

Federal Court of Appeal



Cour d'appel fédérale

Date: 20220323

Docket: A-299-21

Citation: 2022 FCA 49

Present: PELLETIER J.A.

BETWEEN:

TEKSAVVY SOLUTIONS INC.

Appellant

and

**BELL CANADA, BRAGG COMMUNICATIONS INCORPORATED c.o.b. as
EASTLINK, COGECO COMMUNICATIONS INC., ROGERS
COMMUNICATIONS CANADA INC., SHAW CABLESYSTEMS G.P.,
VIDEOTRON LIMITED and TELUS COMMUNICATIONS INC.**

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 23, 2022.

REASONS FOR ORDER BY:

PELLETIER J.A.

Federal Court of Appeal



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REASONS FOR ORDER

PELLETIER J.A.

[1] The parties to this sprawling and complex dispute are unable to agree on the contents of the Appeal Book principally because they disagree as to the application of the exceptions to the general rule as to admissible documents set out in *Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149, 305 A.C.W.S. (3d) 463 [*Namgis*]. They ask this Court to settle their dispute by fixing the contents of the Appeal Book.

[2] Before dealing with the Appeal Book, it is helpful to provide some background information.

[3] This appeal arises by virtue of section 64 of the *Telecommunications Act*, S.C. 1993, c. 38, which provides for an appeal to this Court on a question of law or jurisdiction from a decision of the Canadian Radio-television and Telecommunications Commission (CRTC). In form, statutory appeals such as this one are governed by Part 6 of the *Federal Courts Rules*, S.O.R./98-106 [the Rules] which applies to appeals. However, because the decision in issue was made by an administrative tribunal, statutory appeals have proceeded, in substance, as judicial reviews: see for example, *Gitxaala Nation v. Canada*, 2015 FCA 27, 250 A.C.W.S. (3d) 560 at para. 11, *Bell Canada v. 7262591 Canada Ltd. (Gusto TV)*, 2016 FCA 123, 17 Admin L.R. (6th) 175 at para. 6, *Contrevenant no. 10 v. Canada (Attorney General)*, 2016 FCA 42, 488 N.R. 226 at para. 10 [*Contrevenant no. 10*].

[4] This has not been changed by the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*] which simply decided that, in the name of respecting Parliament's intention, the standard of review in a statutory appeal from an administrative tribunal should be the appellate standard and not the judicial review standard. In every other respect, a statutory appeal continues to be pursued substantively as though it were a judicial review.

[5] This means that the rules as to admissible documents are the rules applied in judicial reviews and not the rules applied in appeals from a lower court: *Contrevenant no. 10* at para. 10.

In the case of appeal from a trial court, the party seeking to tender evidence which is not in the trial court record must make a motion pursuant to Rule 351 of the Rules, and must also satisfy the criteria set out in *Shire Canada Inc. v. Apotex Inc.*, 2011 FCA 10, 414 N.R. 270 at paragraph 17. The question of admissibility of new evidence in judicial review is dealt with more informally in the process of settling the contents of the Appeal Book.

[6] In this case, there appears to be agreement as to a group of documents which are properly in the Appeal Book, while there is another group of documents where there is no agreement. The documents in the first group should constitute the Appeal Book while the documents in the second group should be available to parties for use in the litigation, subject to the demonstration that they come within the exceptions to the general rule, as described below.

[7] It appears from Exhibit A to the Affidavit of Susan Gutteridge that, as of January 25, 2022, there was a draft index of the contents of the Appeal Book in circulation which was agreed to, but which the respondents considered to be under-inclusive. The documents listed in that draft index will constitute the Appeal Book, subject to any modifications agreed to in the email chain reproduced in Exhibit A. It may be that the document at Exhibit B to the Affidavit of Susan Gutteridge includes the agreed changes, in which case, the documents listed in Exhibit B will constitute the Appeal Book. Documents whose inclusion in the Appeal Book was objected to by a respondent prior to January 25, 2022 will not be included in the Appeal Book but will be eligible for inclusion in the Supplementary Appeal Book described below.

[8] The general rule as to the documentary record on an application for judicial review was set out at paragraph 7 of *Namgis*, as follows:

Thus, the normal rule, subject to limited exceptions, is that only material that was before the administrative decision-maker, the merits-decider, is admissible on judicial review: see, e.g., *Association of Universities* at para. 17; *Delios* at para. 42; *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189. Attempts in the first-instance reviewing court to file evidence that goes to the merits of the administrative decision and that was not before the administrative decision-maker must be rebuffed.

[9] This rule is subject to certain exceptions, whose application is the subject matter of the dispute between the parties. The exceptions are listed at paragraph 10 of *Namgis* as follows:

- a) *General background affidavits*;
 - b) *Affidavits concerning grounds of review where evidence cannot be found in the record of the administrative decision-maker*;
 - c) *Affidavits to highlight gaps in the record*; and
 - d) *Affidavits relevant to the reviewing court's remedial discretion*.
- (collectively the Exceptions)

[10] In its responding motion record, Bell Canada (Bell) defines the categories of documents which it seeks to have included in the Appeal Book (the Contested Materials) as follows (the references are to Bell's written representations):

- a) documents already in the CRTC record: at para. 25
- b) general background documents: at para. 28
- c) documents relevant to the grounds of appeal, and the court's remedial discretion: at para. 32
 - i) documents contextualizing Mr. Scott's actions: at para. 34
 - ii) documents demonstrating Teksavvy's abuse of process: at para. 36

- iii) documents demonstrating Teksavvy failed to address the bias issue at the earliest opportunity: at para. 40
- iv) documents demonstrating the availability of alternative relief before Cabinet: at para. 42

[11] It can be seen that Bell's categories are largely the same as the Exceptions, though there are differences. In the normal course a judge would wade through the documents and rule on whether individual documents were "in" or "out". In addition to being time consuming, this process suffers from the judge's unfamiliarity with the underlying context, as it will become known in the hearing of the appeal: see *Sawridge Band v. Canada*, 2005 FCA 259, 339 N.R. 259 at para. 6. For that reason, this Court has, in the past, allowed all the documents "in", subject to the objecting party persuading the hearing panel that the document should be excluded.

[12] I propose to adopt this approach with some modifications.

[13] The respondents argue that the documents which they seek to introduce come within the Exceptions. Normally, those who seek the benefit of an exception have the burden of demonstrating that they are entitled to that benefit: *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361 at para. 38, *Offshore Logistics Inc. v. Halifax Longshoremen's Association, Local 269*, 25 Admin L.R. (3d) 224 (F.C.A.), 2000 CanLII 15852 at para. 58, *Rubin v. President of Canada Mortgage & Housing Corp.*, [1989] 1 FC 265 (F.C.A.), 1988 CanLII 5656 at para. 25, *El Maki v. Canada (Employment Insurance Commission)*, 98 C.L.L.C. 240-006 (F.C.A.), 1998 CanLII 8060 at para. 5, *Defence Construction Canada v. Ucanu Manufacturing Corp.*, 2017 FCA 133, [2018] 2 F.C.R. 269 at para. 75.

[14] As a result, I am not prepared to order that the Contested Materials be included in the Appeal Book subject to their admissibility being challenged by an objecting party. The onus is on the party claiming the benefit of the Exceptions to show that they are entitled to that benefit.

[15] While the number of documents which the respondents seek to introduce is relatively small (somewhere between 45 and 53), they are voluminous. Bell's responding motion record, which includes all those documents, runs to some 1500 pages. The solution adopted for dealing with these documents must give the hearing panel as much information as possible so as to minimize the need for oral argument with respect to individual documents.

[16] The documents whose inclusion in the Appeal Book has been objected to will be included in a Supplementary Appeal Book, grouped under the specific '*Namgis* Exception which is claimed to justify the admissibility of that group of documents. The categories used by Bell in its Written Representations will have to be reconciled with those used in '*Namgis* since, as matters now stand, those are the only recognized exceptions. For greater certainty, the pages of the Supplementary Appeal Book will be numbered consecutively from start to finish, as opposed to being numbered within each group of documents.

[17] The appellant will prepare, serve and file the Appeal Book. Bell will prepare, serve and file the Supplementary Appeal Book.

[18] In keeping with the onus on those who rely on the Exceptions, each party will prepare a compendium of documents from the Supplementary Appeal Book to which it refers in its

memorandum of fact and law. The compendium will contain a copy of the document or, in the case of a voluminous document, the specific page(s) referred to, together with the party's representations demonstrating that the document comes within the Exception under which it is grouped in the Supplementary Appeal Book. This compendium will be in addition to any other compendium which a party may prepare for the benefit of the hearing panel.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-299-21

STYLE OF CAUSE: TEKSAVVY SOLUTIONS INC. v.
BELL CANADA et al.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: PELLETIER J.A.

DATED: MARCH 23, 2022

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