Federal Court of Appeal  Cour d'appel fédérale

Date: 20120703

Docket: 12-A-23

Citation: 2012 FCA 203

Present: **STRATAS J.A.**

BETWEEN:

L'ASSOCIATION DES COMPAGNIES DE TELEPHONE DU QUEBEC INC. AND THE ONTARIO TELECOMMUNICATIONS ASSOCIATION

Moving Parties

and

ATTORNEY GENERAL OF CANADA, ROGERS COMMUNICATIONS PARTNERSHIP, COGECO CABLE INC., BRAGG COMMUNICATIONS INC. (carrying on business as Eastlink), CABLOVISION WARWICK INC., BELL ALLIANT REGIONAL COMMUNICATIONS, BELL CANADA and TELUS COMMUNICATIONS COMPANY

Respondents

Heard at Ottawa, Ontario, on June 27, 2012.

Order delivered at Ottawa, Ontario, on July 3, 2012.

REASONS FOR ORDER BY: STRATAS J.A.

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Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] The moving parties, L'Association des Compagnies de Téléphone du Québec Inc. and the Ontario Telecommunications Association, have brought a motion for an order staying certain

decisions, directives and policies made by the Canadian Radio-television and Telecommunications Commission.

[2] The respondents oppose the motion on the basis that the test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 has not been met. In particular, they say that the moving parties have not established the existence of irreparable harm and have not established that the balance of convenience is in favour of granting a stay. The respondents also note that the moving parties are associations and submit it is their members, not the associations themselves, that will suffer irreparable harm, if any. To deal with that submission, the moving parties have brought an additional motion, seeking to add some of their members as moving parties.

[3] The respondents have also asserted a number of preliminary objections. For the reasons that follow, I find that two of these preliminary objections are well-founded and so I must dismiss the moving parties' stay motion.

A. The basic facts

[4] Since this Court is not dismissing the moving parties' stay motion on its merits and since it is possible that, as a result of these reasons, the moving parties may apply to the Governor in Council for a stay, only a brief recounting of the facts is necessary and appropriate.

(1) What the CRTC has done

[5] Over the past year, the CRTC has made a number of decisions, directives and policies that the moving parties say adversely affect their members: Telecom Regulatory Policy CRTC 2011-291; Telecom Notice of Consultation, CRTC 2011-348; Telecom Decisions CRTC 2011-733, 2012-35, 2012-36, 2012-37, 2012-38, 2012-39, 2012-40, 2012-41, 2012-42, 2012-43, 2012-44, 2012-45, 2012-46 and 2012-47.

(2) Effects on the moving parties

[6] The moving parties say that these decisions, directives and policies expose their members to greater competition and detrimentally change subsidies and other payments they receive. As a result, their members and the public will suffer detrimental effects. Further, they say that their members' financial viability is at stake.

(3) The moving parties' appeals

[7] Under the *Telecommunications Act*, S.C. 1993, c. 38, "decisions" may be varied, rescinded or referred back to the CRTC by way of petition to the Governor in Council under section 12 (collectively "appealed"). They may also be appealed to this Court, with leave, on questions of law or jurisdiction (section 64). "Decisions" are "determination[s] made by the Commission in any form" (section 2).

[8] The moving parties have appealed only two decisions to the Governor in Council: Telecom Regulatory Policy, CRTC 2011-291 and Telecom Decision CRTC 2011-733 (a decision that is not sought to be stayed). These have not been appealed to this Court.

(4) The moving parties' motion to this Court

[9] In their motion in this Court, the moving parties seek a stay of all or part of the decisions, directives and policies set out in paragraph 5, above. They ask that the decisions, directives and policies – most of them not under appeal – be stayed until the Governor in Council determines their appeal of Telecom Regulatory Policy, CRTC 2011-291 and Telecom Decision CRTC 2011-733.

[10] The bottom line is that the moving parties seek a stay from this Court even though the only appeals on the merits have been made to the Governor in Council.

B. Places where the moving parties could seek a stay of the CRTC's decisions

[11] In these circumstances, the moving parties had three places which they could seek a stay of the CRTC's decisions.

(1) The CRTC

[12] After the CRTC makes a decision, an aggrieved party may ask the CRTC to stay it. The CRTC exercises this jurisdiction under section 62 of the *Telecommunications Act*. Among other things, that section allows it to "vary any decision made by it."

[13] Although the CRTC often describes its power as a power to grant stays, in law it is really varying the effective date of its decision. For example, a decision that was to take immediate effect can be varied to come into effect at a future time.

[14] By Practice Note dated February 28, 1997, the CRTC has announced that it will consider stay applications by examining the test set out by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 100 and *RJR-MacDonald Inc., supra*.

[15] In this case, the moving parties asked the CRTC to stay the decisions, directives and policies set out in paragraph 5, above. On March 30, 2012, the majority of the CRTC (with one dissenter) refused the request. The majority found that the moving parties had not established the existence of irreparable harm, nor had they established that the balance of convenience was in favour of granting a stay. The moving parties have brought a motion for leave to appeal to this Court from the CRTC's decision not to grant a stay. That motion remains pending before this Court.

(2) The Governor in Council

[16] The respondent, TELUS, submits that the Governor in Council has the power to stay CRTC decisions. It says that this power exists under section 12 of the *Telecommunications Act*.

[17] I agree with this submission. Section 12 provides as follows:

12. (1) Within one year after a decision by the Commission, the Governor in Council may, on petition in writing presented to the Governor in Council within ninety days after the decision, or on the Governor in Council's own motion, by order, vary or rescind the decision or refer it back to the Commission for reconsideration of all or a portion of it.	**12.** (1) Dans l'année qui suit la prise d'une décision par le Conseil, le gouverneur en conseil peut, par décret, soit de sa propre initiative, soit sur demande écrite présentée dans les quatre-vingt-dix jours de cette prise, modifier ou annuler la décision ou la renvoyer au Conseil pour réexamen de tout ou partie de celle-ci et nouvelle audience.

[18] Many CRTC decisions take effect on the date on which they were pronounced. The Governor in Council can use section 12 to vary the time when they take effect. In effect, they are stayed or suspended until the times specified by the Governor in Council. The Governor in Council has exercised this power on a number of occasions: P.C. 1981-2151, 1981-3382 and 1981-3456 (*Telsat Canada*) (on its own motion); P.C. 1988-2386, 1989-1238 and 1990-620 (*Call-Net*) (on its own motion); *C.W.C. v. Canada (Attorney General)*, [1989] 1 F.C. 643 at paragraph 4 (in response to a party's request).

(3) The Federal Court of Appeal

[19] When a party brings a motion for leave to appeal to this Court from a CRTC decision on the merits, on occasion the party also seeks a stay of a decision of the CRTC until final judgment of this Court. Our jurisdiction to grant such a stay is undoubted: sections 44 and 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and see, *e.g.*, *North American Gateway Inc. v. CRTC* (1997), 74 C.P.R. (3d) 156 (F.C.A.). When a potential appellant or an appellant is before our Court, our Court has the ability to protect that party from the effects of a CRTC decision under challenge. We do so when the test in *RJR-MacDonald*, *supra*, is met.

[20] However, this case is different. As mentioned above, the moving parties have appealed the CRTC decisions only to the Governor in Council, not to this Court. Does this Court have any jurisdiction to entertain a stay motion in circumstances where the only appeal is before the Governor in Council, not this Court?

C. Preliminary Objections

[21] That question is one of the preliminary objections advanced by the respondent TELUS. It answers that question in the negative. It adds that the Governor in Council is an adequate alternative forum for advancing a stay. Finally, it submits that the moving parties are barred from bringing a stay in this Court as a result of issue estoppel caused by the CRTC's decision not to grant a stay.

[22] In my view, this Court can entertain a stay motion in circumstances where the only appeal is before the Governor in Council, but there are important qualifications to this. As will be seen, the circumstances in which that jurisdiction can be exercised are rare.

[23] This Court does have the jurisdiction to grant injunctive relief – and stays are a form of injunctive relief – concerning administrative proceedings and decisions, even in circumstances where there is no proceeding before this Court. A good example is *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626. The basis for this jurisdiction is section 44 of the *Federal Courts Act*. It provides as follows:

44. In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a *mandamus*, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.	**44.** Indépendamment de toute autre forme de réparation qu'elle peut accorder, la Cour d'appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un *mandamus*, une injonction ou une ordonnance d'exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu'elle juge équitables.

[24] An alternative basis for this jurisdiction is section 50 of the *Federal Courts Act*. It provides as follows:

50. (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter	**50.** (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :

(*a*) on the ground that the claim is being proceeded with in another court or jurisdiction; or	*a*) au motif que la demande est en instance devant un autre tribunal;
(*b*) where for any other reason it is in the interest of justice that the proceedings be stayed.	*b*) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[25] The scope of this Court's jurisdiction under these sections is unclear.

[26] On one view, this Court has "a general administrative jurisdiction over federal tribunals" that "should not be interpreted in a narrow fashion": *Canadian Liberty Net*, *supra* at paragraph 36. This is a "plenary jurisdiction" identical to that existing in superior courts to "regulate disputes related to the control and exercise of powers of an administrative agency," for example through "injunctive relief in certain urgent situations": *ibid*.; *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257 at paragraphs 50-53. However, although the Court has this jurisdiction, as a discretionary matter it can decide not to exercise it. For example, there may be other available, adequate and effective administrative avenues for relief: *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61; D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at paragraph 3:2000. Alternatively, another forum may possess superior expertise or be better suited to deciding the issue: *Reza v. Canada*, [1994] 2 S.C.R. 394. But the mere existence of an alternative administrative scheme does not, by itself, oust this Court's jurisdiction: *Canadian Liberty Net*, *supra*; *A.B.L.E. Association for Betterment of Literacy*

& Education v. The Queen (1998), 52 D.T.C. 6668 at paragraph 7 (F.C.A), *Canada (Minister of National Revenue) v. Swiftsure Taxi Co.*, 2005 FCA 136 at paragraphs 3-6.

[27] On another view, this Court's jurisdiction is only "residuary," a word that does not necessarily mean the same thing as "other available, adequate and effective administrative avenues for relief" in the authorities mentioned above. See, *e.g.*, *Canadian Liberty Net*, *supra* at paragraph 41, where, apparently contrary to other passages in the judgment, it is said that "no jurisdiction" should be found where another forum exists. See also *Okwuobi*, *supra* at paragraph 1 and *Brotherhood of Maintenance of Way Employees Canadian Pacific Federation v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495 at paragraph 5. On this view, the existence of another forum in which the relief could potentially be sought could deprive this Court of jurisdiction, regardless of the circumstances.

[28] Under either view, the Court's jurisdiction to grant injunctive relief can be ousted by a clear indication of statutory intention to exclude it: *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Okwuobi*, *supra* at paragraph 38; *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146 at paragraphs 27-29. Even then, in exceptional circumstances, such an ouster might be regarded as similar to a privative clause and so it may be that this Court can still act, albeit deferentially, under its constitutional jurisdiction founded on the rule of law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 27-29. This may be one of the bases for the emergency injunctive power discussed in *Okwuobi*, *supra*.

[29] Were it necessary to decide between these two views, I would subscribe to the former view, the view that our jurisdiction is full and plenary. This view maximizes this Court's ability to react to unusual circumstances while drawing upon the rich jurisprudence on adequate alternative remedies to ensure that administrative regimes are respected and are allowed to operate effectively. Also it is more in accord with the normal analytical framework that applies in administrative matters. Under that framework, three questions are to be asked:

- *Jurisdiction*. Does the Court have jurisdiction? In other words, can it consider the matter placed before it?

- *Discretionary bars*. Do any discretionary bars exist against exercising jurisdiction? In other words, even though it can consider the matter placed before it, should it? The two matters mentioned in paragraph 26, above – the existence of other available, adequate and effective administrative avenues for relief and the existence of another forum which possesses superior expertise or is better suited to deciding the issue – fall to be considered here.

- *Merits*. How should the Court exercise its jurisdiction? In other words, given that the Court can and should consider the matter, what result on the merits should it reach?

In these reasons, I shall follow this analytical framework.

D. Analysis

(1) Does the Court have jurisdiction?

[30] In this case, the moving parties seek relief from the Governor in Council under the provisions of the federal *Telecommunications Act*. In these circumstances, sections 44 and 50 of the *Federal Courts Act* potentially give this Court jurisdiction to grant a stay pending an appeal to the Governor in Council.

[31] The *Telecommunications Act* does not expressly exclude that jurisdiction. There is only a restriction on appealing the merits of a CRTC decision to this Court (see section 64).

[32] Further, it cannot be said that that jurisdiction is impliedly or necessarily excluded by the *Telecommunications Act*. By way of illustration, suppose that a party that has received an adverse decision from the CRTC and has a strong appeal from it. Also suppose that it will be gravely and irreparably affected by it in the next three days. Finally, suppose that the Governor in Council cannot meet within those three days to deal with the party's request for a stay. In my view, there is nothing in the *Telecommunications Act* that would impliedly or necessarily require this Court to stand by and let injustice happen in those urgent circumstances. See *Okwuobi*, *supra* at paragraphs 51-53 (albeit in the context of superior courts).

[33] Therefore, in my view, this Court has jurisdiction to entertain the moving party's stay motion.

(2) Do any discretionary bars exist against exercising jurisdiction?

[34] TELUS submits that the moving parties are barred by way of issue estoppel from seeking a stay from this Court. The estoppel is said to arise from the CRTC's dismissal of the moving parties' application for a stay before it. TELUS submits that the CRTC applied the *RJR-MacDonald* test and this is the same test that must be applied on the motion in this Court.

[35] In order for issue estoppel to constitute a complete bar to this Court's consideration of the moving parties' stay motion, the issues considered by the CRTC must be the same as those to be considered in this Court. Here, although there is substantial overlap in the issues – and indeed, the CRTC uses the same test that this Court uses on stay motions – the issues are not necessarily identical. The CRTC is acting under its power in section 62 of the *Telecommunications Act* to vary one of its decisions. This Court does not vary the CRTC's decision but rather exercises its own original jurisdiction to stay it under either of sections 44 and 50 of the *Federal Courts Act*. Different considerations can potentially come to bear on these two different matters: *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312.

[36] A more fundamental impediment to the application of issue estoppel in these circumstances is the lack of finality associated with the CRTC's decision not to grant the moving parties a stay. As

mentioned in paragraph 15, above, the moving parties have brought a motion seeking leave to appeal that decision to this Court under subsection 64(1) of the *Telecommunications Act*.

[37] I would add that although issue estoppel is not a complete bar to this Court's consideration of the moving parties' stay motion, the doctrine of abuse of process may prevent certain matters from being relitigated: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77. It is not necessary to consider this further, as two other discretionary bars exist to foreclose this Court's consideration of the moving parties' stay motion.

[38] The first discretionary bar is the fact that the Governor in Council is an adequate, available forum in which the moving parties can seek their stay: *Matsqui Indian Band, supra*; *C.B. Powell Limited, supra*; Brown and Evans, *supra* at paragraph 3:2000. As mentioned in paragraph 18, above, the Governor in Council has the power to stay CRTC decisions and has shown a willingness to exercise that power.

[39] Although the Governor in Council is an adequate, available forum for obtaining the remedy they seek, the moving parties have not availed themselves of it. Indeed, their petition to the Governor in Council does not request a stay, nor does it even ask the Governor in Council to speed up its decision-making.

[40] The moving parties submitted that the Governor in Council is not an adequate forum because it is ill-suited to the receipt of complicated evidence, fact-finding and legal submissions.

This is essentially a factual submission made without evidence as to the nature of the Governor in Council's consideration of such matters or its inadequacy or inability to act. In any event, the cases show that the Governor in Council is sometimes required under statutes to consider complicated evidence, fact-finding and legal submissions alongside policy considerations, and it does so: *e.g.*, *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 194; *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307.

[41] In a future case, conditions of urgency or emergency might be demonstrated that would prompt this Court not to apply this discretionary bar and to grant relief, at least until the Governor in Council can consider the matter. In another future case, the Governor in Council, although requested to stay a CRTC decision, might be dilatory in reacting to the request and this Court's intervention might be necessary in the circumstances. In another future case, proof might be supplied that shows that the Governor in Council is not an adequate, available forum for the granting of relief.

[42] But the present case is quite different. For one thing, conditions of urgency or emergency sufficient to overcome this Court's view on the discretionary bar have not been demonstrated. I am not convinced that the financial viability of the moving parties' members is at imminent peril. The moving parties have proceeded at a fairly sedate pace, bringing their stay motion in this Court well after the CRTC decisions were made.

[43] The second discretionary bar is this Court's ability to decline to hear a matter but rather to refer it to another body with jurisdiction in circumstances where that body is more appropriate or better suited to decide the matter: *Reza*, *supra*. In this case, that body is the Governor in Council.

[44] The moving parties' appeal on the merits of the CRTC's decisions has been made to the Governor in Council under section 12 of the *Telecommunications Act*. In these circumstances, this Court would be meddling in a matter that is really for the Governor in Council to decide. Further, in addition to the sorts of factors described in *RJR-MacDonald*, *supra* that the Governor in Council may consider, there may also be relevant policy considerations. As a policy body, the Governor in Council can consider these.

[45] In a future case, a party might demonstrate conditions of urgency, emergency or other compelling circumstance that might overcome the factors supporting a referral of the matter to the Governor in Council. But that has not been demonstrated here.

[46] Therefore, I apply these two discretionary bars against the moving parties' stay motion. The motion must be dismissed.

(3) The merits of the stay application

[47] It is not necessary to consider the merits of the stay motion. It is also not necessary to deal with the moving parties' motion to add some of their members as moving parties.

E. Disposition

[48] For the foregoing reasons, I shall dismiss the stay motion with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	12-A-23
A MOTION TO STAY THE IMPLEMENTATION OF PART OR ALL OF CERTAIN DECISIONS OF THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION RENDERED BETWEEN MAY 2011 AND JANUARY 2012	
STYLE OF CAUSE:	L'Association des Compagnies de Téléphone du Québec Inc. and The Ontario Telecommunications Association v. Attorney General of Canada, Rogers Communications Partnership, Cogeco Cable Inc., Bragg Communications Inc. (carrying on business as Eastlink), Cablovision Warwick Inc., Bell Alliant Regional Communications, Bell Canada and TELUS Communications Company
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 27, 2012
REASONS FOR ORDER BY:	Stratas J.A.
DATED:	July 3, 2012

APPEARANCES:

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