In The Federal Court of Canada
Trial Division

Court No. T-4668-77

BETWEEN:

INUIT TAPIRASAT OF CANADA
THE NATIONAL ANTI-POVERTY ORGANIZATION,

Plaintiffs,

- and -

HIS EXCELLENCY THE RIGHT HONOURABLE JULES LEGER, and
THE RIGHT HONOURABLE P.E. TRUDEAU, THE HONOURABLE A. ABBOTT, W. ALLMAND, R. ANDRAS, S.R. BASFORD, M. BEGIN, J.J. BLAIS, J.J. BUCHANAN, I. CAMPAGNOLO, J. CHRETIEN, F. FOX, A. GILLESPIE, J.P. GOYER, J. GUAY, J.H. HORNER, D. JAMIESON, M. LALONDE, O.E. LANG, R. LEBLANC, M. LESSARD, D.J. MACDONALD, D.S. MACDONALD, A.J. MACEACHEN, J. MUNRO, L.S. MARCHAND, A. OUELLET, R. PERRAULT, J. ROBERTS, J. SAUVE, E.F. WHELAN (collectively referred to as the Governor-in-Council),

THE ATTORNEY GENERAL OF CANADA,
BELL CANADA,

Defendants.

REASONS FOR ORDER

MARCEAU, J.:

This is an application, on behalf of all Defendants except Bell Canada, pursuant to Rule 419(1)(a) of the General Rules of this Court, for an order striking out the Statement of Claim on the ground that it discloses no reasonable cause of action.

The allegations of the Statement of Claim can be summarized as follows.

Pursuant to ss. 320(2) of the *Railway Act* (R.S.C.

1970, c. R-2)[1] as amended by item 5 of the Schedule to the *Canadian Radio-Television and Telecommunications Commission Act* (S.C. 1974-75-76, c. 49), Bell Canada applied on the 3rd of November 1976 to the Canadian Radio-Television Communication and Telecommunications Commission (CRTC) for approval of a new rate structure. The Plaintiffs, two federations of groups, one representing Canadians of Eskimo origin, the other Canadians with low incomes, filed intervention statements opposing portions of this application. On the 1st of June 1977, following a lengthy hearing throughout which both the Plaintiffs participated actively, the CRTC issued its decision.

On the 9th and 10th of June 1977 respectively, both the Plaintiffs filed petitions with the Clerk of the Privy Council requesting the Defendants, the applicants herein, the Governor General and the members of his Council, to set aside the portions of the decision relevant to their oppositions and to substitute a new order therefor. These petitions were made pursuant to section 64(1) of the *National Transportation Act* (R.S.C. 1970, c. N-17) which provides as follows:

> 64.(1) The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind any order, decision, rule or regulation of the Commission, whether such order or decision is made *inter partes* or otherwise, and whether such regulation is general or limited in its scope and application; and any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties.

On the 29th of June 1977, Bell Canada filed replies to the two petitions with the Clerk of the Privy Council.

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[1] 320.(2) Notwithstanding anything in any Act passed before the 7th day of July 1919, all telegraph and telephone tolls to be charged by the company, and all charges for leasing or using the telegraphs or telephones of the company, are subject to the approval of the Commission, and may be revised by the Commission from time to time; this subsection does not apply to the use of telegraph or telephone wires where no toll is charged to the public.

On the 14th of July 1977, the Governor General in Council, by Orders in Council P.C. 1977-2026 and P.C. 1977-2027, dealt with the two petitions refusing to vary the decision of the CRTC.

These decisions of the Governor General in Council, goes on the declaration, were arrived at before the Plaintiffs had had time to file a reply to the reply of Bell Canada and without their being given an opportunity to be heard. The actual submissions of the parties were not presented to "the members of the Governor General in Council" but rather, evidence and opinions were obtained from officials of the Department of Communications and the Minister responsible, none of these opinions being communicated to the Plaintiffs. The CRTC was even requested to express its views which were never made available to the Plaintiffs. Submitting that "the Defendant Governor General in Council was required to decide these appeals himself and to reach these decisions by means of a procedure which is fair and in accordance with the principles of natural justice", the Plaintiffs then pray for the following reliefs:

> i) A writ of certiorari removing into this Court a record of the proceedings before the Governor-in-Council, to set aside the decisions of the Governor-in-Council, made or purported to have been made therein, as found in Orders-in-Council PC 1977-2026 and PC 1977-2027.
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> ii) In the alternative, a declaration that the procedure employed by the Governor-in-Council in these two appeals resulted in:
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> a) no hearing having been held, or in the alternative,
>
> b) such hearing as was held was not a full and fair hearing, in accordance with the principles of natural justice.

This Statement of Claim, contends the application, reveals no cause of action since the facts as alleged cannot give rise to the reliefs sought: it should therefore be struck out. A preliminary remark should here be made.

Counsel for the Plaintiffs reminded me that the jurisdiction of the Court under Rule 419(1)(a)[1] ought to be exercised sparingly. I fully agree, although I am not sure all of the English authorities cited in support of the proposition are here really convincing (see *Dyson v. Attorney General*, C.A. 1910 [1911] 1 K.B. 410). A helpful summation of the matter is to be found in *Pagé v. Churchill Falls (Labrador) Corp. Ltd.* [1972] F.C. p. 1141) where the Chief Justice of this Court had this to say (at p. 1144):

> It is, of course, not appropriate in every case to have a question of law as to the legal position determined as a threshold matter even though it can be framed as a question based on an assumption of the truth of allegations in the pleadings. Compare *Drummond-Jackson v. British Medical Association* [1970] 1 W.L.R. 688. In my view, it is not possible to lay down any general rule as to when it is appropriate and when it is not appropriate to adopt such a course. It must be determined, in each case, having regard to all the circumstances of the particular case.

The circumstances of this case led me to believe that it was proper for me to entertain the application as made. True, an important question of law was involved which could have been raised by way of defence (as was done by the other party, Bell Canada), or under Rule 474 of the General Rules of the Court. But the question could be easily seen and precisely defined immediately without any possibility of it being altered or qualified by further pleadings and moreover it was debated by all parties in a long and elaborate hearing: I could see no valid

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[1] Rule 419(1)(a) reads as follows:

419. (1) The Court may at any stage of an action order any pleading or anything in any pleading to be struck out, with or without leave to amend, on the ground that

(a) it discloses no reasonable cause of action or defence, as the case may be

reason for refusing to deal with it, bearing in mind of course that, at such an early stage of the proceedings, the order sought was to be granted only if I could come to the conclusion that there was no issue which could be better explored at a trial, the action as it stood being clearly unsustainable.

That being said, I turn now to the merit of the applicants' contention.

The principal relief sought by the action is the issue of a writ of *certiorari* addressed to the Governor General in Council to set aside the decisions found in Orders in Council P.C. 1977-2026 and P.C. 1977-2027. The fact that the proceedings for this prerogative common law remedy can be instituted in this Court by way of a Statement of Claim (Rule 603 of the General Rules of the Court) does not change or alter its basic nature or purpose. The Court is asked to exercise its traditional *certiorari* jurisdiction and to make a *certiorari* order against the Governor General in Council. That, in my view, is not possible; the Governor General in Council being the Crown, the Court has simply no jurisdiction to do so. As stated by Cockburn C.J. in *R. v. Lords Com'rs of the Treasury* (1872) L.R. 7 Q.B. 387 at p. 394, cited with approval so many times since and again recently by Rand J. in *Brewer v. McCauley* [1955] 1 D.L.R. 404 at p. 414: "The Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question". No further comments are required: the orders of the Governor General in Council are not amenable to *certiorari*; the Plaintiffs are not entitled to the first remedy they pray for.

This conclusion, however, is far from being decisive. Indeed, the action seeks an alternative remedy, a declaratory order, and the jurisdiction of the Court to grant such a relief, in the circumstances of the case, can certainly not be discarded in the same way. A declaratory order implies no command. It is well established that,

while a Court cannot review a decision of the Governor General in Council made pursuant to a royal prerogative *per se*, it can no doubt review an act done by the Governor General in Council pursuant to the exercise of a statutory power (see for instance *Border Cities Press Club v. A.G. Ont.* [1955] 1 D.L.R. 404; *Doctors Hospital and Minister of Health* 68 D.L.R. (3d) 220; *Davisville Investment Co. Ltd. and City of Toronto et al.* (1977) 15 O.R. (2d) 553). Needless to repeat that the Governor General in Council is not above the law and that his statutory powers must be exercised within the limits, for the purpose of, and according to the law.

I think at this point of my reasoning I should in a parenthetical remark take the opportunity to refer to the alternative submission of the applicants in their notice of motion to the effect that in an action where a plaintiff is seeking to move against an Order in Council, the Attorney General is the proper party and the only party that need be named in the proceedings. The submission appears to me to be well founded (see *Desjardins v. National Parole Board and the Attorney General of Canada* [1976] 2 F.C. 539; *"B" v. Department of Manpower and Immigration* [1975] F.C. 620). However, in view of the general conclusion I have reached, I need not express a definite opinion on the matter.

The Plaintiffs' action therefore, insofar as it seeks a declaratory judgment, does not raise a preliminary question of jurisdiction, as does their action for a *certiorari* order. The action, however, raises an important question of law which must be properly defined.

Taken literally, the declaration sought as formulated in the prayer for relief is meaningless. At this stage, however, it cannot be isolated and must be understood with reference to the whole of the proceeding. The declaration really sought is that the Orders in Council

are invalid because the Governor General in Council could not make them without giving the Plaintiffs "a full and fair hearing in accordance with the principles of natural justice", which was not done. It must be admitted that all of the allegations of the Statement of Claim lead to that submission, but at the same time it must be noted that it is the only conclusion to which they lead. No other issue is raised: there is no question of bias, or of lack of good faith, or of improper delegation, or of abuse of power, or of a wrong criteria having been applied, to refer to the other most common grounds usually alleged to impugn the order of a public authority. The attack on the two Orders in Council is based on a single legal proposition: in exercising the power entrusted to him by section 64(1) of the *National Transportation Act*, the Governor General in Council is duty bound to give a petitioner the full hearing required to give due effect to the so-called principles of natural justice. The proposition being flatly denied by the application, the question raised becomes simple and clear.

I have come to the conclusion that the answer to the question so put is likewise simple and clear: the Governor General in Council in exercising the authority conferred by section 64(1) is not under a duty to give a party a hearing in accordance with the rules of natural justice.

There is nothing in the relevant statute that could be interpreted as requiring the Governor General in Council to observe the principles of natural justice in carrying out the duty which is therein vested in him. The right given to an interested party to make a petition can in no way be construed as meaning a right to be called for a hearing or to be given an opportunity to offer evidence or argument. Of course, it is well known that a duty to observe the *audi alteram partem* rule may be implied - regardless of

the absence of any express statutory requirements to that effect - when on consideration of the statutory provisions and the nature of the situation to which they apply, it appears that the powers conferred on a tribunal are of a judicial or quasi-judicial nature. But, the Governor General in Council in carrying out his duties under section 64(1), is not, in my view, exercising a judicial or quasi-judicial power.

In a recent judgment rendered on January 30, 1978, in *CSP Foods Ltd. and Canbra Foods Ltd. v. the Canadian Transport Commission et al*, the Appeal Division of this Court commented on the nature of the power conferred by section 64(1) of the *National Transportation Act*. Speaking for the Court, Urie, J. had this to say:

> With respect, I do not view the exercise of his powers by the Governor in Council pursuant to section 64(1) as being in the nature of a judicial appeal. It provides a means whereby the executive branch of government may exercise some degree of control over the Canadian Transport Commission to ensure that the views of the government as to the public interest in a given case, on the basis of facts established by this tribunal, can be expressed by the executive and such views are implemented by means of directions which it may see fit to give the tribunal, through the Governor in Council. It is a supervisory role, as I see it, not an appellate role. The Governor in Council does not concern himself with questions of law or jurisdiction which is in the ambit of judicial responsibility. But he has the power to do what the Courts cannot do which is to substitute his views as to the public interest for that of the Commission. (See Re *Davisville Investment Co. Ltd. and City of Toronto et al.* (1977) 15 OR (2d) 533 at 555-6).

In my view, in making decisions under 64(1), the Governor General in Council makes them on the basis of political accountability and not on a judicial or quasi-judicial basis. The scheme of the statutes pertaining to telecommunications is that decisions involving broad economic questions are entrusted to the CRTC which is under a strict duty to hold a hearing and to afford the parties a full opportunity to be heard. The Commission may itself at any time review, rescind, change,

alter or vary any of its orders or decisions (section 63 of the *National Transportation Act*), and these orders or decisions, moreover are subject to appeal to, and review by the Courts (section 64(2) to (7) of the Act). The power to "vary or rescind" entrusted by section 64(1) to the Governor General in Council is, as I understand it, a power of a different nature altogether: it is a political power for the exercise of which the Cabinet is to be guided by its views as to the policy which in the circumstances should be followed in the public interest. Its exercise has nothing to do with the judicial or quasi-judicial process. The party who proceeds to adopt the means of questioning an order or a decision of the CRTC provided by section 64(1) is choosing to resort to a political, not a judicial process.

Referring to some recent English cases, counsel for the Plaintiffs argued that it was enough for a competent authority to be under a "duty to act fairly", for it to be bound by the rules of a natural justice and the *audi alteram partem* principle. The argument, it seems to me, raises a question of terminology rather than a question of substance (see S.A. de Smith, Judicial Review of Administrative Action, 3d edition, p. 347). In any event, the so-called "duty to act fairly" must be understood to mean a duty to adopt a fair procedure to give due effect to the *audi alteram partem* maxim. My reaction is the same. To import into the processes of the Governor's Council and of the Cabinet the procedural requirements flowing from the *audi alteram partem* rule seems to me to be so inconsistent and incompatible with their normal functioning as the executive arm of the Government and with the responsibility and accountability of the Ministers of the Crown to the House of Commons, that it cannot be imposed unless the intent of Parliament to that effect is expressed in the governing statute or may be easily derived from the language used therein.

For all these reasons, I think that the attack on the Orders in Council launched by the Plaintiffs in their action, on the sole basis that they have not been given a full and fair hearing in accordance with the rules of natural justice, cannot succeed. The motion to strike is therefore well founded and it will be granted. Although Bell Canada chose to raise the legal issue involved here by way of defence, it participated in the hearing of the instant application and asked that it be joined with the other defendants-applicants. The Statement of Claim will therefore be struck out as against all Defendants including Bell Canada and the action dismissed.

O R D E R

The application is granted with costs to the applicants.

The Statement of Claim is struck out as against all Defendants and the action is dismissed with costs to all Defendants.

O T T A W A
March 9, 1978.

J.F.C.C.

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