

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130226

Docket: A-152-12

Citation: 2013 FCA 58

**CORAM: SHARLOW J.A.
DAWSON J.A.
STRATAS J.A.**

BETWEEN:

BCE INC., BELL CANADA AND BELL MOBILITY INC.

Appellants

and

TELUS COMMUNICATIONS COMPANY

Respondent

Heard at Toronto, Ontario, on February 26, 2013.

Judgment delivered from the Bench at Toronto, Ontario, on February 26, 2013.

REASONS FOR JUDGMENT OF THE COURT BY:

SHARLOW J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on February 26, 2013)

SHARLOW J.A.

[1] This is an appeal of Broadcasting Decision CRTC 2011-765 dated December 12, 2011. In that decision, the Commission found that a complaint by the respondent Telus Communications Company (“Telus”) against BCE Inc., Bell Canada or Bell Mobility Inc. (collectively “Bell”) was well founded. The complaint was that Bell had given itself an undue preference and subjected Telus to an undue advantage, contrary to Broadcasting Order 2009-660, the *New Media Exemption Order*, when Bell secured exclusive programming rights to certain National Hockey League and National

Football League content for its mobile platform. As a remedy, the Commission required Bell to file a report with the Commission, by January 30, 2012, outlining the steps Bell would take to ensure Telus access to the programming at issue at reasonable terms, and to provide Telus with a copy of the report.

[2] Bell provided the required report within the stipulated deadline. In the report, Bell informed the Commission that its previous agreement with the National Hockey League had expired and that Bell had reached a new non-exclusive mobile content agreement with the National Hockey League. Bell also informed the Commission that under its agreement with the National Football League, Bell has no right to sub-licence the relevant content to a third party mobile service provider, and that the National Football League had expressed opposition to amending the agreement.

[3] In a letter to Bell dated February 29, 2012, the Commission indicated that it was satisfied with the report. Telus submits that in light of this resolution of its complaint, Bell's appeal should be dismissed as moot.

[4] Bell argues that the appeal is not moot because there remains a dispute between the parties as to whether the Commission, in finding an undue preference or advantage, improperly interpreted or applied the reverse onus provisions in the *New Media Exemption Order*. Bell submits that its commercial reputation may be harmed, and it may suffer negative collateral consequences in future transactions, if it is deprived of the opportunity to refute the Commission's findings in this case. Bell also submits that these issues are evasive of appellate review even though they are likely to recur, because the Commission "continuously crafts new orders which quickly overtake its prior

controversial ones, and parties are often required to rapidly comply with [Commission] decisions before an appeal from them can be heard” (paragraph 75 of Bell’s memorandum of fact and law).

[5] Having considered the written and oral submissions of Bell, and having reviewed the decisions to which we were referred (including the leading case, *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342), we have concluded that the appeal is moot and that this Court should not exercise its discretion to hear it.

[6] In this case, it cannot be disputed that the Commission has the legal authority to consider and deal with a complaint alleging a breach of the *New Media Exemption Order*. Bell’s appeal seeks to challenge the Commission’s interpretation and application of the *Order*, and the weight it gave to evidence adduced in relation to the Telus complaint. Those are issues that are likely to be raised in any number of future appeals, but the appeals would have to be determined on a case by case basis.

[7] Bell submits that the recent decision of the Supreme Court of Canada in *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 (referred to as “Cogeco”) has changed the legal landscape and so is a factor that should incline this Court to entertain this appeal. We do not agree. In our view, this Court would benefit in a future case from a ruling of the Commission that takes Cogeco into account.

[8] For these reasons, the appeal will be dismissed as moot. Telus is entitled to its costs.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-152-12

(APPEAL FROM A BROADCASTING DECISION OF THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION (CRTC), DATED DECEMBER 12, 2011, DECISION 2011-765)

STYLE OF CAUSE: BCE INC., BELL CANADA AND
BELL MOBILITY INC. v. TELUS
COMMUNICATIONS COMPANY

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 26, 2013

REASONS FOR JUDGMENT OF THE COURT BY: SHARLOW, DAWSON &
STRATAS J.J.A.

DELIVERED FROM THE BENCH BY: SHARLOW J.A.

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