

Federal Court of Appeal



Cour d'appel fédérale

**Date: 20120628**

**Docket: A-152-12**

**Citation: 2012 FCA 198**

**Present: MAINVILLE J.A.**

**BETWEEN:**

**BCE INC., BELL CANADA and BELL MOBILITY INC.**

**Appellants**

**and**

**TELUS COMMUNICATIONS COMPANY**

**Respondent**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 28, 2012.

**REASONS FOR ORDER BY:**

**MAINVILLE J.A.**

Federal Court of Appeal



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**REASONS FOR ORDER**

**MAINVILLE J.A.**

[1] Within the framework of their appeal of Broadcasting Decision CRTC 2011-765 of the Canadian Radio-television and Telecommunications Commission (the “CRTC”) dated December 12, 2011, the appellants (collectively referred to as “Bell”) have brought a motion for (a) an order granting leave to present new evidence on the appeal (the “New Evidence Order”); (b) an order protecting and maintaining the confidentiality of certain documents to be filed by Bell during the course of this appeal (the “Confidentiality Order”); and (c) an order *nunc pro tunc* extending the timelines under Part 6 of the *Federal Courts Rules*, SOR/98-106 (the “Extension Order”).

[2] That part of the appellant's motion seeking a New Evidence Order was dismissed by Sharlow J.A. on June 22, 2012 for reasons cited as 2012 FCA 191. Sharlow J.A. also required the Registry to refer the other matters set out in the motion to the duty judge sitting in Ottawa on June 27, 2012.

[3] The respondent ("Telus") consents to the Extension Order. I agree that such an order should be made. A consequential order is thus issued with these reasons suspending *nunc pro tunc* the timelines in Part 6 of the *Federal Courts Rules* as of May 25, 2012, the date of the filing of the Notice of Appeal, to the date of this order, from which time they will resume running.

[4] Telus, however, disagrees with the proposed Confidentiality Order. Its two principal objections are (a) that the information which Bell seeks to protect is not confidential; and (b) the proposed order is overbroad in that it restricts Telus' "in-house" counsel, who is its solicitor of record in this appeal, from full access to the information.

#### *The Confidential Nature of the Information*

[5] Dealing first with the confidential nature of the information, it is useful to note that in light of the order of Sharlow J.A. dated June 22, 2012, the only remaining information Bell is seeking to protect are its confidential Comments dated February 24, 2011, filed with the CRTC in the proceedings leading to CRTC Decision 2011-765, as well as its revised confidential Comments dated March 2, 2011, also filed with the CRTC in those proceedings (collectively referred to as the "Bell Comments").

[6] The Bell Comments contain details of Bell's own market data and references to the terms of the agreements (the "Licence Agreements") Bell entered into with the National Football League and the National Hockey League by which Bell Mobility acquired the right to distribute the content from these leagues to its subscribers, some of it on an exclusive basis. The CRTC treated these details as confidential. The CRTC permitted Bell to file an abridged version of the revised Bell Comments, and it only granted Telus access to the abridged version: see paras. 13 and 14 of the Affidavit of Karen Ng sworn May 23, 2012 reproduced at pp. 13 to 18 of Bell's motion record (the "Ng Affidavit").

[7] Bell consistently treats its own market data concerning the size and value of the Canadian mobile content market as highly confidential: Ng Affidavit at para. 10. Bell has also consistently treated the contents of the Licence Agreements as confidential, and these are subject to non-disclosure provisions: Ng Affidavit at para. 11. Bell has submitted unchallenged affidavit evidence asserting that it would be seriously prejudiced by the disclosure of such information. Paragraph 12 of the Ng Affidavit reads in part as follows:

If such information about Bell's market data and Licence Agreements were known to other providers like TELUS, they could use that information to take steps prejudicial to Bell, such as obtaining a material advantage in future negotiations relating to the licensing of mobile content. Disclosure of such information could seriously compromise Bell's ability to compete in the future, and could also cause serious harm to Bell's commercial relationships with the NFL and NHL...

[8] Telus does not challenge directly the affidavit evidence submitted by Bell in support of the Confidentiality Order. Rather, it submits that there is no evidence that all the material alleged to be

confidential concerns the size and value of the Canadian mobile content market, and that, in any event, this information is not an important commercial interest. I disagree.

[9] The Ng Affidavit clearly states that the Bell Comments contain details of Bell's market data, and that this data could be used by Telus to obtain a material advantage in future negotiations relating to the licensing of mobile content. The Supreme Court of Canada has recently found, albeit in another statutory context, "that as a matter of principle, the disclosure of information that is not already in the public domain and that could give competitors a head start in product development, or which they could use to their competitive advantage, may be shown to give rise to a reasonable expectation of probable harm or prejudice to the third party's competitive position": *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 220.

[10] Subsection 39(1) of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, SOR/2010-277, adopted under the *Broadcasting Act*, S.C. 1991, c. 11, provides that in broadcasting matters, a party may designate as confidential the information referred to in paragraph 39(1)(c) of the *Telecommunications Act*, S.C. 1993, c. 38. That paragraph refers to information the disclosure of which could reasonably be expected to prejudice the competitive position of a person or affect its contractual or other negotiations. It was in this context that the CRTC treated the Bell Comments as confidential. Though these provisions and the CRTC confidentiality order do not necessarily bind this Court, they are certainly factors which may be taken into account in deciding whether to grant a confidentiality order under Rule 151 of the *Federal Courts Rules*.

[11] For the above reasons, I find that the details of Bell's own market data and references to the terms of the Licence Agreements in the Bell Comments which were the object of the CRTC confidentiality order should also be treated as confidential information in the appeal to this Court.

*Access to the confidential information by counsel*

[12] Bell proposes that only the external counsel of Telus be allowed to view the confidential information. Telus objects on the grounds that it is represented by "in-house" counsel in this appeal and that it is unaware of any case in which a confidentiality order extended to bar disclosure to an "in-house" counsel. Telus further agrees to limit access to such confidential information to two "in-house" counsels.

[13] Bell has submitted no evidence to justify its position as to why only external counsel should be allowed to view the confidential information. It has not stated any ground nor made any argument as to why the "in-house" counsel of Telus should be precluded from viewing the confidential information, subject to the terms of a confidentiality order. Nor has it provided any authorities supporting such an exclusion.

[14] In these circumstances, there is no basis on which this Court could exclude "in-house" counsel from viewing such information under the terms of a Confidentiality Order.

*Conclusions*

[15] In conclusion, Bell's motion is granted in part. Two orders are issued with these reasons: (a) an order protecting the confidentiality of Bell's own market data and references to the terms of the Licensing Agreements contained in the full version of the Bell Comments, and also providing for confidential access thereto by Telus' two "in-house" counsel; and (b) an order suspending *nunc pro tunc* the timelines in Part 6 of the *Federal Courts Rules* as of May 25, 2012 to June 28, 2012, from which date they resume running.

[16] Costs of this motion are costs in the cause.

"Robert M. Mainville"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-152-12

**STYLE OF CAUSE:** BCE Inc., Bell Canada and Bell  
Mobility Inc. v. Telus  
Communications Company

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:** MAINVILLE J.A.

**DATED:** June 28, 2012

**WRITTEN REPRESENTATIONS BY:**

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