

Federal Court of Appeal



Cour d'appel fédérale

Date: 20100427

Docket: A-374-09

Citation: 2010 FCA 115

**CORAM: BLAIS C.J.
NOËL J.A.
STRATAS J.A.**

BETWEEN:

ROGERS CABLE COMMUNICATIONS INC.

Appellant

and

**BELL ALIANT REGIONAL COMMUNICATIONS
LIMITED PARTNERSHIP**

Respondent

Heard at Toronto, Ontario, on April 27, 2010.

Judgment delivered at Toronto, Ontario, on April 27, 2010.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on April 27, 2010)

STRATAS J.A.

[1] This is an appeal, with leave, of Decision 2009-187 of the Canadian Radio-Television and Telecommunications Commission, and to the extent necessary, three related decisions that the Commission rendered earlier.

[2] The issue in this appeal is whether the Commission correctly declined jurisdiction in the matters before it. A further issue raised by the appellant is whether the Commission in its decisions should have made certain observations or comments concerning the parties' contractual rights.

[3] The facts necessary to deal with the jurisdictional issue can be simply stated.

[4] The appellant and the respondent entered into a five year support structure licence agreement. Under this agreement, the respondent granted the appellant permits allowing it to use certain support structures, known commonly as telephone poles or power poles, in New Brunswick.

[5] The parties agree that the support structure licence agreement between the appellant and the respondent was in the form mandated by the Commission in its National Services Tariff Item 901.

[6] Under the National Services Tariff, a "support structure" is defined as follows:

The supporting structures, including poles...which the Company [in this case the respondent] owns or which the Company does not own but for which it has the right to grant Permits thereto.

[7] The parties also agree that the respondent did not own the support structures. Instead, it only had the right to grant permits for the use of the support structures. New Brunswick Power (N.B. Power), a provincially-regulated utility, owned the support structures and granted the respondent the right to grant permits to third parties under a joint use agreement. As long as this was the case, there were "support structures" under the Commission's National Services Tariff that the Commission could regulate.

[8] Further, the parties also agree that the provision of support structures by the respondent, a federally-regulated carrier, was a federally-regulated “telecommunications service” under section 2 of the *Telecommunications Act*, S.C. 1993, c. 38.

[9] Things changed in January 2004. At that time, N.B. Power revoked the respondent’s right to grant permits to third parties, such as the appellant, for the use of its power poles. This happened during the currency of the five year support structure licence agreement.

[10] The result of this was that the appellant had to pay N.B. Power, the provincially-regulated utility, its provincially-regulated rate for the use of its power poles, a rate that was substantially higher than the respondent’s rate.

[11] In all, there were four Commission decisions raised in this appeal. The Commission’s last decision, CRTC 2009-187 merely confirmed CRTC 2008-62, which reconsidered and, to some extent, amended two earlier decisions. In that decision, the Commission declined jurisdiction, and in doing so made mention of the parties’ contractual obligations.

[12] We agree with the jurisdictional rulings made by the Commission. When N.B. Power revoked the respondent’s right to grant permits, “support structures” were no longer being provided by the respondent, a federally-regulated carrier, and so there was no “telecommunications service” within section 2 of *the Act*. Instead, a provincially-regulated utility, N.B. Power, was offering the use of its provincially-regulated power poles. Under *Barrie Public Utilities v. Canadian Cable*

Television Association, [2003] 1 S.C.R. 476, the Commission does not have the jurisdiction to regulate the terms of access to power poles owned by a provincially-regulated utility. The Commission so found, and correctly held that it lost jurisdiction.

[13] In our view, the Commission, like all administrative tribunals, was entitled to rule on its own jurisdiction, in particular, in this case, whether the respondent still had the right to grant permits concerning N.B. Power's power poles. It was entitled to examine the agreements among the parties to determine that issue, but only for the purpose of determining its jurisdiction, not determining the rights and obligations of the parties under the common law of contract. To the extent that the comments and observations made by the Commission in its decisions can be read as doing this, they were beyond its jurisdiction and should be disregarded.

[14] Accordingly, for the foregoing reasons, the appeal will be dismissed with costs.

“David Stratas”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-374-09

(APPEAL FROM A DECISION OF THE CANADIAN RADIO-TELEVISION AND COMMUNICATIONS CANADA DATED APRIL 8, 2009, IN DOCKET NO. 2009-187)

STYLE OF CAUSE:

ROGERS CABLE
COMMUNICATIONS INC. v. BELL
ALIAN T REGIONAL
COMMUNICATIONS
LIMITED PARTNERSHIP

PLACE OF HEARING:

Toronto, Ontario

DATE OF HEARING:

April 27, 2010

**REASONS FOR JUDGMENT
OF THE COURT BY:**

BLAIS C.J.
NOËL J.A.
STRATAS J.A.

DELIVERED FROM THE BENCH BY:

STRATAS J.A.

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