, the purpose that was articulated by the CRTC to the public, to the Treasury Board and in its reports to Parliament, did not refer to any intention related to extracting the value of the privilege of using broadcasting spectrum or holding a broadcasting licence for commercial benefit. The “three part rationale” relied on by the Respondent to substantiate its claim that the Part II Fees are not a tax was only asserted beginning in 2001-2002, after questions began to arise about their propriety.

Reference: Trial Judgment, paras 38-42, Appeal Record, Vol. I, Tab 3, p. 39-41; Agreed Statement of Facts, paras 61-66, Appeal Record, Vol. II, Tab 12, p. 106-107.; Public Notice 1996-149, Appeal Record, Vol. XI, Tab 44, p. 188; Public Notice 1997-32, Appeal Record, Vol. XI, Tab 46, p. 202.

102. However, this *post facto* justification cannot be relevant in assessing the nature of the fees. Under this Court’s “shifting purpose” doctrine, the original purpose must govern the examination of legislation. It is submitted that no purpose for the original enactment of the Regulation imposing the Part II Fees in 1997 substantiates the Respondent’s claim that they constitute a fee and not a tax. Therefore, in light of their features and effect, the Part II Fees must be considered to impose a tax.

(ii) Taxes are Used to Extract “Economic Rent” or the Value of a Privilege

103. In any event, the argument that these levies may be imposed in exchange for the “privilege” of holding a broadcasting licence or in order to extract the economic rent or value attributable to that privilege does not assist in the analysis of whether the levies are taxes or fees.

104. As the Respondent’s own witness, Mr. Chodorowitz, admitted, and as the references that he used in support of his expert report confirmed, this economic rent is frequently extracted through the imposition of taxes. Therefore, the Crown’s argument that because these Part II Fees are allegedly imposed to extract the value of the privilege of holding a broadcasting licence does not assist in addressing the question of whether such charges are fees or taxes. In most cases,

such charges are taxes.

Reference: Trial Judgment, paras 152-154, Appeal Record, Vol. I, Tab 3, p. 85-86; Evidence of Dustin Chodorowicz, November 23, 2006, p. 837, 1. 2-9, Appeal Record, Vol. VII, Tab 24, p. 18.

(iii) A Fee for a Privilege Must Bear a Relationship to the Value of the Privilege

105. Assuming that a fee for a privilege is different from a regulators charge, and that a fee can be charged to extract the value of a privilege, the fee must relate in some way to the value of the privilege.

106. The requirement for there to be a nexus between the quantum charged and regulatory costs for alleged “privileges” as well as user fees was recognized by the Treasury Board’s own *Cost Recovery and Charging Policy* published in 1997 (the year the *Regulations* came into force):

“Charging ... cannot be used simply as a means of generating revenue to meet the funding requirements of a department or agency. There must be a relationship between the fee charged and the cost of the good or service, **or the value of the privilege provided to clients**. [...] Before attempting to establish a price, it is important to be aware of the full cost of providing services. Only in that context, can one determine the appropriate price to be charged. In the case of rights and privileges, pricing based on market value is often a more appropriate approach. Where there is a mix of public and private benefits, fees should be lower than full cost.” [Emphasis added]

Reference: *Cost Recovery and Charging Policy* (Archived Version), Treasury Board Secretariat at p. 1, Appeal Record, Vol. XII, Tab 56, p. 150; Transcript Read-ins of the Examination of James Stefanik at Tab C, Appeal Record, Vol. XVII, Tab 95. This Policy was subsequently replaced by the Treasury Board’s *External Charging Policy* Appeal Record, Vol. XIII, Tab 59.

107. The approach taken by the government itself in its policies regarding the imposition of fees in respect of privileges is identical to that which has been adopted by the Auditor General of Canada in a recent study that she undertook of various federal regimes in which fees are charged by the government. In her report, she described fees as follows:

Federal government fees can be charged to an individual or organization for a good, a service, or the use of a facility, such as a park campsite. Fees can also be charged for the right or privilege to use publicly owned or managed resources—the fee for a commercial fishing licence, for example.

108. In her analysis of these differing types of fees, the Auditor general went on to say as follows:

1.2 There are two categories of fees. The first category includes fees for goods, services, or the use of a facility; examples include the amount charged for a government publication (good), the charge for inspection services (service), and the cost to enter a federal park (use of a facility). For these fees, the amount charged is normally intended to recover all or part of the cost to the government (not only the organization concerned) of providing that good, service, or use of a facility.

1.3 The second category of fees includes those for rights or privileges, which mainly include authorization to use publicly owned or managed resources. Examples include a licence to fish commercially or to operate a business on federal property. The amount charged for these fees has normally not been related to costs but rather to the market value of the right or privilege, which can be determined by looking at equivalent fees or proxies (domestic or international) or by assessing a fee's potential value. The objective for these fees is to earn a fair return for Canadians from the rights or privileges granted by the government on behalf of all Canadians.

Reference: Report of the Auditor General of Canada – May 2008: Chapter 1 – Management of Fees in Selected Department and Agencies, pp. 3 and 31.

109. Her Approach, and that of the government policies noted above, are consistent with that in the *User Fees Act* which also directs that the benefit or advantage that accrues to the entity that is required to pay the fee must be assessed and must play a role in setting the level of the fee. Despite the title, this legislation applies to all fees that are charged:

"user fee"

«*frais d'utilisation*»: means a fee, charge or levy for a product, regulatory process, authorization, permit or licence, facility, or for a service that is provided only by a regulating authority, that is fixed pursuant to the authority of an Act of Parliament and which results in a direct benefit or advantage to the person paying the fee.

"direct benefit or advantage"

«*avantage direct* »: means a benefit to the client paying the user fee with that benefit being either unique to that client or distinct from and greater than benefits that could also accrue to any other person or business as a result of that user fee being paid.

Reference: *User Fees Act*, S. C. 2004, c. 6, s. 2.

110. While the Respondent alleges that Part II Fees represent a charge for the privilege of broadcasting for commercial benefit, this rationale does not hold up to scrutiny as the evidence was that many broadcasters carry on business for commercial benefit without being required to pay Part II Fees. When the *Regulations* were enacted, a basic licence fee for all undertakings was eliminated, resulting in over 2,000 broadcasters not being required to pay fees for the

“privilege” of operating for commercial benefit. Subsequently, the CRTC revoked the licence requirement (and the requirement to pay Part II Fees) for over 1,300 broadcasting distribution undertakings with fewer than 2,000 subscribers. Later, additional cable broadcasting distribution undertakings were similarly exempted, such that many undertakings that would otherwise have had to pay Part II Fees are now able to carry on business for commercial benefit without being obliged to pay such charges.

Reference: Public Notice 1996-149, Appeal Record, Vol. XI, Tab 44, p. 183; Public Notice 1997-32, Appeal Record, Vol. XI, Tab 46, p. 201; Evidence of John Traversy, November 21, 2006, Appeal Record, Vol. V, Tab 23, p. 171-172; Letter from Jim Stefanik (CRTC) dated October 3, 2003 (Trial Exhibit P-4), Appeal Record, Vol. XV, Tab 82, p. 181.

111. In this case, the Respondent has admitted that no reviews of the relationship between the Part II Fee revenues and the value that may be attributed by broadcasters for a licence exist. The Respondent also admitted that when Part II Fees were introduced no studies had been conducted to determine what the market value of the “privilege” of holding a broadcasting licence might be. The Trial Judge’s holding at paras. 140-151 that there is no reasonable connection between Part II Fees and the alleged “privilege” of broadcasting for commercial benefit is an obvious conclusion, well supported by the evidence.

Reference: Trial Judgment at paras 140 – 151, Appeal Record, Vol. I, Tab 3, p. 80-85; Request to Admit at paras 44, 46, 47 & 51, Appeal Record, Vol. II, Tab 10, p. 56-57; Response to Request to Admit at para 1, Appeal Record, Vol. II, Tab 11, p. 75.

112. Furthermore, as was held by the Trial Judge, because Part II Fees are collected from broadcasting undertakings that do not use Broadcasting Spectrum, and because Industry Canada’s costs of regulating such spectrum are vastly exceeded by Part II Fee revenues, the argument that Part II fees are a charge imposed for the “privilege” of using a public resource cannot be sustained.

Reference: Trial Judgment at paras 131-139, Appeal Record, Vol. I, Tab 3, p. 77-80.

113. The Trial Judge also found as a fact that:

- (i) there is no mention in the *Regulations* or any other document prepared before the *Regulations* were enacted of an intent to impose a fee for the ‘privilege’ of holding a broadcasting licence,
- (ii) the publicly stated intent for the enactment of the *Regulations* reiterates a focus upon maintaining revenues and does not articulate a notion of charging for a ‘privilege,’ and
- (iii) the Respondent led no evidence, and none of the Respondent’s factual witnesses testimony supported the CRTC’s contention, about the intent of the *Regulations* when enacted.

Reference: Trial Judgment, paras 120 – 126 & 141, Appeal Record, Vol. I, Tab 3, p. 71-76, 81.

114. These findings all support the Trial Judge’s conclusion that there is no reasonable connection between Part II Fees and any articulated regulatory purpose, costs or alleged privilege. The Respondent simply has not demonstrated that there is a reasonable nexus between 1.365% of a licensee’s gross revenues and the value of the privileges alleged by the Respondent.

(iv) No Authority to Impose a Fee for a Privilege

115. Perhaps even more importantly, the CRTC has not been authorized by the *Act* to impose a fee for a privilege. This should be contrasted with the statutory provision considered in *620 Connaught* (section 24 of the *Parks Canada Agency Act*, S.C., 2000, c. 32) which provided that Parks Canada may fix fees in respect to “products, rights or privileges.” The *Act*’s authorization for the CRTC should also be contrasted to section 19.1 of the *Financial Administration Act* which also expressly authorizes the imposition of “fees or charges” for “a right or privilege conferred” by the Respondent.

116. The statutory provision at issue in *620 Connaught* as well as many other statutes establish that when Parliament intends to provide authority to collect a fee in respect of a privilege, it does so explicitly. For example, the *Canadian Food Inspection Agency Act*, S.C. 1997, c. 6, section 25, *Department of Health Act*, S.C. 1996, c. 8, section 7, *Department of Social Development Act*, S.C. 2005, c. 35, section 20, *Department of Industry Act*, S.C. 1995, c. 1, section 19, and the *Oceans Act*, S.C. 1996, c. 31, section 48 all unambiguously authorize the imposition of fees for “privileges.” Section 11 of the *Act* does not.

The Market Forces Argument

117. All three of the Appeal Court Judges determined that there does not need to be any attempt to value a privilege. Justice Ryer simply accepted that a rate of 1.365% of gross revenue was suitable, without any evidence. Indeed, he expressly found that, “[i]t is not incumbent upon the Commission to establish the value of the privilege or benefit.”

Reference: Appeal Judgment, para 91, Appeal Record, Vol I, Tab 5, p. 162-163.

118. Justice Ryer, as well as Justices Pelletier and Letourneau all approached the quantum of the fee without any reference to the value of the alleged privilege. They all adopted the view that the marketplace would operate to “adjudicate” the question of the amount of the fee. If the revenues are too high, the broadcaster will seek out another investment. Again, this argument is singularly unhelpful in the determination of whether a levy is a fee or a tax.

Reference: Appeal Judgment, paras 95, 104 & 111, Appeal Record, Vol. I, Tab 5, p. 164, 167, 170.

119. Assume that Parliament has imposed a Broadcasting tax on broadcasters set at 1.365% of gross revenues. If that tax is seen as too high, current broadcasters may leave the market and new entrants will avoid the market. As the tax rises, there will be even fewer new entrants and more broadcasters may leave the market.

120. Similarly, if the fees which were at issue in *620 Connaught* were to become too high, presumably there would be fewer businesses seeking a licence to sell alcohol.

121. Market forces will operate in exactly the same manner on fees as they will on taxes. Therefore, the market forces argument cannot replace the criteria which this Court has established that there must be a regulatory purpose for the imposition of the fees.

A Tax is not Dependent on there Being a Deprivation of Property

122. Justice Pelletier also erred in his conclusion that because there is no deprivation of property by compulsion of law, these levies cannot be taxes, and that money voluntarily paid to the government in exchange for a commercial right or for property is not a tax.

Reference: Appeal Judgment, para 110, Appeal Record, Vol. I, Tab 5, p. 170.

123. In *620 Connaught* the issue was whether money voluntarily paid to the government for a licence to sell alcoholic beverages in Jasper Park constituted a fee or a tax. There was no suggestion by this Court that the charge in that case could not be a tax simply because it was paid in exchange for a commercial right.

124. In *Nanaimo Immigrant Settlement Society v. British Columbia* the British Columbia Court of Appeal found that licence fees charged for the right to operate a bingo were a tax and not a fee. The analysis was based on the decision of this Court in *Westbank* and looked at the revenue from the fees compared to the costs of regulating the operation of these bingo activities. The fees were found to grossly exceed any regulatory costs, they were directed into the Consolidated Revenue Fund and were found to be taxes for that reason. The mere fact that the fees were paid in order to have the right to operate a bingo, an activity which was otherwise proscribed, did not mean that the fees did not have to have a regulatory purpose or bear a relationship to the costs of the regulatory scheme.

Reference: *Nanaimo Immigrant Settlement Society v. British Columbia* (2004), 242 D.L.R. (4th) 394 (B.C.C.A.), paras 33-35.

Conclusion

125. It is submitted that the Court of Appeal misapplied the framework established by this Court and described above as the “*Lawson/Eurig/Westbank/620 Connaught* factors”. The Trial Judge was correct. Part II Fees are not tied to a regulatory scheme. The regulatory scheme at issue in this case must reasonably be the regulatory functions of the CRTC, not the implementation of the entire panoply of Canada’s broadcasting policy objectives as found by Justice Ryer. Part II Fees do not fund the CRTC’s regulatory activities in connection with the regulation of broadcasting through the issuance of broadcasting licences. Part II Fees are not tied to any regulatory scheme in the sense that they are designed to proscribe, prohibit or lend preference to a behavior. Therefore, it cannot be said that they are connected to the regulatory scheme as is required by the analysis that has been adopted by this Court.

126. Justice Ryer’s adoption of the “soft linkage” approach undermines the careful construct that this Court has developed to distinguish between a fee and a tax and undermines the constitutional importance of that distinction.

127. Justices Pelletier and Letourneau have taken matters even further. They have abandoned the “*Lawson/Eurig/Westbank/620 Connaught* factors” and the analysis that this Court has directed be used. There is no merit in their conclusion that money “voluntarily” paid to the government in exchange for a commercial right or for property cannot be a tax. This analysis has the effect of allowing governments to charge whatever they want for licences or permits that allow one to undertake an activity that the government has decided should be regulated. This approach completely undermines the distinction between a fee and a tax as recognized by this Court and undermines s. 53 of the *Constitution Act 1867*.

Recovery

128. Justice Shore ruled that the Corporate Appellants and the members of the Appellant Association who had paid Part II Fees were not entitled to recover any of the amounts they had paid, even though he found that the levies were taxes and therefore illegal.

129. His decision was rendered before the decision of this Court in *Kingstreet*.

130. The Court of Appeal did not deal with the issue of recovery or with the issue, discussed below, of whether the Appellants ought to have been allowed to amend the statement of claim.

(i) *Kingstreet*

131. This Court has ruled in *Kingstreet* that parties who have paid a levy that is subsequently found to be illegal, whether because the legislation imposing it has been found to be unconstitutional, as the result of a misapplication of otherwise valid legislation or because delegated legislation is *ultra vires* in the administrative law sense are constitutionally entitled to the return of any monies paid pursuant to the illegal provision. “--- the Respondent should not be able to retain taxes that lack legal authority.”

Reference: *Kingstreet* paras 5, 57, 58 & 62.

132. It is not necessary that the payments have been made under protest. In any event, the evidence was that the Corporate Appellants and members of the Appellant Association have paid

under protest since 2001.

Reference: Agreed Statement of Facts, paras 114-120; appeal Record, Vol. II, Tab 12, p. 117-118.

(ii) *Period of Recovery*

133. In *Kingstreet* this Court also ruled that claims for the recovery of taxes which have been illegally paid may be subject to an applicable limitation period. In that case, the limitation period was calculated from the date on which the Appellants had filed their Notice of Application.

134. In this case, the Appellants filed their original statement of claim on December 2, 2003 (the Appellant Association) and an amended statement of claim to add the Corporate Appellants on March 1, 2004. Section 39 (2) of the *Federal Courts Act* provides that the limitation period in respect of a cause of action arising otherwise than in a province is six years.

135. Accordingly, the Appellants are entitled to a declaration that they are entitled to repayment of all amounts paid in the six-year period prior to the commencement of the action. This would encompass the amounts paid on November 30, 2003, 2002, 2001, 2000, 1999 and 1998. In addition they are entitled to a declaration that they are entitled to repayment of all amounts paid since the commencement of this action, being the amounts paid on November 30, 2004, 2005 and 2006.⁷

(iii) *Appeal on the Refusal to Allow Amendment of the Statement of Claim*

136. Recovery of levies which have been illegally collected by the government is a constitutional remedy and the Appellants submit that, in light of the nature of the remedy, they are entitled to the declarations that they seek confirming the right of the Corporate Appellants and the members of the Appellant Association to the recovery of all fees that they have paid for the period November 30, 1998 to November 30, 2006. The amendment to the statement of claim which the Appellants sought out of an abundance of caution is not, strictly speaking, necessary.

137. The Appellants originally claimed recovery for the period commencing with the payment of Part II Fees made on November 30, 2001 because, relying on the decision of this Court in *Air Canada*, they had understood that it was necessary for a party to have protested the payment of a

⁷ The CRTC has not collected these fees for 2007 or 2008.

tax which it alleged was being illegally charged in order to seek recovery. It was with the November 30, 2001 payment that the corporate Appellants and members of the Appellant Association began making their payments under protest. Concurrent with the payment under protest, the Appellant Association had made a submission to the Treasury Board under cover of a letter dated January 24, 2002 arguing that Part II Fees are in fact a tax and *ultra vires* section 11 of the *Act* and seeking their repeal.

Reference: *Air Canada v. BC*, [1989] 1 S.C.R. 1161 at pages 1182, 1209 and 1210.

138. The decision of this Court in *Kingstreet* was argued on June 20, 2006 and the Appellants brought a motion to amend the statement of claim to include recovery of Part II Fees paid during the full six years preceding the issuance of the Claim. The motion was in anticipation that the decision of this Court in *Kingstreet*, when rendered, would clarify that payment under protest was not necessary in order for an entity which had paid illegal taxes to be entitled to recovery.

Reference: *Kingstreet* paras 5, 57, 58 & 62.

139. Justice Shore refused the motion to amend the statement of claim. In light of its finding that Part II Fees are not a tax, the Court of Appeal did not deal with the appeal on the issue of whether Justice Shore had erred in refusing to allow the amendment.

140. Justice Shore's refusal to allow the amendment to the statement of claim was based on an erroneous application of the law. He specifically rejected the Respondent's (Defendant) arguments that the proposed amendment created an entirely new foundation upon which recovery was being sought, that a new cause of action was being pleaded or that new issues would be introduced by the amendment. He also rejected the Respondent's argument that there were issues on which it had not been able to conduct discovery. Indeed, the Respondent was unable to point to any additional documents it would have produced or requested production of and was unable to articulate any additional questions it would have posed on discovery. The Trial Judge also rejected the Respondent's argument that there was additional financial and accounting information that it might have led as evidence. In any event, the request for the amendment was made before the commencement of the trial and the Appellants made it clear

that they would accommodate any additional evidence that the Respondent felt it would be necessary to lead.

Reference: Reasons for Judgment of Justice Shore, December 21, 2006, Appeal Record Vol. I, Tab 2, p. 10, 22-23.

141. In other words, the Trial Judge found that the Respondent would not be prejudiced by the amendment. He accepted that Rule 75 of the *Federal Courts Rules* and the jurisprudence provide that amendments shall be granted in the absence of prejudice. Nevertheless, even though he found that the Respondent would not be prejudiced by the amendment and that there was no bar to the Respondent amending its own pleadings or introducing new evidence (even though the Respondent was unable to indicate what that might be), he declined to allow the amendment. That decision was contrary to the jurisprudence, which clearly favours amendments if they are necessary for determining the real questions in controversy and will not result in injustice or prejudice to the other party. Absent a finding of injustice or prejudice, the amendment should have been allowed.

Reference: *Canderel Ltd. v. Canada*, [1993] F.C.J. No. 777 (C.A.), para 9.

142. The amendment did not introduce new issues and would not have added a new issue after a limitation period had expired. As discussed above, the action was commenced at a time when the prevailing jurisprudence required that a party seeking recovery of illegally paid taxes to demonstrate that the monies were paid under protest. This has been described as the “Doctrine of Protest and Compulsion”. At the time of the trial, this Court had heard the arguments in the *Kingstreet* case but had not yet rendered its judgment. One of the issues in that case was whether the Doctrine of Protest and Compulsion should apply to the recovery of illegal taxes. The New Brunswick Court of Appeal had accepted that the Doctrine was applicable and that it operated as an exception to the defence of passing on. The Respondent in this case was also arguing that the defence of passing on would be applicable. Prior to this Court’s decision in *Kingstreet*, the law was quite unsettled.

143. There was never any issue that the amendment was seeking to claim recovery of any amounts outside of the limitation period as calculated from the date of the issuance of the statement of claim. The period of recovery sought by the amendment was for the six years

preceding the issuance of the statement of claim. The amendment was merely directed to addressing a legal limitation on recovery that had prevailed at the time of the filing of the claim but which would possibly be removed by this Court in the anticipated *Kingstreet* decision.

144. Accordingly, because the Respondent was unable to demonstrate any injustice or prejudice, and because the amendment was being sought in order to address an anticipated change in the law, the Trial Judge erred in not allowing the amendment.

PART IV-COSTS

145. The Appellants request their costs of this appeal as well as the costs of the proceedings before the Federal Court and the Federal Court of Appeal. Due to the complexity of the matters in issue, the costs of the proceedings before the Federal Court and the Federal Court of Appeal are sought in accordance with Column V of Tariff B of the *Federal Court Rules*.

PART V-ORDERS SOUGHT

146. The Appellants submit that this Court should overturn the decision of the Federal Court of Appeal and declare that Part II Licence Fees charged pursuant to Section 11 of the *Broadcasting Fee Licence Regulations, 1997* are in fact and law a tax and therefore *ultra vires* section 11 of the *Broadcasting Act*.

147. The Appellants further submit that this Court should declare that:

- (i) The Corporate Appellants are entitled to the return of all monies paid by them pursuant to Section 11 of the *Broadcasting Licence Fee Regulations, 1997* for the years 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005 and 2006 with prejudgment and post-judgment interest in accordance with sections 31 and 31.1 of the *Crown Liability and Proceedings Act* and sections 36 and 37 of the *Federal Courts Act*; and
- (ii) All members of the Appellant Association which have paid amounts pursuant to Section 11 of the *Broadcasting Licence Fee Regulations, 1997* for the years 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005 and 2006 are entitled to the return of such amounts with prejudgment and post-judgment interest in accordance with sections 31 and 31.1 of the *Crown Liability and Proceedings Act* and sections 36 and 37 of the *Federal Courts Act*.

148. If necessary, the Appellants request that this Court allow the amendment of the statement of claim to permit recovery of the monies paid by the Corporate Appellants and by the members of the Appellant Association which have paid amounts pursuant to Section 11 of the *Broadcasting Licence Fee Regulations, 1997* for the years 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005 and 2006.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

May 6, 2009

Original Signed by Barbara McIsaac

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PART VI—TABLE OF AUTHORITIES

1. *Lawson v. Interior Tree Fruit and Vegetable Committee*, [1931] S.C.R. 35
2. *Eurig Estate (Re)*, [1998] 2 S.C.R. 565
3. *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134
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5. *Ottawa-Carleton (Regional Municipality) By-law 234-1992 (Re)*, [1996] O.M.B.D. No. 553 (QL)
6. *Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General)* (1997), 144 D.L.R. (4th) 536 (N.S.S.C.)
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8. *La Compagnie de Publication La Presse Ltée c. Procureur Général du Canada*, [1964] Ex. C.R. 627
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12. *R. v. Stevens*, [1995] 4 W.W.R. 153 (Man. C.A.)
13. *Nanaimo Immigrant Settlement Society v. British Columbia* (2004), 242 D.L.R. (4th) 394 (B.C.C.A.)
14. *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] 1 S.C.R. 3
15. *Air Canada v. BC*, [1989] 1 S.C.R. 1161
16. *Canderel Ltd. v. Canada*, [1993] F.C.J. No. 777 (C.A.)
17. *R. v. Butler*, [1992] 1 S.C.R. 452
18. *Confédération des syndicats nationaux v. Canada (A.G.)*, 2008 SCC 68

PART VII—STATUTES AND REGULATIONS

1. *Broadcasting Act*, S.C. 1991, c.11, as am.
2. *Broadcast Licence Fee Regulations*, 1997, SOR/97-144
3. *Constitution Act, 1867*, s. 53
4. *Canadian Broadcasting Act*, 1936, S.C. 1936, c.24
5. *Radiotelegraph Act*, 1913, R.S. 1927, c.195
6. *Radio Regulations – Amendment*, Canada Gazette, Vol. 67, No. 8, August 19, 1933, pp.394-396
7. *Broadcasting Act*, S.C. 1958, c.22
8. *Radio Act*, 1938, R.S.C. 1952, c.233. In particular, section 3 authorizing the charging of fees
9. *General Radio Regulations*, Part I, amended, SOR/58-421, Canada Gazette, Part II, Vol. 92, No. 20, October 22, 1958, p.1199 (Fr. p. 1265)
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11. *User Fees Act*, S.C. 2004, c. 6, s. 2
12. *Parks Canada Agency Act* , 1998, c. 31 [section 24]
13. *Financial Administration Act*, R.S. 1991, c. 24, amending R.S. 1985, c. F-11, ss. 19- 19.1
14. *Canadian Food Inspection Agency Act*, S.C. 1997, c. 6, s. 25
15. *Department of Health Act*, S.C. 1996, c. 8, s. 7
16. *Department of Social Development Act*, S.C. 2005, c. 35, s. 20
17. *Department of Industry Act*, S.C. 1995, c. 1, s. 19
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19. Report of the Auditor General of Canada—May 2008 : Chapter 1—Management of Fees in Selected Departments and Agencies pp. 1-4
20. *Federal Courts Act* (R.S., 1985, c. F-7), sections 36, 37 and 39(2)
21. *Federal Courts Rules* (SOR/98-106), rule 75 & Tariff B

22. *Crown Liability and Proceedings Act* (R.S., 1985, c. C-50), sections 31 and 31.1
23. *Radio Act, 1938*, S.C. 1938, c. 50, s. 3(1)(b)
24. *An Act to Amend the Radio Act, 1938*, S.C. 1952-53, c. 48, ss. 2, 9

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT
OF APPEAL)

BETWEEN:

VIDÉOTRON LTÉE, VIDÉOTRON (RÉGIONAL)
LTÉE AND CF CABLE TV INC.

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

AND BETWEEN

CANADIAN ASSOCIATION OF BROADCASTERS,
ET AL.

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

THE ATTORNEY GENERAL OF QUÉBEC

Intervener

**FACTUM OF THE APPELLANTS,
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