

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160420

Docket: A-51-16

Citation: 2016 FCA 123

Present: STRATAS J.A.

BETWEEN:

BELL CANADA AND BELL MEDIA INC.

Appellants

and

7262591 CANADA LTD. (D.B.A. GUSTO TV), ACCESS COMMUNICATIONS CO-OPERATIVE LIMITED, ALLARCO ENTERTAINMENT INC., ANTHEM MEDIA GROUP, BLUE ANT MEDIA INC., CANADIAN CABLE SYSTEMS ALLIANCE INC., CBC/RADIO-CANADA, COGECO INC., COMPETITION BUREAU, DHX MEDIA LTD., EASTLINK, GROUPE V MÉDIA INC., INDEPENDENT BROADCAST GROUP/LE GROUPE DE DIFFUSEURS INDÉPENDANTS, L'OFFICE DES TÉLÉCOMMUNICATIONS ÉDUCATIVES DE LANGUE FRANÇAISE DE L'ONTARIO (GROUPE MÉDIA TFO), MEDIAMIND DIGITAL, MTS INC., PELMOREX COMMUNICATIONS INC., PUBLIC INTEREST ADVOCACY CENTRE, QUÉBECOR MÉDIA INC., SASKATCHEWAN TELECOMMUNICATIONS, SOGETEL INC., STINGRAY DIGITAL GROUP INC., STORNOWAY COMMUNICATIONS LIMITED PARTNERSHIP, TEKSAVVY SOLUTIONS INC. AND HASTINGS CABLE VISION LTD., TELUS, TV5 QUÉBEC CANADA, VMEDIA INC. and ZAZEEN INC.

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 20, 2016.

REASONS FOR ORDER BY:

STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

A. Introduction

[1] Bell Canada and Bell Media appeal to this Court from decisions made by the Canadian Radio-television and Telecommunications Commission on September 24, 2015. On that date, the CRTC made Broadcasting Order 2015-439, Broadcasting Regulatory Policy 2015-438 and Broadcasting Information Bulletin 2015-440. The parties describe these three items together as the 2015 Wholesale Code decision. I shall do the same.

[2] Bell has moved to settle the contents of the appeal book. Nine documents are in dispute. Bell says that these documents are not admissible in this appeal and should not be included. Many of the respondents say they are admissible and should be included.

B. Should admissibility be determined now?

[3] At the outset, this Court must consider whether the issue of admissibility should be determined now or left to the panel hearing the appeal. This is a matter of discretion to be exercised on the basis of recognized factors: *Association of Universities and Colleges of Canada v. Access Copyright*, 2012 FCA 22, 428 N.R. 297 at para. 11; *Collins v. Canada*, 2014 FCA 240, 466 N.R. 127 at para. 6.

[4] One factor is whether an admissibility ruling at this time would allow the hearing to proceed in a more timely and orderly fashion: *Collins*, above at para. 6, *McConnell v. Canada (Canadian Human Rights Commission)*, 2004 FC 817, aff'd 2005 FCA 389. Another factor is whether the result of the motion is relatively clear cut or obvious: *Collins* at para. 6; *Canadian Tire Corp. Ltd. v. P.S. Partsource Inc.*, 2001 FCA 8, 267 N.R. 135. If reasonable minds might differ on the issue, the ruling should be left to the panel hearing the appeal: *McKesson Canada Corporation v. Canada*, 2014 FCA 290, 466 N.R. 185 at para. 9; *Gitxaala Nation v. Canada*, 2015 FCA 27 at para. 7.

[5] All of the parties have argued the question of admissibility on the basis that it can be decided now. I agree. In my view, an admissibility ruling at this time would allow the hearing to proceed in a more timely and orderly fashion. Further, the question of admissibility in this case is clear cut and obvious.

C. Admissibility

[6] For the purposes of admissibility of the nine documents in dispute, the respondents opposing Bell regard this statutory appeal from the CRTC as equivalent to a judicial review. This is correct. In a statutory appeal, this Court is acting as a reviewing court assessing an administrative decision-maker's decision: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 399. Thus, this motion falls to be governed by this Court's authorities concerning the admissibility of documents in an application for judicial review: see, e.g., *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189; *Access Copyright*, above at

paras. 17-19 (adopted in *Connolly v. Canada (Attorney General)*, 2014 FCA 294, 466 N.R. 44 at para. 7); *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at paras. 41-42.

[7] Under these authorities, the general rule is that only the evidence that was before the administrative decision-maker is admissible before the reviewing court. In some cases, this general rule manifests itself as a prohibition against the reviewing court admitting anything that could have been placed before the administrative decision-maker but was not.

[8] In this motion, the parties disagree concerning the scope of the general rule.

[9] Bell submits that the nine documents in dispute were not before the CRTC when it made the 2015 Wholesale Code decision and so they cannot be admitted into the evidentiary record. In essence, as these documents were not physically before the CRTC, for example as exhibits, they cannot be a part of this Court's evidentiary record.

[10] In my view, Bell reads the general rule too literally and without regard to its purpose and the context in which it can be applied.

[11] The purpose of the general rule is two-fold:

- *To respect the role of the administrative decision-maker.* The administrative decision-maker is the merits decider. It decides what evidence or information it should rely upon, it considers that evidence and information, and it makes

findings of fact. That is not the role of the reviewing court. See *Bernard, Access Copyright* and *Delios*, all above.

- *To further the role of the reviewing court.* The reviewing court must assess the administrative decision-maker's decision against the evidence and information the administrative decision-maker took into account. If certain of that evidence and information is withheld from the reviewing court, the review may be artificial and lead to inaccurate outcomes. See the discussion in *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268 at paras. 13-14.

[12] As for the context in which the general rule can be applied, one must appreciate that administrative decision-makers and the decisions they make come in all shapes and sizes.

[13] Some administrative decision-makers deal with discrete matters that are unrelated to other matters. For example, a Law Society discipline tribunal usually deals with lawyers charged with specific professional offences at a specific time. The conduct giving rise to the charges does not usually relate to other matters. The discipline tribunal decides the charges strictly on the basis of the evidence before it. Previous misconduct cannot be considered unless it is admitted into evidence by the tribunal. For these reasons, the record before the reviewing court on judicial review should normally be limited to the evidence that was physically before the tribunal.

[14] But some administrative decision-makers, like the CRTC in this case, operate in an ongoing regulatory context where multiple issues, often more general and polycentric, interrelate

and evolve over time. Administrative decision-makers such as these continually see many of the same parties on issues that relate to or intersect with past issues. In making decisions, these administrative decision-makers will focus on evidence placed before them in the specific matter but, subject to any obligations of procedural fairness and disclosure owed to the particular parties before them, they may go further and draw upon broader industrial, economic, regulatory or technological insights they have gathered from past proceedings and regulatory experience.

[15] In those circumstances, past proceedings and regulatory experience can form part of the data the administrative decision-maker can draw upon in making a decision. Accordingly, parts of that data, identified by the parties as matters that the administrative decision-maker drew upon in making its decision, can form part of the evidentiary record before the reviewing court. The inclusion of that data in the reviewing court's record can often be useful in assessing reasonableness: a decision at odds with past proceedings and regulatory experience might be suspect, while one that is consistent with past proceedings and regulatory experience might be more likely to be found acceptable and defensible.

[16] When faced with a question of admissibility of this sort of data on judicial review, the reviewing court must be persuaded that there is at least a case for saying that the administrative decision-maker drew upon it. And in deciding the merits of the judicial review, the reviewing court might have to determine whether that is so to a higher degree of likelihood.

[17] In this case, that threshold for admissibility of materials relating to past proceedings—here Broadcasting Decision 2013-310 and events around it—is met. The CRTC was no doubt

aware of what it decided in Broadcasting Decision 2013-310: to some extent Broadcasting Decision 2013-310 relates to issues it decided when it enacted the 2015 Wholesale Code. Also there are concrete indications the CRTC may have actually drawn upon its understandings of Broadcasting Decision 2013-310 and events surrounding it when it enacted the 2015 Wholesale Code: see, *e.g.*, Broadcasting Regulatory Policy CRTC 2015-438 at para. 113, footnote 5 and compare sections 5(a) and 13 of the 2015 Wholesale Code with certain conditions of licence that arose as a result of Broadcasting Decision 2013-310. In short, the 2015 Wholesale Code seems to have some relationship with Broadcasting Decision 2013-310, decided a couple of years previously and involving many of these same parties, including Bell.

[18] Seven of the nine disputed documents relate to Broadcasting Decision 2013-310. Exhibits Z, AA, BB, CC and DD to the Affidavit of Sonia Atwell are written submissions made by or on behalf of Bell in the course of the proceedings that led to Broadcasting Decision 2013-310 concerning Bell's acquisition of Astral Media. Paragraphs 260-429 of Exhibit EE to the Affidavit of Sonia Atwell is a transcript of Bell's submissions to the CRTC during the hearings of that matter. Exhibit N to the Affidavit of Sonia Atwell is a broadcasting procedural letter from the CRTC that confirms and implements Broadcasting Decision 2013-310 to impose certain conditions of license on Bell following its acquisition of Astral Media. On the record before me, for the purposes of admissibility, all of these predate the CRTC's decision to enact the 2015 Wholesale Code and are related to a context that the CRTC may well have taken into account when it made its decision. I am fortified in my conclusion on admissibility by the parties' agreement that Broadcasting Decision 2013-310 is itself admissible, no doubt because it forms part of the relevant context surrounding the CRTC's decision to enact the 2015 Wholesale Code.

[19] I am concerned that if these seven documents are not admitted into the record before this Court in this appeal, this Court will not be able to assess the CRTC's decision against all of the evidence and information the CRTC may have drawn upon when making its decision.

[20] Put another way, I am satisfied on this record that admitting these documents does not violate the CRTC's role as merits decider, as explained above, and that it will further the role of this Court as a reviewing court.

[21] Therefore, these seven documents are admissible and should be included in the appeal book.

[22] Two of the nine disputed documents, Exhibits O and Y to the Affidavit of Sonia Atwell, postdate the CRTC's decision to enact the 2015 Wholesale Code. It is argued that the two documents show that the CRTC had a regulatory agenda or policies concerning the television wholesale market, an agenda or policies that underlie its decision to enact the 2015 Wholesale Code. However, I am not satisfied that these post-decision documents show that the agenda or policies existed before the CRTC's decision. Normally, review must take place only against the documents and information the administrative decision-maker took into account at the time of the decision. In the circumstances of this case, only documents predating or contemporaneous with the CRTC's decision can show that a regulatory agenda or policies prompted it.

[23] As an alternative submission, the respondents represented by Fasken Martineau DuMoulin LLP also invoke one of the exceptions to the general rule in support of their

submission that certain documents must be included in the record before this Court. They wish to rely upon certain documents to establish in this case that certain discretionary bars applied by reviewing courts should stop this Court from reviewing the CRTC's decision.

[24] I have already ruled admissible the documents that appear to be relevant to this submission, namely Exhibits Z, AA, BB, CC and DD and paragraphs 260-429 of Exhibit EE to the Affidavit of Sonia Atwell. The documents that postdate the CRTC's decision that I have ruled inadmissible, namely Exhibits O and Y to the Affidavit of Sonia Atwell, do not support any of the discretionary bars the Fasken respondents wish to invoke. Exhibit N to the Affidavit of Sonia Atwell, ruled admissible, is also not relevant to this submission. Therefore, it is not necessary to consider the Fasken respondents' alternative submission.

[25] I want to emphasize that I am only deciding an issue of admissibility. There are indications that the CRTC may have drawn upon seven of the documents or the information in them when it made its decision. This is enough to meet the threshold for admissibility. It is for the panel hearing the appeal to decide whether in fact the CRTC drew upon these seven documents or the information contained in them when it made its decision, and to decide what weight or significance should be accorded to them. It is also for that panel to assess the significance of these documents on the issue of whether any discretionary bars apply.

D. Disposition

[26] An order shall go in accordance with these reasons. The respondents represented by Fasken Martineau DuMoulin LLP and Norton Rose Fulbright Canada LLP (who filed substantial submissions in opposition to Bell) shall have their costs of the motion in any event of the cause.

“David Stratas”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-51-16

STYLE OF CAUSE:

BELL CANADA AND BELL
MEDIA INC. v. 7262591 CANADA
LTD. (D.B.A. GUSTO TV), *ET AL.*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

STRATAS J.A.

DATED:

APRIL 20, 2016

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