Date: 20100719

Docket: A-227-09

Citation: 2010 FCA 191

CORAM: **EVANS J.A.**
PELLETIER J.A.
STRATAS J.A.

BETWEEN:

TELUS COMMUNICATIONS COMPANY

Appellant

and

THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION, BELL CANADA, PUBLIC WORKS GOVERNMENT SERVICES CANADA, MTS ALLSTREAM, ROGERS CABLE COMMUNICATIONS INC., and COALITION OF COMMUNICATIONS CONSUMERS

Respondents

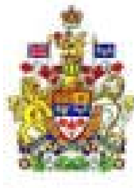
Heard at Edmonton, Alberta, on June 14, 2010.

Judgment delivered at Ottawa, Ontario, on July 19, 2010.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: PELLETIER J.A.
STRATAS J.A.

Federal Court of Appeal



Cour d'appel fédérale

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REASONS FOR JUDGMENT

EVANS J.A.

[1] This is an appeal, with leave of the Court, by TELUS Communications Company (TELUS) under subsection 64(1) of the *Telecommunications Act*, S.C. 1993, c. 38 (Act), from a decision of the Canadian Radio-television Telecommunications Commission (CRTC), Telecom Decision CRTC 2009-85 (Decision 2009-85). That decision was rendered orally on January 30, 2009; written reasons for decision followed on February 20, 2009.

[2] TELUS also appeals the *Broadcasting and Telecom Information Bulletin*, CRTC 2009-38 (FOA Bulletin), issued on January 29, 2009, setting out the procedures to be followed for dispute resolution processes, including final offer arbitration (FOA).

[3] In Decision 2009-85 the CRTC set a rate under subsection 27(1) of the Act for the provision by Bell Canada of telecommunications services to, and only to, the Department of National Defence (DND) under a customer-specific arrangement tariff which had been approved by the CRTC. The services in question are deemed vital to national security. The rate ran for a fixed term, commencing on December 15, 2008, when Bell's contractual obligation to supply these services ended. The problem arose because TELUS which in June 2007 had been awarded the contract to provide these services, in place of the incumbent, Bell, had been unable to start providing the services to the DND at the date stipulated in its contract.

[4] Appeals under subsection 64(1) are restricted to questions of law and jurisdiction. TELUS bases its appeals on three grounds. First, it was denied a fair opportunity to participate in the CRTC's hearing process that culminated in Decision 2009-85, which resolved a rate dispute between Public Works and Government Services Canada (PWGSC) and Bell Canada (Bell). Second, the CRTC exceeded its statutory authority by basing its decision on FOA, rather than on whether the rates proposed by Bell Canada were just and reasonable. Third, the procedural rules contained in the FOA Bulletin are not authorized by the Act because they were not pre-published in the *Canada Gazette* as required by subsection 69(1) of the Act.

[5] In my view, TELUS cannot succeed on any of these arguments. I would therefore dismiss the appeal. However, I should deal with two preliminary issues before addressing the grounds of the appeal.

[6] First, despite prior reticence on the subject, counsel for TELUS stated at the hearing of the appeal that it is contractually obligated to indemnify PWGSC to an undisclosed extent for expenses that it incurs in purchasing services from Bell as a result of TELUS's failure to start to provide telecommunications services to DND on the date stipulated in its contract. Hence, I have assumed for the purpose of this appeal that Decision 2009-85 may indirectly cause TELUS financial loss.

[7] Second, towards the end of May 2010, the Court invited the parties to make submissions on whether the appeal is premature in light of TELUS's request that the CRTC reconsider Decision 2009-85. The present appeal was scheduled to be heard on June 14, 2010.

[8] In July 2009, TELUS requested the CRTC to reconsider Decision 2009-85, having been granted leave on May 20, 2009, to appeal to the Court. In Decision 2010-11, dated January 14, 2010, the CRTC declined to grant the variance sought.

[9] On April 12, 2010, TELUS requested a second reconsideration by the CRTC, emphasizing procedural fairness issues and the improper use of FOA, both of which are also central issues in this appeal. The CRTC has advised the parties that it expects to decide this second request for reconsideration within the next four months, that is, by early October of this year.

[10] The parties do not agree on whether the appeal is premature and the CRTC takes no position on it.

[11] TELUS says that the appeal is not premature because the Act provides three remedies with respect to the CRTC decision under appeal: an application for leave to appeal under subsection 64(1); a petition to the Governor in Council pursuant to subsection 12(1); and a right under section 62 to request the CRTC to reconsider its decision. TELUS submits that each remedy has a different focus and that they are therefore cumulative: questions concerning procedural fairness, such as those raised in the present appeal, are appropriately decided by the Court, rather than by the CRTC.

[12] Bell, on the other hand, observes that, in its second reconsideration request TELUS raised some of the same procedural issues as it has in the present appeal, as well as an allegation that the CRTC failed to consider the impact of its decision on competition. If TELUS succeeds on any of these issues, the present appeal will be moot. Accordingly, Bell argues, in the interests of judicial economy, the Court should adjourn the appeal pending the CRTC's decision on TELUS's second request for reconsideration.

[13] The Court permitted the appeal to continue. The parties had prepared for the hearing and were ready to proceed with their oral submissions. Since I would dismiss the appeal on the merits, I need not be definitive on whether it was premature. However, I would make the following two points.

[14] First, the question of prematurity was not considered on the motion for leave to appeal and, once leave is granted, it may not have been appropriate for the Court to dismiss the appeal on this preliminary ground. Unlike an application for judicial review, an appeal is not an extraordinary, discretionary remedy. Second, TELUS's appeal to this Court was scheduled to be held only two months after it made its second reconsideration request. Hence, questions of prematurity were more appropriately raised before the CRTC. However, the CRTC rejected Bell's motion for the summary dismissal of TELUS's second request for reconsideration as an abuse of process.

Procedural fairness

[15] TELUS complains that it was denied procedural fairness in three principal respects. First, although TELUS was permitted to make written submissions to the CRTC as a party interested in the dispute over the terms on which Bell Canada would continue to supply telecommunications services to DND, it was excluded from the *in camera* portion of the oral hearing at which Bell Canada and DND participated, even though, contrary to TELUS's expectation, the hearing was not restricted to the consideration of confidential commercial information, such as Bell Canada's costs and contractual terms.

[16] Second, TELUS was not informed that the CRTC was going to change its procedure and to resolve the dispute by FOA, nor given an opportunity to comment on it.

[17] Third, the CRTC denied its request for an adjournment in order to correct statements made at the hearing that were prejudicial to its interest, namely, the speed at which it would complete the

preparations necessary for it to start delivering the telecommunications services that it had contracted with PWGSC to provide to DND.

[18] In determining whether a participant in an administrative process was denied the procedural rights to which it was entitled by the common law, a reviewing court must consider whether in all the circumstances the procedures provided a fair opportunity to be heard. The factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 21-28, provide the contextual framework within which to analyse this question. In my opinion, however, this appeal can be decided without a detailed exposition of the facts, law or the administrative context in which Decision 2009-85 was made.

[19] One point, though, does deserve emphasis in any consideration of the content of the common law procedural rights to which TELUS was entitled. The proceeding before the CRTC leading up to Decision 2009-85 was initiated by an application to the CRTC by PWGSC for a ruling that the rates proposed by Bell Canada for its provision of telecommunications services to DND after December 2008, were not just and reasonable. The CRTC thus properly regarded Bell Canada and PWGSC as the only parties to a bilateral dispute.

[20] TELUS may well have had an interest in the proceeding if, as it now says, it was contractually obliged to indemnify PWGSC for payments that it was required to make to Bell Canada for continuing to supply post-contract telecommunications services if, by the agreed date, TELUS could not complete the transition of DND services to its network from Bell Canada's.

However, the fact that TELUS was no more than an intervener in the proceeding, albeit one with an indirect financial interest in the outcome, reduces the content of the procedural rights to which it was entitled under the duty of fairness.

[21] It would have been open to TELUS to take the position before the CRTC that, since it was, in effect, a guarantor against the loss caused to PWGSC by the delay, it should have full party status in the resolution of the rate dispute. Having chosen not to do so but, instead, to attend the public part of the oral hearing as an observer, TELUS must live with the consequences.

[22] Five more particular considerations undermine TELUS's argument that it was denied procedural fairness.

[23] First, TELUS made written submissions to the CRTC before Decision 2009-85 was made. In these submissions it could have dealt with its delay in effecting the transition, which it must have known would be an issue in the dispute. The right to procedural fairness does not always include a right to an oral hearing in regulatory proceedings, particularly when, as here, the claimant is at best no more than an intervener in a proceeding designed to resolve a dispute between two others. Neither the Act, nor the *CRTC Telecommunications Rules of Procedure*, SOR79/554, confers on those interested in a matter an unqualified right to an oral hearing, as TELUS seems to be demanding.

[24] Administrative agencies normally have considerable discretion over the precise form of participation in their decision-making by those interested. A reviewing court will not interfere with a specialist agency's procedural choices unless, in all the circumstances, they result in a denial of a fair opportunity to be heard. TELUS's argument that it was denied an opportunity to answer the case against it is misconceived: in the bilateral dispute between PWGSC and Bell there was no case against it for it to answer.

[25] Second, in a letter, dated November 20, 2008, which TELUS received, the CRTC outlined the process that it intended to follow, including the possibility of FOA, if the parties could not resolve the dispute by negotiation. TELUS responded to this letter, explaining why it regarded FOA as an inappropriate basis for the CRTC's decision. In any event, the CRTC did not make its decision on the basis of FOA in the normal sense.

[26] Third, in a letter, dated December 19, 2008, the CRTC stated that PWGSC and Bell would be the only parties at an oral hearing regarding the applicable rate for the telecommunications services to be provided by Bell to DND and that, because of the confidential nature of the matters in dispute, parts of the hearing would be *in camera*. This same letter also indicated that the dispute would be dealt with by expedited hearing in accordance with Telecom Circular CRTC 2004-2, which is normally applicable to competition matters involving no more than two parties.

[27] TELUS raised no objection to the procedures set out in this letter. It remained similarly silent when the Chair of the CRTC indicated on January 22, 2009, that the public portion of the hearing would be confined to the CRTC's jurisdiction.

[28] Fourth, at the first reconsideration of Decision 2009-85, TELUS made submissions on the matter on which it said that it had wanted to be heard orally before the CRTC made its rate-setting decision, namely, the time that TELUS would take to be ready to provide services to DND.

[29] Since the CRTC decided not to vary Decision 2009-85 after hearing TELUS's submissions on this issue, any breach of the duty of fairness that may have occurred was immaterial to the outcome. Alternatively, the opportunity that TELUS had to make submissions at the first reconsideration would have effectively remedied any breach of the duty of fairness that might previously have occurred.

[30] Fifth, TELUS only requested an adjournment late in the process, an expedited hearing. In responding to TELUS's request, the CRTC explained in great detail why it had concluded that an adjournment was unwarranted. When all the circumstances set out in that letter are considered, the CRTC's exercise of discretion to refuse the adjournment cannot be said to have denied TELUS a fair hearing.

[31] In short, TELUS had ample opportunity to make submissions on the issues of concern to it, and to object much earlier than it did to the hearing process. In the circumstances set out above, I

am not persuaded that TELUS has established that there was any breach of the CRTC's duty of procedural fairness warranting the intervention of the Court.

Final offer arbitration

[32] TELUS argues that the CRTC exceeded its jurisdiction to ensure that the rates charged by a telecommunications carrier are just and reasonable, because it simply based its decision on an offer made by one of the parties, Bell Canada. I disagree.

[33] First, reasonableness is the standard of review applicable to this question, because it involves the exercise of the broad statutory discretion conferred by section 27 on the CRTC with respect to rate setting: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 53 (*Dunsmuir*). Thus, for example, subsection 27(5) of the Act provides that in determining a rate, the CRTC "may adopt any method or technique that it considers appropriate".

[34] To the extent that the question raised in this appeal also concerns the interpretation of section 27 of the CRTC's constituent statute, it, too, is presumptively reviewable for reasonableness: *Dunsmuir* at para. 54. This presumption is reinforced in this case by the breadth of the discretion conferred on the CRTC by subsection 27(1), and by the fact that the interpretative question at issue involves rate-setting, which is at the heart of the agency's expertise: *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764 at para. 38.

[35] Second, the fact that the CRTC selected one of the offers made by the parties as the applicable rate is not inconsistent with its determining a rate that was just and reasonable. On the basis of the submissions by the parties, and the information obtained from them in response to interrogatories by CRTC staff and questions from the Commission itself, the CRTC identified low and high bookend rates, within which a just and reasonable rate could be approved. The "bookend" at the low end of the range was the existing rate, and the high "bookend" rate was one of the offers made by Bell Canada. During the hearing, other proposals were made within this range which brought the parties closer together. The CRTC explained in paragraph 35 of the reasons for Decision 2009-85 why, on the basis of all the material before it, it had selected Bell Canada's last proposal.

[36] Consequently, CRTC's method of rate selection can only be set aside if it was unreasonable. Given the breadth of the CRTC's discretion, its expertise in rate-setting, and its determination on the basis of the information before it that the rates within a given range were just and reasonable, I am not persuaded that its approval of a rate at the high end of the range constituted an unreasonable exercise, or a failure to exercise, its statutory discretion. The facts do not establish that the CRTC abdicated its rate-setting responsibilities by simply selecting an offer made by one the parties.

FOA Bulletin

[37] TELUS was also given leave to appeal against the FOA Bulletin, which was issued the day before Decision 2009-85. TELUS says that the procedures contained in the FOA Bulletin are

unlawful because it did not have an opportunity to comment on their adoption, and they had not been pre-published in the *Canada Gazette* as required by subsection 69(1) of the Act.

[38] The short answer to this argument is that their validity cannot be the subject of appeal under section 64, because they are not a "decision", a term defined in subsection 2(1) of the Act to include "a determination made by the Commission in any form". Rather, they set out some general procedures within which the CRTC may make decisions or determinations based on various dispute resolution processes, including FOA.

[39] Of course, if the CRTC had relied on the procedures in the FOA Bulletin in making Decision 2009-85, TELUS could have included the invalidity of those procedures as a ground of its appeal against Decision 2009-85. However, the CRTC did not make Decision 2009-85 on the basis of the procedures in the FOA Bulletin.

[40] In these circumstances, an application for judicial review by a person aggrieved may be a more appropriate procedure than an appeal under section 64 to challenge the validity of the FOA Bulletin. I express no opinion on whether the procedures set out in the FOA Bulletin should have been issued as regulations under paragraph 67(1)(*b*) as establishing "rules respecting [the CRTC's] practices and procedures", and published in the *Canada Gazette* for notice and comment by interested persons before coming into effect (subsection 69(1)), or whether they are merely non-binding guidelines issued under section 58 to which subsection 69(1) does not apply.

Conclusion

[41] For all these reasons, I would dismiss the appeal with costs payable by TELUS Communications Company to Bell Canada.

"John M. Evans"
J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	PELLETIER AND STRATAS JJ.A.
DATED:	July 19, 2010

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