BEFORE THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

IN THE MATTER OF AN APPLICATION UNDER THE *TELECOMMUNICATIONS ACT* BY

THE PUBLIC INTEREST ADVOCACY CENTRE

(APPLICANT)

and

295.ca, Acanac Inc., AEI Internet, ALLO Telecom, Atima Telecom, Aserty, Auracom, Axcessnet, Axion, B2B2C, BasicISP, BeauceSansFil, Bell Canada, Bell Aliant, Bell Mobility, BravoTelecom, Cable Amos, Câble-Axion Digitel inc., CableVision, Call-One communications, Caneris, CCAP, Cintek, Citénet, Cogeco, Communication Témiscamingue, Comwave, ConnectMoi, Coopérative de câblodistribution Ste-Catherine-Fossambault, CoopTel, Copper.net, CRONOMAGIC, DERYtelecom, Digicom, Distributel, EBOX, Eastlink, EZ Cable Solutions, Fusion Telecom, Galaxy, goZoom.ca, GROUPE-ACCES communications, Hawkesbury IGS, HeroNet, IHR, Ice Wireless, Innsys, Inter.net Canada, Internexe, Leopard Networks, MAZAGAN TELECOM, Mektel Networks, Metrointernet, Montreal DSL, MTS Inc., Mustang Technologies, MySignal.ca, Navigue.com, Netfox, NetWest, NorthWind, Odynet, Ondenet.com, Oricom, Pioneer Wireless, Primus, QMI (Videotron), Réseau Internet Maskoutain, Rogers Communications Inc., RutexNet, Sasktel, Securenet, Shannon Vision, Shaw, Sirius ISP, Slamhang, Sogetel, Storm, SwitchWorks, Tamco Tech, Targo Communications, TekSavvy Solutions Inc., Télébec, Télécâble Multi-Vision, Telnet Communications, TELUS Communications Company (Telus Québec), TSE, Unitelecom, Velcom, Vert l'Avenir, Videotron (QMI), VIF Internet, Vivotel, Vodalink Telecom, Vybe, Wime, WIND Mobile, Worldline, Xit Telecom, Xplornet Communications Inc., Yak, Zeuter, ZID Internet

(RESPONDENTS)

REGARDING QUEBEC BILL 74, *LOI CONCERNANT PRINCIPALEMENT LA MISE EN OEUVRE DE CERTAINES DISPOSITIONS DU DISCOURS SUR LE BUDGET DU 26 MARS 2015* and BLOCKING OF CERTAIN WEBSITES ASSOCIATED WITH ONLINE GAMBLING

8 July 2016

TABLE OF CONTENTS

1. INTRODUCTION 1

2. FACTS 2

3. GROUNDS OF APPLICATION 5

A. Bill 74's purported blocking requirement directly conflicts with Section 36 of the *Telecommunications Act* and is unconstitutional 5

Pith and Substance 6

Interjurisdictional Immunity 7

Federal Paramountcy 9

B. The Commission should not approve any blocking requests under section 36 of the *Telecommunications Act* 9

History of CRTC's Application of s. 36 12

Bill 74 frustrates the Canadian telecommunications policy objectives 15

Bill 74 threatens constitutionally-protected free speech. 16

Bill 74 is practically unworkable 17

4. RELIEF SOUGHT 19

Test for injunction 19

5. CONCLUSION 22

1. INTRODUCTION

1. The Public Interest Advocacy Centre ("**PIAC**") [1] files this Application under the *Telecommunications Act* [2] and pursuant to the *CRTC Rules of Practice and Procedure* [3] (Rules of Procedure) regarding certain provisions of Québec Bill 74 promulgated by the Province of Québec, ("Province of Québec").

2. Bill 74 was adopted on 17 May 2016 and assented to on 18 May 2016. The provisions in issue are not yet in force.

3. Bill 74 purports to allow the Province of Québec to authorize gambling websites, to identify unauthorized gambling websites, and to notify Internet service providers ("**ISPs**") to "block access" to unauthorized gambling websites within 30 days of receipt of a notice from Québec. The relevant passages of Bill 74 are appended hereto as Appendix "A".

4. Telecommunications undertakings in Canada that interconnect across provincial or international borders are subject to federal jurisdiction and regulated by the Canadian Radio-television and Telecommunications Commission (the "**CRTC**" or "**Commission**"). [4] The courts have consistently recognized the exclusive federal jurisdiction in respect of telecommunications carriers.

5. Section 36 of the *Telecommunications Act* explicitly prohibits "Canadian carriers", which are subject to the legislative authority of Parliament, to "control the content or influence the meaning or purpose of telecommunications carried by it for the public" unless they seek prior approval of the Commission. The power to grant permission to influence the meaning or control the content of telecommunications is at the core of the federal power over telecommunications.

6. Bill 74 directly conflicts with section 36 of the *Telecommunications Act*, and trenches on exclusive federal jurisdiction over telecommunications. Bill 74 frustrates the Canadian telecommunications policy objectives expressed in s. 7 of the *Telecommunications Act*. Bill 74 also presents a compliance challenge to ISPs operating in Québec. Finally, Bill 74 threatens constitutionally-protected free speech.

7. PIAC therefore requests that the Commission declare that Bill 74 is unconstitutional and *ultra vires* the Province of Québec and a violation of the *Charter*. PIAC also

---

1 PIAC is a non-profit organization that provides legal and research services on behalf of consumer interests, and, in particular, vulnerable consumer interests, concerning the provision of important public services. See Public Interest Advocacy Centre, online: http://www.piac.ca.

2 S.C. 1993, c. 38.

3 SOR/2010-277.

4 Telecom Regulatory Policy CRTC 2011-291, *Obligation to serve and other matters*, 3 May 2011, at para. 4.

requests that the Commission declare that any application made under section 36 of the *Telecommunications Act*[5] by a Canadian carrier in purported observance of Bill 74 will, without more, be denied. PIAC also requests that the Commission issue an interim injunction to all ISPs and WSPs operating in Quebec enjoining them from blocking online gaming websites, and from taking any steps precedent to blocking the aforementioned online gaming websites. The requested injunction would apply pending the repeal, substantial amendment (to remove any blocking or similar requirement that trenches on federal jurisdiction over telecommunications) or declaration of unconstitutionality, reading down or other invalidation by any competent Canadian superior or federal court of sections 260.33 through 260.38, and 277(h) of the Quebec *Consumer Protection Act*.[6] Finally, PIAC requests its costs for bringing this application.

8. In addition, as a courtesy to the Province of Québec, PIAC has served by e-mail its Attorney General, Minister of Public Security (responsible for the Régie (Alcools, Courses et Jeux)) and the Minister of Finance (responsible for the Société (Loto-Québec)). PIAC has as a similar courtesy served the Attorney General of Canada. There is no requirement in the *Telecommunications Act* nor in the *Canadian Radio-television and Telecommunications Commission Act* to notify attorneys-general that there is a constitutional question before the CRTC.

9. PIAC is serving this application on WSPs and ISPs that we believe are operating in Quebec. PIAC believes that its distribution list covers most of the major WSPs with Quebec operations. As required by the Rules of Procedure, a copy of this application has been placed on PIAC's website.

2. FACTS

10. On 17 May 2016, the Province of Québec passed Bill 74, *Loi concernant principalement la mise en oeuvre de certaines dispositions du discours sur le budget du 26 mars 2015* [English title: *An act respecting mainly the implementation of certain provisions of the Budget Speech of 26 March 2015]*.[7] On 18 May 2016, the Her Majesty the Queen in Right of Québec gave Royal Assent and brought into force the majority of Bill 74.

11. To date, the Province of Québec has not yet brought into force the new provisions of the Québec *Consumer Protection Act* ("QCPA") that purport to require ISPs and WSPs to block certain gambling websites and content. Instead, under s. 225, article 4 of Bill 74, new section 12 of that Act (which contains the changes to the QCPA

5 *Telecommunications Act*, S.C. 1993, c 38, s 36.
6 *Loi sur la protection du consommateur*, [English: Consumer Protection Act], R.S.Q., c. P-40.1, ss 260.33-260.38 and 277(h) [hereafter "QCPA"].
7 S.Q. 2016, c. 7. Hereafter "Bill 74".

detailed below) will come into force on a date or dates to be determined by the government.[8]

12. The proposed changes to the QCPA read as follows:

> 260.33. For the purposes of this Title, "online gambling site" means a website on which a person may make wagers and bets through an interactive mechanism.
>
> 260.34. An Internet service provider may not give access to an online gambling site whose operation is not authorized under Québec law.
>
> 260.35. The Société des loteries du Québec shall oversee the accessibility of online gambling. It shall draw up a list of unauthorized online gambling sites and provide the list to the Régie des alcools, des courses et des jeux, which shall send it to Internet service providers by registered mail. The receipt notice or, as the case may be, the delivery notice serves as proof of notification.
>
> 260.36. An Internet service provider that receives the list of unauthorized online gambling sites in accordance with section 260.35 shall, within 30 days after receiving the list, block access to those sites.
>
> 260.37. If the Société des loteries du Québec becomes aware that an Internet service provider is not complying with section 260.36, it shall report the non-compliance to the Régie des alcools, des courses et des jeux. In such a case, the Régie des alcools, des courses et des jeux shall send a notice to the non-compliant Internet service provider and send a copy of the notice to the Société des loteries du Québec.
>
> 260.38. For the purposes of this Title, the Régie des alcools, des courses et des jeux and the Société des loteries du Québec may enter into an agreement on the frequency at which the list of unauthorized online gambling sites is to be updated and sent and on any other terms relating to the carrying out of this Title.
>
> [...]
>
> 277. Every person who
>
> […]
>
> (h) contravenes section 260.36,
>
> is guilty of an offence.[9]

13. In the "Notes explicatives/Explanatory notes" to the Bill, is a description of the effect of these changes and the purported effect of the Bill:

> Troisièmement, dans le but de contrôler l'offre de jeux d'argent en ligne, la loi modifie la Loi sur la protection du consommateur afin d'obliger les fournisseurs de services Internet à bloquer l'accès aux sites illégaux de jeu d'argent inscrits sur une liste établie par la Société des loteries du Québec.

[8] See Bill 74, s. 225, para. 4.

[9] *Consumer Protection Act*, R.S.Q., c. P-40.1, ss. 260.33-260.38 and 277(h); implementing Bill 74, s. 12. See also Appendix A.

> Elle prévoit que la Société fera rapport à la Régie des alcools, des courses et des jeux lorsqu'un fournisseur ne se conformera pas à la loi. La Régie aura la responsabilité d'aviser le fournisseur de son défaut. De plus, elle accorde au président-directeur général de la Société ou à la personne qu'il désigne des pouvoirs d'enquête afin de s'assurer du respect de la loi.
>
> To monitor online gambling, the Consumer Protection Act is amended to require Internet service providers to block access to illegal gambling sites entered on a list drawn up by the Société des loteries du Québec, which must report to the Régie des alcools, des courses et des jeux if service providers fail to comply with the Act. The Régie will be responsible for informing service providers of their non-compliance, and the president and chief executive officer of the Société or a person the latter designates is granted investigation powers to ensure compliance.

14. To sum up, sections 260.33 through 260.38 purport to require ISPs and WSPs operating in Québec to block their customers' access to certain online gambling sites in Quebec, as designated by a list drawn up by the Société des loteries du Québec. The Société will advise the Régie of violations by ISPs and the Régie des alcools, des courses, et des jeux will investigate. Section 277(h) makes it an offence for an ISP to not block such websites as designated on this list.

15. Under s. 278 of the QCPA, any violation of s. 277 can result in a fine (for a corporation) from $2,000 to up to $100,000 *per violation*. In the case of a repeat offence, this fine is doubled, from $4,000 to up to $200,000.

16. PIAC presently is unaware of any ISP or WSP operating in Québec that has, to date, blocked any access to any gambling website or other website. We understand that the Régie is in the process of drawing up this list and while that is occurring, these sections, although passed, will not be proclaimed for anywhere from 6 months up to 18 months.[10] However, PIAC is concerned that ISPs and WSPs will be forced to begin planning and configuring and testing blocking systems, buying equipment, hiring personnel to administer the list and block the relevant websites (steps precedent to blocking). It is our understanding – and we contend – that the lead time before such changes to ISP and WSP operations are likely already happening or will be very shortly.

17. PIAC contends that any steps an ISP or WSP takes towards preparing for this law hurts consumers. All expense, all testing, all staff that may be unnecessary should this law be declared unconstitutional or be repealed will inevitably be paid for by

[10] See P. Couture, "Loto-Québec a maintenant le feu vert pour identifier et bloquer les sites illégaux de jeux de hasard en ligne offerts au Québec." (27 May 2016) online: http://www.journaldequebec.com/2016/05/27/a-la-chasse-aux-sites-illegaux and CARTT, "Quebec passes web-blocking legislation; ISPs will have to do the dirty work" (31 May 2016) online: https://cartt.ca/article/quebec-passes-web-blocking-legislation-isps-will-have-do-dirty-work

customer rate increases and possibly in reduction in other services or reduction in network performance. All affected consumers also will lose their ability to access the content of their choice on the internet and will have their freedom of expression curtailed.

18. As a result of ISPs and WSPs adhering to, or preparing to adhere to, the *Consumer Protection Act* amendments, therefore, all subscribers/users/customers of these ISPs and WSPs, or subscribers who directly or indirectly access the Internet through networks that these ISPs or WSPs run in Quebec, will suffer such consequences. All customers also will no longer be able to access the listed online gambling sites through their service provider. While this latter result is obviously the intent of the provisions, PIAC submits that by requiring WSPs and ISPs to block sites, Bill 74 places WSPs and ISPs in the position where they inevitably will contravene section 36 of the federal *Telecommunications Act*, unless they seek approval of the Commission.

19. Section 36 prohibits a "Canadian carrier" to influence or interfere with the content or meaning of telecommunications except upon prior authorization of the Commission. To our knowledge, no Canadian carrier ISP nor WSP has yet applied for nor obtained such authorization from the Commission. If any such ISP or WSP has, or will request such permission to interfere with telecommunications for this purpose, PIAC hereby requests that the Commission deny any such request, for the reasons below.

3. GROUNDS OF APPLICATION

A. Bill 74's purported blocking requirement directly conflicts with Section 36 of the *Telecommunications Act* and is unconstitutional

20. Bill 74, purportedly requires any "Internet service provider" (s. 260.35 of the proposed amendments to the QCPA) to "block access" to the proposed list of "unauthorized online gambling sites in accordance with s. 260.34". This provision, as well as the related sections of the QCPA noted above, is in direct conflict with s. 36 of the *Telecommunication Act*. It is, no matter its intended purpose, *ultra vires* the Province of Québec, as an attempted exercise of the federal power over the control of content of telecommunications.[11] It is unconstitutional on a division of powers analysis.

[11] See *Rogers Communications Inc.* v. *Châteauguay (City)*, 2016 SCC 23 (16 June 2016). Hereafter "*Rogers* v. *Châteauguay*".

21. PIAC hereby asks that the Commission make an explicit ruling on this aspect of the constitutionality of the purported Québec law and to declare it is unconstitutional. Such a ruling will assist ISPs operating in Québec to determine how to react to this purported Québec law and will allow customers of these ISPs to have continued access to the entire internet free of potential unconstitutional interference from provincial governments.

Pith and Substance

22. Interjurisdictional immunity is not in issue here – the provincial law is directly in conflict with the federal *Telecommunications Act* (for a parallel with the *Radiocommunication Act*, see *Rogers* v. *Châteauguay* at para. 46): the pith and substance of the requirement on an ISP to block internet traffic is not the protection of the health and well being of residents nor the control of gaming within the province but, rather, an effort to control the content of telecommunications, a federal power delegated directly to the CRTC in s. 36 of the *Telecommunications Act*.

23. In other words, the dominant purpose of Bill 74's efforts to block website access is precisely to control telecommunications and content on telecommunications and not health and safety in relation to gambling. That this is so is belied by the fact that the Province of Québec seeks not to ban online gambling but to corral it into a regulatory scheme and in fact into an internet portal (Espace Jeux of Loto-Québec) from which the provincial government can derive fees. Therefore the Province of Québec cannot claim to be exercising an ancillary power under its constitutional authority over local matters (health and safety) in the province.

24. Finally, PIAC notes the recent warnings of the Supreme Court of Canada regarding the pith and substance analysis in relation to the concept of "co-operative federalism" in *Rogers* v. *Châteauguay* (at para. 39):

> [39] However, although co operative federalism has become a principle that the courts have invoked to provide flexibility for the interpretation and application of the constitutional doctrines relating to the division of powers, such as federal paramountcy and interjurisdictional immunity, it can neither override nor modify the division of powers itself. It cannot be seen as imposing limits on the valid exercise of legislative authority: *Quebec (Attorney General)* v. *Canada (Attorney General)*, at paras. 17 19. Nor can it support a finding that an otherwise unconstitutional law is valid.

25. PIAC submits that the present effort of the Province of Québec with Bill 74 is precisely the sort of situation where a claim of "co-operative federalism" should not be used to mask a blatant effort to "override [or] modify the division of powers itself" or to "impos[e] limits on the valid exercise of legislative authority" as expressed in the *Telecommunications Act* and in particular, s. 36.

Interjurisdictional Immunity

26. Even if the Quebec legislation is not in pith and substance a control of the content of communications, it impairs a core federal power, namely the CRTC's jurisdiction to be the sole body to determine how telecommunications is routed. *Rogers* v. *Châteauguay*, at para. 59, notes a two stage test to determine if interjurisdictional immunity applies. First, the "core" of a legislative power of one level of government must be "trenched" upon by the other's purported law. The second step is to determine if it is a serious impairment. This is precisely the case here, where the CRTC's control of telecommunications facilities, interconnection and routing are all seriously threatened by this provincial interference which seeks to direct the opposite effect to that produced under s. 36 of the *Telecommunications Act* (which generally prohibits interference with telecommunications). This is a serious interference with a core federal power.

27. The Supreme Court of Canada in *Rogers* v. *Châteauguay* also notes that in general the doctrine of interjurisdictional immunity generally will not be applied in the absence of precedent.[12] However, there are precedents directly for the control of communications being sought here – and PIAC relies upon the one the Supreme Court of Canada did to ground its decision in *Rogers* v. *Châteauguay*: the Privy Council decision in *Toronto (City)* v. *Bell Telephone Company of Canada* [1905] A.C. 52.

28. Specifically, that case found that regulation of telecommunications facilities (erection and placement of telephone poles on city streets) were under the exclusive jurisdiction of the Parliament of Canada, not the provincial legislatures. In order to block transmissions as improperly requested by Bill 74, telecommunications facilities will have to be used, modified or added. The situation of telephone poles in 1905 is analogous to the control of internet communications with electronic switches and computers in 2016. This is a precedent.

29. In addition, in the Bell case in the Privy Council, an "ingenious" argument that certain of the communications within a province were "local" and thus subject to provincial jurisdiction was dismissed (at para. 10):

> 10 (1.) It was argued that the company was formed to carry on, and was carrying on, two separate and distinct businesses - a local business and a long-distance business. And it was contended that the local business and the undertaking of the company so far as it dealt with local business fell within the jurisdiction of the provincial legislature. But there, again, the facts do not

[12] See *Rogers* v. *Châteauguay* at para 61: "This is why the application of the doctrine of interjurisdictional immunity is generally reserved for situations that are already covered by precedent."

> support the contention of the appellants. The undertaking authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long-distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic and miles of railway communicating with distant places. The special case contains a description of the company's business which seems to be a complete answer to the ingenious suggestion put forward on behalf of the appellants.

30. This type of argument is likely the foundation of any jurisdictional claim of the Province of Québec, namely, that somehow telecommunications are divisible such that any "local" ones within the province can be controlled by provincial legislation. They cannot.

31. This opinion is bolstered by the Supreme Court of Canada decisions in *Alberta Government Telephones* v. *Canadian Radio-television and Telecommunications Commission*, [1989] 2 S.C.R. 225, [1989] S.C.J. No. 84, at paras. 65-101 and *Téléphone Guèvremont Inc.* v. *Quebec (Régie des télécommunications)* [1994] 1 S.C.R. 878, [1994] S.C.J. No. 31 at para. 1: the question of the scope of s. 92(10)(a) of the *Constitution Act*, 1867 in relation to telecommunication providers and their networks (even existing only within a province) that allow interconnection interprovincially and internationally is settled: it is wholly a federal matter.

32. The Internet is now the *sina qua non* for interprovincial and international communication. All ISPs and WSPs operating in Quebec connect to the Internet, a global "network of networks" employing common communications protocols. There is no question the Internet is the essence of such interprovincial, international interconnection.

33. Any attempt by the Province of Québec to block websites through the vehicle of requirements on ISPs or WSPs is clearly an "impairment" of those telecommunications service providers' activities, but more importantly is a clear impairment of the CRTC's power to regulate the flow and routing of telecommunications traffic.[13]

34. The Commission has authority of approval of any interference with, or control over, the meaning and content of telecommunications under s. 36 of the *Telecommunications Act*. Such power, which resides exclusively in the CRTC, is directly and specifically impaired by the provisions of Bill 74. PIAC therefore submits

[13] See *Quebec (Attorney General)* v. *Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] S.C.R. 536 at paras. 45-52 and Ryan, Michael H., "Telecommunications and the Constitution: Re-Setting the Bounds of Federal Authority" (2010), 89 Can. Bar Rev. 695 at 715.

that under the doctrine of interjurisdictional immunity Bill 74 is clearly unconstitutional and of no force or effect.

Federal Paramountcy

35. PIAC also has attached a legal opinion originally commissioned by Bell Canada and PIAC on provincial legislative efforts in the wireless space from the Commission's initial Wireless Code proceeding as Appendix B. The Bell-PIAC opinion contains argument on federal paramountcy in the telecommunications sphere that is also applicable to the current application and it is hereby adopted and argued as a further basis for declaring Bill 74 unconstitutional.

36. As noted in that opinion:

> This doctrine [of federal paramountcy] applies to render inoperative any provincial legislation inconsistent with federal legislation — or subordinate regulation enacted by an administrative agency — to the extent of the inconsistency. [footnote omitted]
>
> As already noted above, federal paramountcy will be triggered if there is an operational conflict between federal and provincial laws, such that a telecommunications company cannot comply with both, or if the provincial laws frustrate the federal purpose in the area of telecommunications.

37. It is PIAC's submission that the application of Bill 74 would frustrate the purpose of s. 36 of the *Telecommunications Act*, which is to allow the Commission only to determine, upon application of the relevant Canadian carrier, if any interference with content or meaning of telecommunications is to be permitted.

38. PIAC also submits that should the Commission find as requested below that it should not, no matter the constitutionality of Bill 74, accept website blocking for the purposes outlined in Bill 74, then it would be impossible for ISPs and WSPs to both comply with Bill 74 and section 36. This conflict also would trigger the doctrine of federal paramountcy.

B. The Commission should not approve any blocking requests under section 36 of the *Telecommunications Act*

39. PIAC also notes from a policy standpoint that if blocking as purportedly required under Bill 74 is permitted there likely will be an unending stream of provincial "consumer protection" or indeed any other regulatory goals that will "justify" similar attempts to block telecommunications. PIAC in its work in payday loan regulation has

already come across discussions about the possibilities of attempting to block, for example, online payday lenders.

40. This result would be akin to censorship in aid of other goals. Parliament has clearly designated the CRTC in s. 36 as the body that must do the difficult weighing of social objectives with the need for open and accessible telecommunications networks. However, Parliament has not authorized CRTC to change the division of powers. Therefore CRTC must also respect the federal jurisdiction over telecommunications (as found by the SCC) to be exclusive. The CRTC can only permit blocking when convinced that the blocking would clearly further the policy objectives of the *Telecommunications Act* (and not any other provincial acts, which are irrelevant). PIAC submits that in interpreting the policy objectives, there are no such overriding arguments for blocking telecommunications and that rather, the policy objectives support the denial of s. 36 approval to block traffic for this purpose.

41. Blocking online gambling sites without express prior permission of the Commission, as Bill 74 purportedly requires ISPs and WSPs operating in Quebec to do, violates section 36 of the *Telecommunications Act*. Section 36 provides the following:

> 36. Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.[14]

42. The rest of this section will discuss (1) the definition of "Canadian carrier" and its significance in s. 36; (2) the concepts of "control the content or influence the meaning or purpose of telecommunications carried"; and (3) the Commission's approach to approval under s. 36.

43. First, all of the named ISPs and WSPs in this application either are a "Canadian carrier" or interconnect with a Canadian carrier in order for that ISP or WSP to complete any Internet transmission.

44. A "Canadian carrier" for the purposes of section 36 is defined by the *Telecommunications Act* as "a telecommunications common carrier that is subject to the legislative authority of Parliament".[15] The *Act* in the same section defines a "telecommunications common carrier" as "a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation". "Person", in the *Act*, "includes any individual, partnership, body corporate, unincorporated organization, government, government agency and any other person or entity that acts in the name of or for the benefit of another, including a trustee, executor, administrator, liquidator of the succession, guardian, curator or tutor". A "transmission facility" is defined as "any wire, cable, radio, optical or other electromagnetic system, or any similar

[14] *Telecommunications Act*, S.C. 1993, c. 38, s. 36.
[15] *Telecommunications Act*, SC 1993, c 38, s 2(1).

technical system, for the transmission of intelligence between network termination points, but does not include any exempt transmission apparatus."

45. Many of the larger ISPs and WSPs party to this application are Canadian carriers as they own or operate physical telecommunications transmission facilities in Canada and in Quebec. These Canadian carriers could seek approval of the Commission to block website access.

46. Some of the smaller ISPs and WSPs or those operating in Quebec outside of their "home territory" may, however, operate by interconnecting with, leasing service from or purchasing wholesale internet or wireless access from a Canadian carrier. These other telecommunications carriers commonly are referred to by the Commission globally with Canadian carriers as "telecommunications service providers".

47. "Telecommunications service provider" is defined in the *Telecommunications Act* as "a person who provides basic telecommunications services, including by exempt transmission apparatus". As noted by Ryan,[16] there is thus a category of "non-facilities-based telecommunications service providers" or "NFB TSPs" which, although they are not defined as such by the *Act*, do in fact engage in "telecommunications service" which is defined by the *Act* as: "a service provided by means of telecommunications facilities and includes the provision in whole or in part of telecommunications facilities and any related equipment, whether by sale, lease or otherwise".[17] Many of these are ISPs.

48. PIAC submits that the Commission only has authority to allow a Canadian carrier to "control the content or influence the meaning or purpose of telecommunications carried by it for the public". In other words, non-Canadian carriers (the other TSPs referred to above) cannot seek such approval. Those NFB TSPs therefore cannot even seek permission to interfere with telecommunications under s. 36 and must always pass the public traffic on their network (subject to any conditions that the Commission might impose under its other regulatory authority).

49. Therefore only the Canadian carrier ISPs and WSPs can seek s. 36 approval.

50. One result, therefore, of the purported effect of Bill 74 would be to place NFB TSPs (referred to in Bill 74 as "ISPs") in the impossible position of being supposedly required to block websites under Bill 74 while being prohibited from seeking approval to block under s. 36 of the *Telecommunications Act*.

51. Turning now to the Canadian carrier ISPs (including WSPs offering data access to the Internet and thus effectively functioning as wireless ISPs), it should be noted that blocking of any telecommunications, including online gambling sites, without prior authorization of the Commission would constitute an activity that contravenes section 36 of the *Act.* The Commission has, thus far, been extremely clear that blocking is

16 See Ryan, "Telecommunications and the Constitution", *supra*, at p. 702.
17 *Ibid.*

unlawful interference with content or meaning of telecommunications and has declared it will not, without significantly more justification, grant approval to block under s. 36.

52. In Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet traffic management practices of Internet service providers* ("the ITMP Framework"), the Commission "note[d] that the majority of parties are in agreement that actions by ISPs that result in outright blocking of access to content would be prohibited under section 36 unless prior approval was obtained from the Commission".[18] The Commission then found "that where an ITMP would lead to blocking the delivery of content to an end-user, it cannot be implemented without prior Commission approval".[19] Ryan summed up the pertinent part of this decision in the leading telecommunications law text: "Blocking would amount to controlling the content and influencing the meaning and purpose of the traffic"[20]—and thus be subject to section 36 of the *Act*. PIAC contends that Bill 74 unquestioningly calls on ISPs and WSPs to block content in this manner.

History of CRTC's Application of s. 36

53. To determine the scope and interpretation of section 36, and the Commission's proper approach to it, it is useful to review its history and application by the Commission.

54. In Telecom Decision 84-18 - *Enhanced Services,* the Commission made reference to s. 8 of the *Bell Canada Act* (the predecessor section to s. 36). The Commission held Bell should not be permitted to engage in electronic publishing involving editorial control over content or in creation or distribution of own data bases, and that the principle of separation of control over carriage and content should apply to all federally regulated common carriers.

55. This decision reflects the policy thinking of the time that the scope of the common carriage obligation embodied in s. 8 of the *Bell Canada Act* (later s. 36) would go so far as to oblige the company to have structural separation between its content and carriage businesses. This attitude was eventually reversed by the Commission in Telecom Decision 94-19, below.

56. In Telecom Decision 88-16 - *Bell Canada - ALEX Market Trial*, the Commission noted that the provision of the electronic Yellow Pages directory by Bell might violate s. 8 of the *Bell Canada Act*. Again, this decision reflected a concern with structural separation to avoid excessive market control by a Canadian carrier.

---

18 *ITMP Framework*, at para 121.

19 *Ibid.*, at para 122.

20 Ryan, Michael H., *Canadian Telecommunications Law and Regulation* (Toronto: Carswell), looseleaf, at §730, 7-106.9.

57. In Telecom Letter Decision 92-5 - *Re: 976 Services - Billing and Collection*, the Commission refused to permit Bell Canada to revise its billing arrangements with 976 service providers to include the ability of Bell Canada to block sexually explicit or implicit messages. This is one of the most on-point decisions of the Commission on s. 36 in relation to the matter of this application. The Commission stated in relation to s. 36 in this context that:

> . . . the very fact that the grounds for discrimination are based solely on content is objectionable, in the Commission's view. In these circumstances, the Commission finds that the discrimination has not been justified.
> [. . .]
>
> . . . such refusal based solely on content could amount to controlling the contents or influencing the meaning or purpose of messages, contrary to section 8 of the *Bell Canada Act*.

58. This decision sets the bar very high for any telecommunications carrier that wishes to interfere with "content" over its network.

59. In Decision 94-19 - *Review of Regulatory Framework,* the Commission signaled its willingness to consider applications under s. 36 to allow carriers to provide their own content over their networks. The Commission's concerns, at that time, were with vertical integration, cross-subsidy and access. However, as the Consumer Groups noted in its argument in *CAIP v Bell*,[21] times have changed, such that carriers now do have the capability of interfering with communications in real-time via deep packet inspection and similar technologies.

60. Similarly, in Decision 98-9 – *Regulation under the Telecommunications Act of Certain Telecommunications Services offered by "Broadcast Carriers"* the Commission granted interim approval under s. 36 to continued provision by "broadcast carriers" of full channel TV services.

61. In Decision 99-4 - *Stentor - Request for Approval under Section 36 of the Telecommunications Act* the Commission granted approval to involvement by Canadian carriers in content of their own internet services. No analysis beyond that in Decision 94-19 was given.

62. The other key decision, for the purposes of this application, regarding the scope of s. 36 and its interpretation is contained in a Letter Decision from Diane Rheaume, Secretary General of the CRTC to J. Edward Antecol dated 24 August 2006,[22] (the "Antecol Letter").In this decision, the Commission declined an application purportedly made under s. 36 to have the Commission proactively authorize ISPs to block certain websites alleged to constitute hate speech. The Commission made these comments:

---

[21] Part VII Application by CAIP regarding Bell Peer-to-peer Bandwidth Throttling and DPI - Comments of the Consumer Groups, July 3, 2008, at paras. 19-33. Online: http://www.crtc.gc.ca/public/partvii/2008/8622/c51_200805153_1/923474.zip

[22] File No.: 8622-P49-200610510. Online: http://www.crtc.gc.ca/eng/archive/2006/lt060824.htm

> The Commission notes that section 36 of the Act would not allow it to require Canadian carriers to block the web sites; rather, under section 36 of the Act, the Commission has the power to permit Canadian carriers to control the content or influence the meaning or purpose of telecommunications it carries for the public. The scope of this power has yet to be explored. [emphasis added.]

63. Therefore, section 36 does not provide the Commission jurisdiction to directly order the blocking of websites, only, upon application by a Canadian carrier, "to permit Canadian carriers to control the content or influence the meaning or purpose of telecommunications it carries for the public". As noted, in the ITMP decision, the Commission stated that blocking would constitute control of content or influence on the meaning of telecommunications and would require approval. That approval (for blocking) has never to date been given.

64. The Antecol Letter and ITMP decision establish that simple blocking of Internet websites or services *prima facie* violates s. 36 of the *Telecommunications Act* and that any provider seeking to exercise such a level of control would have to apply under s. 36 for approval so to do. It also expresses the Commission's fairly recent view that the scope of s. 36 "approval" and the criteria for doing so when there is a *prima facie* violation of the section has not yet been defined by the Commission.

65. However, what the Antecol Letter does not establish is that there is any exception to s. 36 for controlling content, even if "harmful" – indeed, even if otherwise specifically criminal, without a clear (constitutional) statutory prohibition of transmission of such material. That is, at the first level of analysis, even content as harmful as alleged hate crime, cannot permit a carrier to executorially interfere with transmission of that content.

66. The Commission therefore has never authorized in the past outright blocking requests brought by private parties despite the alleged importance of blocking access to harmful materials.

67. The only difference in the present case is that a provincial government has indirectly supported an eventual request by a Canadian carrier by purporting to "require" ISPs operating within Quebec to block traffic. As argued above, these pretended requirements are wholly unconstitutional. Therefore, PIAC contends that the CRTC may disregard the request to block (Bill 74) and ignore the seeming conflict of laws – as Bill 74 is constitutionally inoperative.

68. Further, even if the Commission considers the desired effect of Bill 74 in an application by a Canadian carrier (that relies only upon the desire to block gambling websites without explicitly relying upon Bill 74) this application should be rejected for the reasons given in the Antecol letter (the Commission is not a moral telecommunications police force) and for the reasons outlined below.

69. The Commission has rarely used s. 36 to approve interference with telecommunications – and never outright blocking. As noted above, in the ITMP decision, the CRTC indicated that blocking would be *prima facie* violating s. 36 and that the Commission, without more, would not authorize it.

70. In addition, approving such blocking would both run counter to several section 7 *Telecommunications Act* policy objectives and also run counter to the ITMP Framework; would support an unprincipled approach to Internet access; and would set a dangerous precedent going to broader issues of censorship and government control over freedom of expression. These issues are discussed below.

Bill 74 frustrates the Canadian telecommunications policy objectives

71. Granting approval to outright blocking of content run counter to the telecommunications policy objectives stated in sections 7(a), 7(b), 7(c) and 7(h) of the *Telecommunications Act.* Section 7(a) requires facilitating "a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric" of Canada; section 7(b) requires carriers "to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;" section 7(c) requires the Commission "to enhance the efficiency and competitiveness … of Canadian telecommunications;" while section 7(h) requires the telecommunications system "to respond to the economic and social requirements of users of telecommunications services".

72. Transmitting content is the *raison d'etre* of telecommunications services; this means that granting section 36 approval would run directly counter to the policy objective in section 7(b) of the *Act*: "to render reliable and affordable telecommunications services of high quality".[23] A telecommunications service provider that blocks legal content requested and transmitted over their network is an unreliable service provider providing sub-standard service. The very point of an Internet service provider, the reason a contract exists between the ISP and the user, and what the ISP accepts monetary compensation for, is to provide access to the Internet.

73. Next, granting section 36 would impair the policy goal found in section 7(c): "to enhance the efficiency and competitiveness…of Canadian telecommunications".[24] Granting section 36 approval would be technically inefficient. Bram Abramson, Chief Legal and Regulatory Officer to the ISP TekSavvy Solutions Inc., explained the technical difficulties in implementing the blocking involved in this proceeding:

> "We would have to re-engineer our network to basically segregate out Quebec and set up different servers for our Quebec users. Basically we would have to do a whole bunch of pirouettes that will cost us significant time and money for

[23] *Telecommunications Act*, SC 1993, c 38, s 7(b).
[24] *Telecommunications Act*, SC 1993, c 38, s 7(c).

> something that will be ineffective." Plus, he said, users could simply change their settings so that their ISP does not act as their DNS (domain name system) server—which matches website names with corresponding Internet protocol (IP) addresses and helps direct traffic to the right location—and the blocking would be ineffective.[25]

74. As indicated by Mr. Abramson's statement, blocking would introduce unnecessary and unjustifiable inefficiencies into both the demand and supply sides of the Canadian telecommunications system—through impacting ISPs' operations and networks, and incenting users to put time and effort towards setting up workarounds, not to mention any resources put towards enforcement. Blocking content only in Quebec would also impair competition by unfairly disadvantaging ISPs who happen to serve users in Quebec, compared to rivals in service areas outside of Quebec.

75. Turning last to s. 7(a) and s. 7(h) and the economic and social aspects, in proceedings such as Telecom Notice of Consultation CRTC 2015-134, *Review of basic telecommunications services*, the CRTC has established the now fundamental role of Internet access in safeguarding, enriching, and strengthening Canada's "social and economic fabric." This fabric is often characterized as rooted in a free and open democracy, and that entails preserving a free and open telecommunications backbone. ISPs blocking otherwise legal online content, however, weakens democratic values such as freedom of expression and access to information, in a way that undermines Canada's social and economic fabric. Additionally, unprincipled blocking as in this case runs contrary to users' social and economic requirements, such as the ability to connect over common interests, make financial decisions for themselves, and trust a telecommunications provider to do the job the user is paying it for: transmit content untouched.

Bill 74 threatens constitutionally-protected free speech.

76. In addition to being constitutionally invalid by virtue of a direct conflict with exclusive federal jurisdiction, Bill 74 threatens constitutionally-protected free speech and is therefore contrary to free expression rights in s. 2(b) of the *Charter*.

77. PIAC believes that the Commission can take notice of the vital role that the Internet plays in the preservation and promotion of fundamental human rights, including freedom of expression.

78. The importance of maintaining a free and open Internet, subject to constitutionally reasonable limits in respect of legitimate purposes regarding law enforcement and

[25] Christine Dobby, "Quebec plan to block gambling sites draws cries of censorship," *Globe and Mail* (13 November 2015), online: <http://www.theglobeandmail.com/report-on-business/quebec-plan-to-block-gambling-sites-draws-cries-of-censorship/article27259448/>.

hate speech, are well documented by numerous legal experts and scholars,[26] jurists[27] and telecommunications experts.

79. In the United States for example the Supreme Court found the 1996 *Communications Decency Act*'s provisions seeking to protect minors from harmful material on the Internet to be constitutionally invalid because it was overbroad despite the legislation's legitimate purposes.[28] In PIAC's view, this case, from twenty years ago, illustrates an early recognition of the fundamental importance of free speech online.

80. As former CRTC National Commissioner Timothy Denton, as he then was, wrote: "History shows that schemes of regulation – and censorship – have a tendency to expand […]."[29]

81. If Québec is found competent to indirectly licence the forms of communication that may take place online, PIAC believes other provinces will follow suit for various reasons (fiscal or otherwise) in developing schemes of regulation and censorship that will impair free speech.

82. *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 S.C.R. 927 does not assist the Province of Québec. The speech purportedly being controlled by Bill 74 affects choices and preferences of the public and is not one way, advertising speech. It is two-way, internet-delivered speech.

83. PIAC does not argue the *Oakes* test at this stage. Should any party disagree that interference with freedom of expression guaranteed under s. 2(b) of the *Charter* is justifiable under s. 1 of the Charter, we shall address that argument in our reply comments.

Bill 74 is practically unworkable

84. As alluded to above in the quote from Mr. Abramson, efforts to block public access to websites also would be technically ineffective. Customers could easily use a different DNS server than their own ISP's to circumvent blocking done on this basis. Customers also could employ a virtual private network (VPN). VPN communications are typically encrypted and would not, absent extremely intrusive efforts, be controllable by ISPs or WSPs. Blocking all VPNs would be an overbroad response by ISPs or WSPs that would catch other telecommunications and would inadvertently

---

26 See e.g., Michael Geist, "Lawsuits put online free speech at risk", https://www.thestar.com/news/2007/04/30/lawsuits_put_online_free_speech_at_risk.html ; Roach K. and D. Schneiderman, "Freedom of Expression in Canada", (2013), 61 S.C.L.R. (2d) 429 – 525.

27 See e.g., The Hon. Mr. Justice John Sopinka, "Freedom of Speech and Privacy in the Information Age", 15 September 1997.

28 https://www.law.cornell.edu/supct/html/96-511.ZS.html

29 Broadcasting Regulatory Policy CRTC 2009-329, *Review of broadcasting in new media*, 4 June 2009, Concurring opinion of Commissioner Timothy Denton (Revised as of 8 July 2009). Online: http://www.crtc.gc.ca/eng/archive/2009/2009-329.htm

interfere with other telecommunications and content and would restrict unaffiliated speech.

85. Deep packet inspection (DPI) to look for content affiliated with gambling would run afoul of the Commission's own ITMP framework, which forbids using DPI for anything but network management and even then, only at a very high (shallow packet inspection) level.

86. Finally, the Province of Québec has no regulatory or policy tools in the area of telecommunications to use in pursuing its technical goals. The CRTC would be called upon to be the enforcer of this purported provincial law and would face incessant inquiries, applications and calls for enforcement of the purported law as well be required to adjudicate adequacy of the efforts to block websites – a messy and inefficient result.

87. In brief, there is no overwhelming policy goal that would justify the drastic step of approving blocking of certain content from the Internet, whether to enable Bill 74 or as a moral or public policy goal. The Commission has no evidence of such a need and PIAC submits that such evidence would have to be of an evil so overwhelming that it trumped the rights of all users of the Internet for otherwise lawful purposes and expression – an extremely high, most likely constitutionally impossible, barrier.

4. RELIEF SOUGHT

88. Based on the foregoing, PIAC requests the following relief:

(i). A declaration that the provisions of Bill 74 purporting to require ISPs and WSPs to block certain websites is unconstitutional (*ultra vires*) and contrary to the *Charter of Rights and Freedoms* and therefore of force or effect;

(ii). A declaration that any application by a Canadian carrier under s. 36 which seeks to block public access to any websites listed by the Quebec Régie or Loto-Quebec or the Government of Quebec, as the case may be, under the purported authority of Bill 74 will, without more, be denied.

(iii). An interim injunction enjoining all ISPs or WSPs operating in Quebec from actually blocking, or taking any steps preparatory to complying with Bill 74 to block, any gambling websites, pending the repeal, amendment, reading down or other judicial invalidation of sections 260.33 through 260.38, and 277(h) of the Quebec *Consumer Protection Act*, whichever occurs first.

(iv). In accordance with the *CRTC Rules of Practice and Procedure*, PIAC's costs in bringing and arguing this application.

Test for injunction

89. In order to give effect to the second last ground of relief, it is necessary to establish the grounds for the granting of an interlocutory injunction.

90. The Commission recently set out its test for interim injunctions, as follows:

> To assess applications for interim relief, the Commission's practice is to apply the criteria set out by the Supreme Court of Canada in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd. [1987] 1 S.C.R. 110, and modified in RJR-MacDonald Inc. v. Canada (Attorney General) [1994] 1 S.C.R. 311. These criteria (the RJR-MacDonald criteria) are that (i) there is a serious issue to be determined, (ii) the party seeking the interim relief will incur irreparable harm if the relief is not granted, and (iii) the balance of convenience, taking into account the public interest, favours granting the interim relief. To be successful, an applicant must establish that it meets all three criteria.[30]

[30] CRTC, "Commission Letter Addressed to William Sandiford (Canadian Network Operators Consortium Inc.) and Natalie MacDonald (Eastlink), 31 August 2015, in Part 1 Application by CNOC - Request for relief with regard to the pricing and availability of Eastlink's cable retail

91. The facts of this proceeding have created a situation that meets all three criteria.

92. First, Internet service providers blocking particular websites due to government blacklisting is a serious issue to be determined. As discussed with respect to the ITMP Framework decision and *Telecommunications Act* policy objectives above, such a possibility threatens the fundamental role of the Internet in citizens' lives, and their ISPs' ability to appropriately fulfill that role. ISP content blocking violates principles of net neutrality and an open Internet,[31] freedom of expression, and access to information, all of which are pillars of Canada's social, economic, and political fabric. Such a break from currently established and hard-won legal principles could have far-reaching consequences in multiple areas of law beyond telecommunications, such as *Charter* rights,[32] labour law,[33] criminal law,[34] and constitutional law.[35] Furthermore, the Commission has established that "[t]he threshold for a finding that there is a serious issue to be tried is low. Generally, if an application is not clearly frivolous, it will meet this standard."[36] This low standard combined with the high stakes suggest that the case at hand meets the first criteria for interim relief.

93. Second, Canadian consumers and the Canadian public generally will incur irreparable harm if the relief is not granted. This is because granting the unprecedented ability to block online content would "violate the first rule of the Canadian Internet",[37] as Michael Geist asserted, and open a particularly devastating Pandora's Box. History suggests that once authorities are given new or expanded powers, even in cases framed as special, temporary, or for a state of emergency only,

---

Internet access services for resale by ISPs – CNOC's request for Interim Relief ["Commission Letter, CNOC's request for Interim Relief"].

31 Michael Geist, "Quebec Law Would Violate First Rule of the Canadian Internet," Michael Geist (2 December 2015), online: <www.michaelgeist.ca/2015/12/quebec-law-would-violate-first-rule-of-the-canadian-internet>.

32 Dobby, supra.

33 "Telus cuts subscriber access to pro-union website," CBC News (24 July 2005), online: <http://www.cbc.ca/news/canada/telus-cuts-subscriber-access-to-pro-union-website-1.531166>; "To Censor Pro-Union Web Site, Telus Blocked 766 Others," The Tyee (4 August 2005), online: < http://thetyee.ca/News/2005/08/04/TelusCensor>.

34 See, e.g., the controversy over sections 17 and 18 (repealed in 2015) of the Digital Economy Act 2010 in the United Kingdom, which empowered the Secretary of State to "make regulations about the granting by courts of injunctions requiring the blocking of websites that infringe copyright". Deregulation Act 2015, UK 2015, c 20, s 56. Copyright infringement is a criminal offence in the United Kingdom, and while this is not currently the case in Canada, allowing any blocking of online content by an ISP due to government-designated "unauthorization" would set a dangerous precedent that could easily descend to this point. Government of the United Kingdom, "Intellectual Property Crime and Infringement," Gov.UK (12 May 2014, last updated 22 February 2016), online: <https://www.gov.uk/guidance/intellectual-property-crime-and-infringement>.

35 ISP X would violate constitutional law by blocking access to certain sites to fulfill a provincial request, Bill 74, in direct violation of federal law, the Telecommunications Act, within an area where the province has no jurisdiction—telecommunications.

36 Commission Letter, CNOC's request for Interim Relief.

37 Geist, *supra*.

those new powers are rarely, if ever, clawed back. Little evidence assures us that this would not happen with ISP content blocking.[38]

94. In addition, any efforts of ISPs and WSPs in preparing to block content will, as noted, transfer immediately into higher rates or poorer service for consumers. Such losses are difficult to compensate: it would be administratively complex and inefficient to attempt to calculate refunds for any rate increases resulting from these preparations. Further, any degradation of service (either due to resources being diverted from normal network management to the blocking project or due to permanent reduction in service – such as slowing traffic in order to filter it for gambling content) could not be effectively compensated.

95. Lastly, as noted, building the infrastructure for consumer surveillance is a harm that is likely irreparable. It is extremely likely that any such infrastructure will not be removed from the network once installed. This vastly increases the risk to consumers of future surveillance (either corporate or state) and destroys consumer privacy.

96. Third, the balance of convenience, taking into account the public interest, favours granting the interim relief. Interim relief in the form of an injunction against blocking, in this case, would preserve the status quo, while withholding such relief would create the risks and inefficiencies mentioned above.

97. Finally, at the moment, consumers in Quebec can access these websites so this situation would simply continue – with no inconvenience or confusion on the part of consumers. Likewise, serious efforts to accommodate a very suspect law could be avoided by ISPs and WSPs until the status of the law was more certain.

98. Finally, PIAC notes that the Quebec government is not attempting to protect its citizens from gambling (through a ban). It is attempting to regulate access of its citizens to gambling. Indeed, our understanding is that it seeks the ability to "authorize" gambling websites in Quebec and provide them only via Loto-Quebec's "Espace-Jeux" website. Presumably there will be fees and other requirements to be so enshrined. This is a less noble pursuit than attempting to shield its citizens from the evils of gambling. Therefore, we submit that the Quebec government's interest should be viewed in this practical light and discounted relative to the communications freedom of its citizens. As the Province of Québec presently does not derive revenue in this manner, and the ISPs and WSPs face considerable costs to implement blocking, an injunction merely preserves the status quo, meaning the balance of convenience favours an injunction.

---

[38] See, for example, concerns as articulated in a separate legal proceeding involving blocking of online content: Sunny Dhillon, "Google loses appeal in B.C., forced to block tech company from search," Globe and Mail (11 June 2015), online: <http://www.theglobeandmail.com/news/british-columbia/google-loses-appeal-in-bc-forced-to-block-tech-company-from-search/article 24933607/>.

99. The balance of convenience then, between the status quo of granting interim relief and the high public interest stakes implicated in setting a precedent for ISP blocking, weighs on the side of the Canadian public, meeting the third criteria of the test.

100. Taking all of the above into account, the situation at hand meets all three criteria for interim relief and we request that the Commission so enjoin all ISPs and WSPs operating in Quebec.

101. The requested injunction would apply pending the repeal, substantial amendment (to remove any blocking or similar requirement that trenches on federal jurisdiction over telecommunications) or declaration of unconstitutionality, reading down or other invalidation by any competent Canadian superior or federal court of sections 260.33 through 260.38, and 277(h) of the Quebec *Consumer Protection Act*.

5. CONCLUSION

102. PIAC urges the Commission to take action on this application and to expeditiously decide the issues. PIAC views the purported Québec law as destabilizing of the telecommunications regulatory sphere and is concerned about the consequences of internet censorship in pursuance of other regulatory goals.

End of document

Appendix "A" – Relevant passages of Bill 74 as adopted 18 May 2016

CHAPTER III

CONSUMER PROTECTION IN ONLINE GAMBLING

CONSUMER PROTECTION ACT

12. The Consumer Protection Act (chapter P-40.1) is amended by inserting the following after section 260.32:

"TITLE III.4

"ONLINE GAMBLING

"260.33. For the purposes of this Title, "online gambling site" means a website on which a person may make wagers and bets through an interactive mechanism.

"260.34. The Société des loteries du Québec shall oversee the accessibility of online gambling. It shall draw up a list of online gambling sites not authorized under the laws of Québec and provide the list to the Régie des alcools, des courses et des jeux, which shall notify it to Internet service providers.

"260.35. An Internet service provider that receives the list of unauthorized online gambling sites in accordance with section 260.34 shall, within 30 days after receiving the list, block access to those sites.

"260.36. If the Société des loteries du Québec becomes aware that an Internet service provider is not complying with section 260.35, it shall report the non-compliance to the Régie des alcools, des courses et des jeux.

In such a case, the Régie des alcools, des courses et des jeux shall send a notice to the non-compliant Internet service provider and send a copy of the notice to the Société des loteries du Québec.

"260.37. For the purposes of this Title, the Régie des alcools, des courses et des jeux and the Société des loteries du Québec may enter into an agreement on the frequency at which the list of unauthorized online gambling sites is to be updated and sent and on any other terms relating to the carrying out of this Title."

13. Section 277 of the Act is amended by adding the following paragraph after paragraph g:

“(h) contravenes section 260.35.”

14. Section 278 of the Act is amended by replacing “g” in the first paragraph by “h”.

15. Section 292 of the Act is amended by inserting “, except Title III.4,” after “to supervise the application of this Act” in paragraph a.

16. Section 305 of the Act is amended by replacing “respecting any Act or regulation the application of which is under the supervision of the Office” in the first paragraph by “under the Office’s jurisdiction”.

17. Section 352 of the Act is amended by adding “, except Title III.4, the application of which is under the responsibility of the Minister of Public Security if it concerns the responsibilities of the Régie des alcools, des courses et des jeux, and under the responsibility of the Minister of Finance if it concerns the responsibilities of the Société des loteries du Québec” at the end.

END OF APPENDIX “A”

Appendix "B" – Legal Opinion filed by Bell Canada and PIAC in

[Please see next page.]

February 7, 2013

Mr. Jonathan Daniels
Vice President, Regulatory Law
BCE Inc.
160 Elgin Street, 19th fl.
Ottawa, Ontario K1P 2C4

Mr. John Lawford
Executive Director and General Counsel
Public Interest Advocacy Centre
ONE Nicholas Street, Suite 1204
Ottawa, Ontario K1N 7B7

Our Reference: 066476-0001

Michel Bastarache

T 613 236.3488
F 1 866 411.2699
mbastarache@heenan.ca

55 Metcalfe Street
Suite 300
Ottawa, Ontario
Canada K1P 6L5

heenanblaikie.com

Re: Telecom Notice of Consultation CRTC 2012-557, *Proceeding to establish a mandatory code for mobile wireless services;* Legal opinion on constitutional jurisdiction over the regulation of cell phone contracts

Dear Messrs. Daniels and Lawford,

You have asked us for our opinion on the constitutionality of provincial legislation governing the terms and conditions of contracts for the provision of retail mobile wireless data and voice services ("**mobile wireless services**") provided by wireless service providers, in light of regulation on the same subject by the Canadian Radio-television and Telecommunications Commission ("**CRTC**" or "**Commission**").

In particular, you have asked us the following:

1. Whether the regulation of mobile wireless services contracts is *ultra vires* the constitutional jurisdiction of the provinces, either wholly or in part;

2. Assuming the provinces have constitutional jurisdiction to regulate mobile wireless services contracts at least in part, whether such legislation would be inapplicable to mobile wireless service providers, either wholly or in part;

3. Assuming the provinces have constitutional jurisdiction to regulate mobile wireless services contracts at least in part, whether a proposed CRTC national code for mobile wireless services ("**Wireless Code**") would take precedence over any provincial legislation; and

4. Whether the CRTC could provide a clause within such a Wireless Code to accommodate the operation of provincial legislation, and if so what effect such a clause would have.

SUMMARY OF CONCLUSIONS

For the reasons set out below, we are of the opinion that:

1. Existing and proposed provincial legislation regulating mobile wireless services contracts are outside the constitutional jurisdiction of the provinces. These provisions specifically target federal undertakings and have substantial effects on their operations. In pith and substance, they would be an impermissible provincial attempt to regulate telecommunications, an area of exclusive federal jurisdiction.

2. In the alternative, even if a court were to find some or all of these provincial initiatives valid, they would nonetheless be inapplicable to mobile wireless service providers as a matter of interjurisdictional immunity, as they would impair the vital part of the operations of federal telecommunications undertakings.

3. In the further alternative, even if such provincial initiatives were found to be both valid and applicable to mobile wireless service providers, the federal regime would render inoperative any inconsistent provision of the provincial regimes, as a matter of constitutional paramountcy. Specifically, the provincial regimes would be found inoperative because they frustrate the federal purpose of the *Telecommunications Act*.

4. Any attempt by the CRTC to accommodate provincial regulation of mobile wireless service contracts, whether by

   a. providing that the Wireless Code be interpreted to permit a consumer to benefit from any more favourable provincial regime, or

   b. suspending the operation of the Wireless Code in the face of provincial regulation,

would be ineffective in expanding the provinces' constitutional jurisdiction, and would therefore result in legal uncertainty. It would, moreover, be inconsistent with the Parliament's clear intent that the Commission exercise regulatory authority over all aspects of the Canadian telecommunications system.

FACTS AND ASSUMPTIONS

Our opinion is based on the following facts and assumptions.

1. In Telecom Notice of Consultation CRTC 2012-557[1] ("**Notice of Consultation**"), the Commission initiated a public proceeding to establish a mandatory Wireless Code to address the clarity and content of mobile wireless services contracts and related consumer issues. That proceeding is still ongoing.

2. As part of the consultation process, the Commission has published a "Wireless Code Working Document".[2] The Commission has emphasized, however, that the Working Document is intended to stimulate debate, and does not represent its preliminary view.

3. Several provincial legislatures have implemented, or are considering, legislation governing mobile wireless service contracts. In particular, legislation has been passed in Quebec, Manitoba, Newfoundland and Labrador, and Nova Scotia. In addition, similar legislation was introduced by the Ontario government in the previous legislative session, though it did not pass.

4. In the Notice of Consultation, the CRTC requested comments on, among other issues, whether the application of the Wireless Code should be "suspended" in provinces or territories which the Commission determines have legislation that provides substantially similar protections for mobile wireless consumers. In the Working Document, the CRTC has suggested an alternative approach, wherein the Wireless Code would be "interpreted" so as to permit consumers to benefit from any other "more favourable" federal or provincial regime.

QUALIFICATIONS

Our opinions below are subject to the following qualifications.

---

[1] Telecom Notice of Consultation CRTC 2012-557, *Proceeding to establish a mandatory code for mobile wireless services* (11 October 2012).

[2] "Read the Draft Code", online: http://consultation.crtc.gc.ca/read-draft-code (accessed February 3, 2013).

(i) The opinions relate only to the laws discussed herein as they exist as of the date of this opinion.

(ii) The opinions are limited to the issues as set out above.

(iii) Although we understand that this opinion may be filed on the public record in the public proceeding initiated by the Notice of Consultation, this opinion is provided to you solely for the use and benefit of BCE Inc. and the Public Interest Advocacy Centre. Our opinion may not be used or relied upon by any other person for any purpose without our express written consent.

LEGAL ANALYSIS

1. The constitutional framework of telecommunications regulation

Federal constitutional jurisdiction over telecommunications is beyond dispute.[3] Even local telephone companies constitute interprovincial undertakings, by reason of the nature of the services they provide and their mode of operation,[4] and are therefore excepted from provincial authority under s. 92(10)(*a*) of the *Constitution Act, 1867*.[5]

That federal jurisdiction includes setting the rates and conditions for the provision of any telecommunications service. As the Supreme Court has noted, the Commission's powers in this respect, set out in the *Telecommunications Act*[6] ("**Act**"), are very broad:

> The [Act] grants the CRTC the general power to set and regulate rates for telecommunications services in Canada. All tariffs imposed by carriers, including rates for services, must be submitted to it for approval, and it may decide any matter with respect to rates in the telecommunications services industry [...]
>
> A central responsibility of the CRTC is to determine and approve just and reasonable rates to be charged for telecommunications services. Together with its rate-setting power, *the CRTC has the ability to impose any condition on the provision of a service*, adopt any method to determine whether a rate is just and reasonable and require a carrier to adopt any accounting method. It is obliged to exercise all of its powers

[3] Peter Hogg, *Constitutional Law of Canada*, 5th ed. Supplemented, looseleaf (Carswell, 2007) at 22-37, 38 [Hogg]; *Téléphone Guèvremont v. Québec*, [1994] 1 SCR 878; *Alberta Government Telephones v. CRTC*, [1989] 2 SCR 225; *Federation of Canadian Municipalities v. AT&T Canada Corp.* 2002 FCA 500, [2003] 3 FC 379 at para. 47.
[4] *Téléphone Guèvremont v. Québec, supra.*
[5] Hogg, *supra*, at 22-2.
[6] S.C. 1993, c. 38.

> and duties with a view to implementing the Canadian telecommunications policy objectives set out in s. 7.[7] [emphasis added]

We note that that the Commission's forbearance from regulating certain telecommunications services, such as the mobile wireless services market, does not affect this analysis.[8] The CRTC's statutory and constitutional jurisdiction over rates, as well as the conditions governing the offering and provision of any telecommunications services by a Canadian telecommunications common carrier, exist irrespective of how the CRTC chooses, as a policy matter, to exercise that jurisdiction. In that regard, while the Commission has forborne from regulation of the mobile wireless services market, it has expressly determined that it would retain its regulatory powers under s. 24 and ss. 27(2) and 27(4) of the Act, which enable it to impose any conditions on the offering and provision of a mobile wireless service, and to enforce the prohibition on a Canadian carrier unjustly discriminating or giving an undue preference in relation to the provision of a telecommunications service.[9]

However, the existence of federal jurisdiction over telecommunications does not, *ipso facto*, exclude the possibility of provincial jurisdiction to legislate in ways that may affect telecommunications. We consider this issue further below.

2. Provincial jurisdiction to legislate in respect of telecommunications

a. General constitutional principles

The principles applicable to a constitutional division of powers analysis are well-established, and will be reviewed here only briefly. The initial task is to identify the "pith and substance" of the impugned legislation: that is, the constitutional "matter" to which the law essentially relates. This may entail inquiring into both the purpose of the law and its effects, and may be directed to the legislation as a whole or to particular provisions.[10]

Where the pith and substance of the law falls under one of the constitutional heads of power of the level of government that enacted it, the legislation will be valid, despite any incidental effects on matters within the jurisdiction of the other level of

---

[7] *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 SCR 764, paras. 29, 36. See also Act, ss. 24, 25(1), 27, 32(g).

[8] *Bell Mobility Inc. v. Anderson*, 2012 NWTCA 4 at paras. 22-25; Telecom Decision CRTC 96-14, *Regulation of Mobile Wireless Telecommunications Services* (23 December 1996).

[9] See Telecom Decision CRTC 2012-556, *Decision on whether the conditions in the mobile wireless market have changed sufficiently to warrant Commission intervention with respect to mobile wireless services* (12 October 2012) at para. 17, referring to Telecom Decision CRTC 96-14 and follow-up company-specific decisions relating to mobile wireless service providers.

[10] *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3, at paras. 25-27 [*Canadian Western Bank*].

government. If, however, the pith and substance of the law falls outside any such head of power, the law will be invalid or "*ultra vires*".

Constitutionally valid provincial legislation may nonetheless be ousted or restricted in its effect, through the doctrines of interjurisdictional immunity or paramountcy:

- Interjurisdictional immunity applies where a provincial law both "trenches on" and "impairs" the federal exercise of its core competence, or the vital part of a federal undertaking, whether or not any federal legislation exists. In such a case, the challenged provincial legislation is valid, but inapplicable to the extent of the impairment.[11] (We address the applicable legal tests governing the "impairment" threshold in subsection (d), below.)

- Paramountcy, by contrast, applies where valid federal legislation and valid and applicable provincial legislation exist. In the event of conflict between the two, the federal law renders the provincial law inoperative to the extent of the conflict. Paramountcy may arise in cases of operational conflict (that is, where compliance with one enactment entails defiance of the other), or where the federal purpose would be frustrated by the provincial enactment.[12] We note, however, that the mere fact that provincial legislation imposes a higher standard than federal legislation will not necessarily engage paramountcy.[13]

b. Existing and proposed provincial enactments

As noted, four provinces have enacted legislative regimes addressing mobile wireless service contracts, and a fifth has proposed legislation in this area.[14] We review the regimes briefly below.

Quebec

In 2009, the *Consumer Protection Act*[15] was amended to add provisions applicable to "contracts involving sequential performance for a service at a distance".[16] These provisions govern the information such contracts must contain, the payment of services during repair of goods, the use of the security deposit, the renewal and expiration of

---

[11] *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 SCR 536 at paras. 27, 35, 43 [*COPA*].
[12] *COPA*, *supra* at paras. 64, 66.
[13] *Canadian Western Bank*, *supra* at para. 72.
[14] In addition to these five provincial initiatives, we note that in New Brunswick a private member's bill introduced in the previous legislative session (Bill 35, the *Cellular Phone Contracts Act*) proposed to enact stand-alone legislation to regulate mobile wireless service contracts, similar to the proposed Ontario legislation. The bill did not, however, progress beyond first reading, and has not as yet been reintroduced in the current session.
[15] *An Act to amend the Consumer Protection Act and other legislative provisions*, 2009, chapter 51 (Bill 60).
[16] *Consumer Protection Act*, R.S.Q. c. P-40.1, Division VII.

such contracts, and the cancellation of such contracts by the customer.[17] Though the services covered by these provisions are not expressly defined in the statute, the legislative history indicates that they include mobile wireless services and other telephone services cable and internet services, and alarm system services.[18] That is also the position of the Quebec Office de la protection du consommateur, which is charged with enforcing the legislation.[19]

Manitoba

Recent amendments to the *Consumer Protection Act*[20] regulate "contracts for cell phone services", including the content of cell phone contracts, advertising in relation to cell phone contracts, additional or extended warranties on cell phones, unilateral amendments of cell phone contracts, cancellations of cell phone contracts by customer, contract expiry and extension, security deposits and equipment repairs.

Newfoundland and Labrador

New amendments to the *Consumer Protection and Business Practices Act*[21] govern "distance service contracts", defined as "a service contract for cell phones, residential phones, internet, cable and satellite television and remote surveillance, and includes the goods used in conjunction with the service contract".[22] The provisions regulate the form and content of distance service contracts, their expiry, renewal and cancellation, as well as advertisement, warranties and security deposits related to such contracts.

Nova Scotia

Recent amendments to the *Consumer Protection Act*,[23] not yet proclaimed into force, deal with contracts for cellular telephone services, including provisions dealing with the information that contracts for cellular telephone services must set out, the cancellation of such contracts by consumers, and the renewal and amendments of such contracts by the supplier.

---

[17] *Ibid.*, ss. 214.2, 214.5, 214.9-214.11, 214.3-214.4, 214.6-214.8.
[18] Ministre de la justice K. Weil : journal des débats, Étude détaillée du projet de loi n° 60, jeudi 5 nov 2009, Vol 41 No. 11.
[19] See Office de la protection du consommateur, online: http://www.opc.gouv.qc.ca/WebForms/MessageImportant/ProjetLoiLpc.aspx
[20] *Consumer Protection Amendment Act (Cell Phone Contracts)*, C.C.S.M. c. C-200 (Bill 35), assented to June 14, 2012.
[21] *An Act to amend the Consumer Protection and Business Practices Act*, SNL 2009 c. C-31.1 (Bill 6), assented to June 27, 2012.
[22] *Consumer Protection and Business Practices Act*, s.35.1(1)(b).
[23] *An Act to Amend Chapter 92 of the Revised Statutes, 1989, the Consumer Protection Act, to Ensure Fairness in Cellular Telephone Contracts* (Bill 65), royal assent May 17, 2012.

Ontario

A government bill introduced in the previous legislative session[24] would have enacted a stand-alone *Wireless Services Agreement Act*, "to protect consumers who enter into agreements with suppliers for wireless services accessed from a cellular phone, a smart phone or any other similar mobile device".[25] The bill includes provisions dealing with the information that wireless agreements must disclose, the cancellation of agreements by consumers, and the renewal and amendments of the agreements by the supplier. The legislation as proposed would apply to a wireless agreement in addition to otherwise applicable provisions of the *Consumer Protection Act*.

c. The "pith and substance" of the provincial regimes is telecommunications

The provisions of the various actual and proposed provincial regimes, on their face, arguably possess both provincial and federal features. While they purport to deal with contracts of sales and purchase, which fall within provincial constitutional authority over property and civil rights, they also clearly address telecommunications, a matter of exclusive federal jurisdiction. The key question for a reviewing court is which of the two features is the dominant feature, or "pith and substance", of the legislation.[26]

As noted above, a reviewing court will consider both the purpose of the enacting legislative body and the legal effects of the law.[27] In determining the purpose of the legislation, courts may look both to intrinsic evidence, like preambles, purposive clauses, and the general structure of the act, and extrinsic evidence such as parliamentary debates.[28] The key is to determine the *true* purpose rather than the *stated* purpose of the legislation.[29] The effects of the legislation are also relevant in a pith and substance analysis and include the "practical consequences that flow from the application of the statute".[30]

With the exception of the proposed Ontario legislation, the legislative provisions at issue are all integrated within provincial consumer protection legislation of general application.[31] However, their stated purpose, as is evidenced by the legislative history, is specifically to protect consumers who enter into agreements with suppliers of

---

[24] *An Act to strengthen consumer protection with respect to consumer agreements relating to wireless services accessed from a cellular phone, smart phone or any other similar mobile device* (Bill 82). The bill was introduced May 3, 2012; the bill had not yet passed second reading when the Ontario legislature was prorogued on October 15, 2012. Whether the bill will be reintroduced once the legislature is recalled is unknown.

[25] *Ibid.*, s. 1.

[26] We note that "consumer protection" is too broad to serve as a "matter" in a division of powers analysis. See Hogg, *supra* at 21-31.

[27] *Canadian Western Bank*, *supra* at para. 27.

[28] *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 SCR 453 at para. 20.

[29] *Canadian Western Bank*, *supra* at para. 27.

[30] *Quebec (Attorney General) v. Lacombe*, *supra* at para. 20.

[31] The private member's bill in New Brunswick, *supra* note 14, would also have created a stand-alone act.

telecommunication services.[32] In Manitoba and Nova Scotia, the provisions at issue deal exclusively with cell phone contracts. In all cases, discrete bills were devised to regulate the field of telecommunication services.[33]

An examination of the "practical consequences" arising from these regimes further supports their characterization as primarily directed towards telecommunications. Regulating the terms and conditions of contracts or agreements through which specific telecommunication services are offered to the public imposes significant restrictions on the operation of mobile wireless service providers, and has obvious effects on their overall business operations. Notably, such regulation affects the revenues and profitability of mobile wireless service providers, which in turn potentially affects the rates that such service providers can charge to an end user.[34] In the *Alberta Bank Taxation Reference*,[35] the Privy Council held a provincial statute levying a tax on banks to be invalid, on the basis that its effects on banks were so great that its true purpose could not be raising money through taxation, but rather was directed at the regulation of banking.[36] Similarly, the effects of the actual and proposed provincial legislation on mobile wireless service providers is such that, in our view, its matter is properly described as the regulation of telecommunications.

Another significant factor is the extent to which the provincial regimes "single out" telecommunications.[37] The Manitoba and Nova Scotia legislation, as well as the Ontario bill, purport to regulate exclusively contracts with mobile wireless service providers. In the case of Quebec and Newfoundland, the provisions apply somewhat more broadly, albeit principally to companies providing telephone (both wireless and residential), internet, cable or satellite television services, which are all under federal jurisdiction.[38] The relevant provincial regimes therefore are at least primarily, if not exclusively, directed at the regulation of contracts involving federally-regulated undertakings. These

---

[32] See, for example: explanatory note in Manitoba Bill 35; comments from Quebec Minister of Justice in legislative assembly; described purpose of Ontario's *Wireless Services Agreement Act*.

[33] We note that the Quebec and Newfoundland provisions also address contracts relating to the provision of alarm services. In that regard, it is important to note that the provision of alarm system services contemplates the use of telecommunications services provided by Canadian carriers, which fall under exclusive federal jurisdiction. Moreover, we note that many such services are provided pursuant to a tariff approved by the CRTC.

[34] For example, under the proposed legislation in Ontario, the maximum amount that the supplier may henceforth charge the consumer as a cancellation fee would be $50: *supra* note 24, s. 17(5).

[35] *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] AC 117.

[36] *Canadian Western Bank, supra* at para. 27.

[37] Hogg, *supra* at 15-11.

[38] *Radio Reference*, [1932] AC 304; *Capital Cities Communications v. CRTC*, [1978] 2 SCR 141. In the *Radio Reference*, it was established that broadcasting as an "undertaking" fell under s. 92(10)(*a*); see Hogg, *supra* at 22-29. Note that while the term "broadcasting" under s. 92(10)(*a*) is usually understood to mean "organization" or "enterprise", in the case of radio and television broadcasting it has been used to encompass the entire broadcasting activity and not just particular broadcasting firms (Hogg, *supra* at 22-4).

factors all point to the "pith and substance" of the provincial regimes being directed towards matters under federal jurisdiction.

We note that courts have held that certain matters have a "double aspect", meaning that both the federal Parliament and provincial legislatures are constitutionally competent to pass laws dealing with that matter.[39] Such areas have included, for example, insolvency and gaming.[40] We believe such a conclusion is unlikely in this case, however: courts have not held that telecommunications services fall within the "double aspect" doctrine. There is no meaningful constitutional distinction, in our view, between a regime directed at the regulation of telecommunication *services* and the regulation of telecommunications or telecommunication companies. The latter are of exclusive federal jurisdiction, and not subject to the double aspect doctrine.

In summary, our opinion is that the provincial regimes at issue, in purporting to regulate mobile wireless services contracts, are in pith and substance regulating telecommunications or telecommunications companies, a matter of exclusive federal jurisdiction. In our view a court would likely conclude that the actual and proposed provincial regimes are invalid as *ultra vires* provincial jurisdiction.

As we discuss in greater detail in subsections (e) and (f) below, the Commission has raised the possibility of accommodating provincial regulation of mobile wireless services contracts, either through "suspending" the operation of the Wireless Code in provinces with regimes offering similar consumer protection, or "interpreting" the Wireless Code to allow consumers to benefit from whichever regime is "more favourable". We emphasize that in light of our conclusions above, neither approach would be constitutionally effective. The Commission cannot expand provincial jurisdiction to legislate in an area of exclusive federal competence, and any attempt to accommodate constitutionally invalid legislation would result in significant legal uncertainty.

However, were a court to conclude, contrary to our analysis above, that any of the foregoing provincial legislative regimes are in principle valid exercises of provincial jurisdiction (over, *e.g.*, property and civil rights in the province), this would not detract from federal jurisdiction in this area. The provincial legislation would be ousted to the extent that it impaired the vital part of federal undertakings or that it conflicted with a federal regime. We consider these scenarios in the subsections below.

---

[39] *Canadian Western Bank, supra* at paras. 28-30. The majority provided the following example: "A classic example is that of dangerous driving: Parliament may make laws in relation to the "public order" aspect, and provincial legislatures in relation to its "Property and Civil Rights in the Province" aspect" (at para. 30, citation omitted).

[40] See, *e.g.*, *Robinson v. Countrywide Factors*, [1978] 1 SCR 753 (insolvency); *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 SCR 59 (entertainment in taverns); *Siemens v. Manitoba*, [2003] 1 SCR 6 (gaming).

d. Provincial regimes would in any event be inapplicable on the basis of interjurisdictional immunity

As noted above, under the doctrine of interjurisdictional immunity, otherwise valid provincial legislation that trenches on and impairs the vital part of a federal undertaking or the core of a federal competence will be held inapplicable to the extent of the impairment.

Only what is "absolutely indispensable or necessary" to an undertaking constitutes its "vital part" for the purposes of applying the doctrine of interjurisdictional immunity. For example, the Supreme Court held that the promotion of "peace of mind" insurance was not indispensable or necessary to banking activities,[41] and that authorizing the construction of a cement mixing facility on port lands did not fall within the vital functions of the port authority, a federal undertaking.[42] By contrast, however, it held that television advertising is a vital part of the operation of a television broadcast undertaking.[43] It has further held that working conditions and labour relations,[44] as well the erection of telephone poles and wires,[45] are vital parts of the operation of telephone companies.

In our view, there are compelling arguments that the terms and conditions of contracts and agreements for the provision of mobile wireless services are a vital part of the operation of mobile wireless service providers. As noted above, such contracts are integral to the overall business operations of such providers, and are the basis for the underlying economics of providing such services. Such contracts have a fundamental impact on revenues, profitability and, potentially, the viability of certain of the providers' activities and services. They are analogous to labour relations and the erection of telephone poles and wires in terms of how essential they are to the operations of mobile wireless service providers. Indeed, the terms and conditions set out in such contracts as appear to be more vital to the operation of a mobile wireless service provider than advertising is to a broadcast undertaking.

Moreover, the provincial legislation *impairs* this vital part of mobile wireless service providers. For the impact of provincial legislation to amount to impairment, it must constitute a significant or serious intrusion on the exercise of the federal power.[46] For example, the British Columbia Court of Appeal recently held that the British Columbia *Builders Lien Act* impaired a vital part of the Vancouver International Airport Authority, as the registration of a lien against the Authority's leasehold interest could diminish its ability to obtain financing, and the execution of the lien by the sale of the

---

[41] *Canadian Western Bank, supra* at para. 51.
[42] *British Columbia (Attorney General) v. Lafarge*, 2007 SCC 23, [2007] 2 SCR 86 at para. 72 [*Lafarge*].
[43] *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 SCR 927 at para 26.
[44] *Bell Canada v. Quebec* [1988] 1 SCR 749.
[45] *Toronto v. Bell Telephone Co.* [1905] AC 52.
[46] *COPA, supra* at paras. 45.

leasehold interest would end the airport's operations.[47] Similarly, the Ontario Superior Court held that a city by-law governing (among other things) the siting of radio antennas for wireless telecommunications services was constitutionally inapplicable to a mobile wireless service provider, as the control over the placement or siting of antennas would allow the city to "substantially impair" the provider's "essential activities." By contrast, however, the city would in principle be permitted to regulate the "aesthetic and visual qualities of a telecommunications facility" through siting requirements.[48]

The provincial regimes at issue circumscribe the way mobile wireless service providers can offer their services. Of the different legislative provisions, some appear to affect the operations of mobile wireless service providers more than others. Requiring providers to include certain information in their contracts with customers would, on its face, appear mostly to affect the providers' internal administration. On the other hand, provisions allowing consumers to cancel contracts at any time, and limiting cancellation fees, or provisions preventing providers from unilaterally amending or automatically renewing contracts, clearly have the potential to significantly intrude upon providers' business operations, including revenues, profitability and, potentially, the viability of certain of the providers' activities and services. Whether a court would ultimately find that these legislative provisions have the potential to impair the operations of mobile wireless service providers will, to some extent, depend on facts which we do not have before us.

A reviewing court may also consider relevant that the CRTC has so far made an express policy choice to largely forbear from regulating mobile wireless services, under s. 34 of the Act. That is, the provinces, by regulating such services, are impairing Parliament's legislative freedom, in its exclusive jurisdiction over telecommunications and telecommunication companies, to calibrate the appropriate balance between regulatory oversight and reliance on market forces to ensure that policy and statutory objectives for telecommunications service providers are realized. The Supreme Court reached a similar conclusion in *COPA*:

> Instead of the current permissive regime, Parliament would be obliged to legislate for the specific location of particular aerodromes. Such a substantial restriction of Parliament's legislative freedom constitutes an impairment of the federal power.[49]

We note that courts use the doctrine of interjurisdictional immunity to read down provincial legislation of general application so that it does not apply to federal undertakings. As discussed, however, the legislative provisions at issue *only* regulate contracts with federal undertakings, with the possible exception of contracts for alarm systems covered by the legislation in Quebec and Newfoundland. In Manitoba and

---

[47] *Vancouver Intl Airport v. Lafarge*, 2011 BCCA 89, 16 BCLR (5th) 226 at para 59.
[48] *Telus Communications Company v. Toronto (City)* (2007), 84 OR (3d) 656 at paras. 22-28 (Sup. Ct.).
[49] *COPA, supra* at para. 48.

Nova Scotia, it is therefore very unlikely that a court would find the provisions valid but inapplicable to mobile wireless service providers, as this would make little sense conceptually. The doctrine might arguably be invoked to read down the legislative provisions in Quebec and Newfoundland, but their application would then be extremely limited.

For these reasons, our opinion is that a court's review of these provincial legislative regimes would occur at the stage of assessing their validity under a division of powers analysis, as discussed in the previous section. That said, as we have noted above, the factors set out with respect to interjurisdictional immunity will come into play in a "pith and substance" analysis. The fact that customer contracts are an essential part of mobile providers' operations, and that provincial legislation will affect the companies' business operations, including revenues and finances, combined with the provincial legislation applying essentially only to federal undertakings, would suggest that these regimes are directed to the regulation of telecommunications (in this case, mobile wireless service providers).

e. Provincial regimes would in any event be inoperative on the basis of paramountcy, as frustrating the purpose of the Act

For the reasons already set out, in our view the enactment by the Commission of a Wireless Code falls squarely within federal jurisdiction.[50] Moreover, as stated, in our opinion the provincial regimes are invalid, falling outside provincial jurisdiction, and in any case inapplicable to telecommunication undertakings.

In the alternative, assuming the provincial legislative regimes were both (i) valid as an exercise of provincial jurisdiction, and (ii) not inapplicable as a result of interjurisdictional immunity, the federal regime would nonetheless take precedence over any conflicting provincial regime on the basis of the doctrine of paramountcy. This doctrine applies to render inoperative any provincial legislation inconsistent with federal legislation – or subordinate regulation enacted by an administrative agency – to the extent of the inconsistency.[51]

As already noted above, federal paramountcy will be triggered if there is an operational conflict between federal and provincial laws, such that a telecommunications company

---

[50] There appears to be no basis for the Government of Quebec's suggestion, in its submission in response to the Notice of Consultation, that the federal government lacks jurisdiction to enact such a Code: see « Mémoire du Ministère de la culture et des communications du Québec (MCC) et de l'Office de la protection du consommateur du Québec (OPC) au nom du gouvernement du Québec au Conseil de la Radiodiffusion et des télécommunications canadiennes (CRTC), 4 décembre 2012 » at paras 6-7.

[51] The operation of paramountcy is unaffected by the Wireless Code being regulations, rather than law enacted by Parliament. See, *e.g.*: *COPA*, *supra* (whether Quebec's agricultural legislation frustrated the purpose of the *Canadian Aviation Regulations* under the *Aeronautics Act*); *Lafarge*, *supra* (a management plan adopted by the Vancouver Port Authority under the *Canada Marine Act* was paramount over a municipal by-law).

cannot comply with both, or if the provincial laws frustrate the federal purpose in the area of telecommunications. We consider these issues further below.

i. The Telecommunications Act

While there does not appear to be any direct operational conflict between the provisions of the Act itself and the provincial legislative regimes regulating mobile wireless services, there are, in our view, compelling arguments that these provincial regimes frustrate the federal purpose manifested in the Act.

We note that in recent cases the Supreme Court has emphasized the high threshold for finding frustration of a federal purpose. In *Canadian Western Bank*, it warned:

> The fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject. As this Court recently stated, "to impute to Parliament such an intention to 'occup[y] the field' in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since at least *O'Grady*".[52]

In *COPA*, the Court stated that "permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission."[53] Parliament had put in place a regulatory framework to govern the location of aerodromes, but the Court held that there was no proof that Parliament had "deliberately adopted minimal requirements for the construction and licensing of aerodromes in order to encourage the spread of aerodromes".[54]

However, despite this strict test, there is a compelling argument that, by entrusting the CRTC with the broad power to impose conditions on the provision of telecommunications services, Parliament intended that the Commission have the final say in this area. If so the provincial regimes would frustrate that federal purpose.[55]

Parliament has enacted comprehensive legislation dealing with telecommunications and has expressly made the provision of telecommunication services subject to the conditions imposed by the CRTC.[56] The Act specifically affirms that "telecommunications performs an essential role in the maintenance of Canada's identity

---

[52] *Canadian Western Bank* at para. 74, quoting *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 SCR 188 at para. 21 (citing *O'Grady v. Sparling*, [1960] SCR 804).
[53] *COPA* at para 66.
[54] *COPA* at para 68.
[55] See *e.g. Lafarge* at para. 83, where the Supreme Court held that the application of the relevant municipal standards would frustrate the federal purpose, as the Vancouver Port Authority retained the final say in respect of all matters falling within valid federal jurisdiction, in case of conflict.
[56] Act, s. 24.

and sovereignty"[57] and that one of the objectives of Canadian telecommunications policy is "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."[58] This statutory language expresses Parliament's intent that telecommunications policy, as a matter of vital national concern, coherently further national objectives. Indeed, the Federal Court of Appeal has made clear that, "[i]n order to attain the statutory objects, the Act should be interpreted as creating a comprehensive regulatory scheme."[59]

Moreover, as the Supreme Court recently explained:

> The [Act] sets out certain broad telecommunications policy objectives. It directs the [CRTC] to implement them in the exercise of its statutory authority, balancing the interests of ***consumers***, carriers and competitors in the context of the Canadian telecommunications industry.[60] [emphasis added]

The fact that Parliament intended to grant the CRTC "comprehensive regulatory powers"[61] to implement telecommunications policy objectives of national scope, and reach a particular balance between the interests of consumers, carriers and competitors, strongly suggests that the regulation of mobile wireless services through discrete and varied provincial regimes *in itself* frustrates the federal purpose of the Act. In addition, the administrative and legal complications arising from the application of different legislative regimes to wireless services may frustrate Parliament's intent of effectively regulating telecommunications, as set out in the policy objectives in the Act.[62]

ii. The Wireless Code

The existence of an operational conflict between the Wireless Code and the provincial regimes will obviously depend on the content of the final draft of the Wireless Code.

For example, the Wireless Code Working Document currently contemplates two options to deal with automatic contract renewal (D3.4):

- option 1 provides that "a fixed-term contract will automatically renew on a month-to-month basis on the same terms and conditions on the day it expires unless the consumer contacts the wireless service provider to cancel the service"; and

---

[57] Act, s. 7.
[58] Act, s. 7(a).
[59] *Edmonton (City) v. 360Networks Canada Ltd.*, 2007 FCA 106, [2007] 4 FCR 747 at para. 46.
[60] *Bell Canada v. Bell Aliant Regional Communications, supra* at para. 1.
[61] *Ibid.* at para 32.
[62] Act, s. 7(f).

- option 2 states that "a fixed-length contract cannot be extended or renewed by a service provider unless the consumer provides express consent before the contract expires".

The legislation in Nova Scotia, not yet in force, provides for a provision akin to the CRTC's Option 2 to deal with automatic contract renewal, whereby the contract automatically terminates on its expiry date unless the customer has given notice requesting that the contract be extended.[63] If the CRTC were to adopt Option 1, it arguably would be impossible for a mobile wireless service provider in Nova Scotia to comply with both the provincial legislation (and therefore not automatically renew its contracts) without defying the conditions established by the CRTC (which state that contracts are automatically renewed).

We note that the Commission has suggested mechanisms to allow for the operation of provincial legislation:

- In the Notice of Consultation, the Commission raised the idea that "application of the Wireless Code be suspended in provinces or territories which the Commission determines have legislation that provides substantially similar protections for mobile wireless consumers."

- In the Working Document, the Commission proposed an "interpretation clause" (Section A.4), stating that "the Wireless Code is to be interpreted in favour of the consumer and must not be interpreted in a way that prevents a consumer from benefiting from any other federal or provincial law or regulation which is more favourable to the consumer."

In principle, these mechanisms may obviate the possibility of express contradiction between the Wireless Code and provincial regimes. They may also make it more difficult for a court to conclude that the provincial legislation frustrates the federal purpose, as their very purpose is to allow the continued application of provincial consumer protection legislation. That being said, both these "accommodation" mechanisms appear to present difficulties. Either mechanism may be inconsistent with the purpose of the Act, as noted above, that the CRTC implement a comprehensive and effective national telecommunications regulatory framework.[64] Moreover, the "interpretation clause" would engender great legislative uncertainty, as there exist no clear and objective criteria to assess which of the federal or provincial provisions would be "more favourable" to the consumer. For example, some consumers may find it "more favourable" to be given a choice, while others may find it more troublesome to have to review their situation and make a new choice at the end of their contracts.

---

[63] Bill 65, *supra* note 23, ss. 25AE and 25AF.
[64] Act, s. 7; *Edmonton (City) v. 360Networks Canada Ltd.*, *supra*.

Finally, a frustration of federal purpose would exist if the CRTC included a policy or purpose statement in its Wireless Code to the effect that (a) the rules in the Wireless Code were intended to strike a particular balance between the interests of consumers and mobile wireless service providers, and/or (b) the Code was intended to harmonize the regulation of such services in Canada and eliminate a patchwork of legislation, in order for mobile wireless service providers to better know their obligations and in order for consumers to better know their rights.[65] Provincial legislation regulating mobile wireless services would necessarily frustrate (b), and it would frustrate (a) as long as it provided for materially different rules than those included in the Wireless Code.[66]

f. The CRTC should not try to accommodate constitutionally suspect provincial legislation

In view of our conclusions above, in our opinion both the "suspension" and the "interpretation" mechanisms mooted by the Commission would be ineffective and inadvisable.

First, to the extent that such clauses would purport to grant jurisdiction to the provinces to regulate telecommunications, they are unconstitutional. As discussed, the regulation of telecommunications is a matter of exclusive federal jurisdiction. The CRTC Wireless Code cannot delegate legislative powers to the legislatures of the provinces that they do not possess under the Constitution.[67] Nor could such mechanisms have any effect on the constitutionality of the provincial regimes: no clause in the Wireless Code could save otherwise constitutionally invalid provincial legislation.

Moreover, the CRTC's proposed accommodation of constitutionally suspect provincial regimes would create significant legal uncertainty, as the provincial statutes deferred to could always be modified, and subject to constitutional challenge. As the Supreme Court recently underscored, "even a long-standing exercise of power does not confer constitutional authority to legislate".[68] Because a code such as the proposed Wireless Code Working Document defers to constitutionally suspect legislation, its own operation would be uncertain.

---

[65] We note that in Telecom Decision CRTC 2012-556, *supra* at para. 35, the CRTC stated that a Wireless Code would be "symmetrical across all mobile WSPs, *irrespective of* [...] *the geographical market in which they operate*" [emphasis added], thereby ensuring consistency with the Telecom Policy Direction.

[66] We note that the conclusions of the Supreme Court in the *Securities Reference*, 2011 SCC 66, [2011] 3 SCR 837, have no bearing on the questions addressed in this opinion. In that reference, the Supreme Court held that national securities legislation did not meet the criteria for a valid enactment under the federal trade and commerce power. In contrast, federal jurisdiction over telecommunications is unquestionable; a national code regulating mobile wireless services would not have to meet any of the criteria discussed in the *Securities Reference*, which pertain specifically to the federal trade and commerce power.

[67] *Attorney General of Nova Scotia v. Attorney General of Canada* (Nova Scotia Inter-delegation), [1951] SCR 31.

[68] *Securities Reference* at para. 116.

Finally, because federal jurisdiction over telecommunications is unquestionable, there is no constitutional justification for such an exemption provision. As expressly stated in the Notice of Consultation, the inspiration for a suspension mechanism comes from the approach adopted under the *Personal Information Protection and Electronic Documents Act (PIPEDA)*. However, *PIPEDA*'s suspension mechanism was very likely adopted as a result of uncertainty about federal jurisdiction to enact national privacy legislation under the s. 91(2) trade and commerce power of the *Constitution Act, 1867*[69] – which only authorizes federal regulation of intra-provincial trade when the matter being regulated is of genuine national importance and scope.[70] It appears to be an attempt to remedy any constitutional deficiencies through a form of cooperative federalism. The constitutionality of that approach has never been decided by the courts. In any event, such a provision would be wholly out of place in the Wireless Code because there are simply no doubts about the federal jurisdiction to adopt the Code.

We trust that the information and advice contained in our opinion will assist you. We would be pleased to discuss with you our opinion and any questions that you may have at any time.

Heenan Blaikie LLP

Michel Bastarache, C.C.

[69] France Houle and Lorne Sossin, "Powers and Functions of the Ombudsman in the *Personal Information Protection and Electronic Documents Act: An Effectiveness Study*", (Research commissioned by the Office of the Privacy Commissioner of Canada, August, 2010) at 47.
[70] *Reference re Securities Act, supra* at para. 124.