Date: 20080307

Dockets: A-516-06
A-517-06

Citation: 2008 FCA 91

CORAM: **RICHARD C.J.**
NOËL J.A.
SHARLOW J.A.

A-516-06

BETWEEN:

BELL CANADA

Appellant

and

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION
BELL ALIANT REGIONAL COMMUNICATIONS, LIMITED PARTNERSHIP
BC OLD AGE PENSIONERS ORGANIZATION
THE CONSUMERS' ASSOCIATION OF CANADA
MTS ALLSTREAM INC.
THE NATIONAL ANTI-POVERTY ORGANIZATION
PUBLIC INTEREST ADVOCACY CENTRE
SASKATCHEWAN TELECOMMUNICATIONS
SOCIÉTÉ EN COMMANDITE TÉLÉBEC
TELUS COMMUNICATIONS INC.
L'UNION DES CONSOMMATEURS and
ARCH DISABILITY LAW CENTRE

Respondents

A-517-06

BETWEEN:

THE CONSUMERS' ASSOCIATION OF CANADA and
THE NATIONAL ANTI-POVERTY ORGANIZATION

Appellants

and

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Respondent

and

BELL ALIANT REGIONAL COMMUNICATIONS, LIMITED PARTNERSHIP
BELL CANADA
ARCH DISABILITY LAW CENTRE
CANADIAN ASSOCIATION OF THE DEAF
MTS ALLSTREAM INC.
SASKATCHEWAN TELECOMMUNICATIONS
TÉLÉBEC, SOCIÉTÉ EN COMMANDITE
TELUS COMMUNICATIONS INC. and
TELUS COMMUNICATIONS (QUÉBEC) INC.

Respondents

Heard at Ottawa, Ontario, on January 23 and 24, 2008.
Judgment delivered at Ottawa, Ontario, on March 7, 2008.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: RICHARD C.J.
NOËL J.A.

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Appellant

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] These are two appeals of the decision of the Canadian Radio-Television and Telecommunications Commission (CRTC) dated February 16, 2006, entitled Telecom Decision CRTC 2006-9, *Disposition of funds in the deferral accounts* (the "Deferral Account Decision").

[2] Both appeals raise issues as to the scope of the authority of the CRTC to order the disposition of the balance of a deferral account created pursuant to a prior CRTC order. Bell Canada says that the CRTC cannot order it to use the balance of the account for subscriber rebates. Consumers' Association of Canada and National Anti-Poverty Organization (collectively, the "Consumers") say that the CRTC must order the balance to be used for subscriber rebates (or to improve accessibility to telecommunication services for persons with disabilities).

[3] For the reasons that follow, I have concluded that both appeals should be dismissed.

[4] For convenience, these reasons are organized under the following headings:

1. Statutory provisions

[5] The Deferral Account Decision is one of a series of decisions made by the CRTC in relation to the approval of tariffs for telecommunications services for the period commencing on June 1, 2002 and ending on May 31, 2007. The CRTC's authority to approve such tariffs is derived from the combined operation of sections 23, 24, 25, 27 and 32 of the *Telecommunications Act*, S.C. 1993, c. 38. Those provisions read in relevant part as follows:

23. For the purposes of this Part and Part IV, "telecommunications service" has the same meaning as in section 2 and includes any service that is incidental to the business of providing telecommunications services.	23. Pour l'application de la présente partie et de la partie IV, «service de télécommunication » s'entend du service de télécommunication défini à l'article 2, ainsi que de tout service accessoire à la fourniture de services de télécommunication.

24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.	24. L'offre et la fourniture des services de télécommunication par l'entreprise canadienne sont assujetties aux conditions fixées par le Conseil ou contenues dans une tarification approuvée par celui-ci.
25. (1) No Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.	25. (1) L'entreprise canadienne doit fournir les services de télécommunication en conformité avec la tarification déposée auprès du Conseil et approuvée par celui-ci fixant — notamment sous forme de maximum, de minimum ou des deux — les tarifs à imposer ou à percevoir.
[…]	[…]
27. (1) Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.	27. (1) Tous les tarifs doivent être justes et raisonnables.
[…]	[…]
32. The Commission may, for the purposes of this Part,	32. Le Conseil peut, pour l'application de la présente partie :
[…]	[…]
(*g*) in the absence of any applicable provision in this Part, determine any matter and make any order relating to the rates, tariffs or telecommunications services of Canadian carriers.	*g*) en l'absence de disposition applicable dans la présente partie, trancher toute question touchant les tarifs et tarifications des entreprises canadiennes ou les services de télécommunication qu'elles fournissent.

[6] Section 47 of the *Telecommunications Act* is also relevant to the issues in these appeals. It reads as follows (my emphasis):

47. The Commission shall exercise its powers and perform its duties under this Act and any special Act	47. Le Conseil doit, en se conformant aux décrets que lui adresse le gouverneur en conseil au titre de l'article 8 ou aux normes prescrites par arrêté du ministre au titre de l'article 15, exercer les pouvoirs et fonctions que lui confèrent la présente loi et toute loi spéciale de manière à réaliser <u>les objectifs de la politique canadienne de</u>
(*a*) with a view to implementing the <u>Canadian telecommunications policy objectives</u> and ensuring that Canadian carriers provide telecommunications services and	

charge rates in accordance with section 27; and

(*b*) in accordance with any orders made by the Governor in Council under section 8 or any standards prescribed by the Minister under section 15.

télécommunication et à assurer la conformité des services et tarifs des entreprises canadiennes avec les dispositions de l'article 27.

[7] The Canadian Telecommunications policy objectives referred to in section 47 of the *Telecommunications Act* are set out in section 7, which reads as follows:

7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives

(*a*) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

(*b*) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

(*c*) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

(*d*) to promote the ownership and control of Canadian carriers by Canadians;

(*e*) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points

7. La présente loi affirme le caractère essentiel des télécommunications pour l'identité et la souveraineté canadiennes; la politique canadienne de télécommunication vise à :

a) favoriser le développement ordonné des télécommunications partout au Canada en un système qui contribue à sauvegarder, enrichir et renforcer la structure sociale et économique du Canada et de ses régions;

b) permettre l'accès aux Canadiens dans toutes les régions — rurales ou urbaines — du Canada à des services de télécommunication sûrs, abordables et de qualité;

c) accroître l'efficacité et la compétitivité, sur les plans national et international, des télécommunications canadiennes;

d) promouvoir l'accession à la propriété des entreprises canadiennes, et à leur contrôle, par des Canadiens;

e) promouvoir l'utilisation d'installations de transmission canadiennes pour les télécommunications à l'intérieur du Canada et à destination ou en

outside Canada;	provenance de l'étranger;
(*f*) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;	*f*) favoriser le libre jeu du marché en ce qui concerne la fourniture de services de télécommunication et assurer l'efficacité de la réglementation, dans le cas où celle-ci est nécessaire;
(*g*) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;	*g*) stimuler la recherche et le développement au Canada dans le domaine des télécommunications ainsi que l'innovation en ce qui touche la fourniture de services dans ce domaine;
(*h*) to respond to the economic and social requirements of users of telecommunications services; and	*h*) satisfaire les exigences économiques et sociales des usagers des services de télécommunication;
(*i*) to contribute to the protection of the privacy of persons.	*i*) contribuer à la protection de la vie privée des personnes.

[8] The specific provisions of the *Telecommunications Act* relating to orders of the CRTC are found in sections 60, 61 and 62, and read in relevant part as follows.

60. The Commission may grant the whole or any portion of the relief applied for in any case, and may grant any other relief in addition to or in substitution for the relief applied for as if the application had been for that other relief.	60. Le Conseil peut soit faire droit à une demande de réparation, en tout ou en partie, soit accorder, en plus ou à la place de celle qui est demandée, la réparation qui lui semble justifiée, l'effet étant alors le même que si celle-ci avait fait l'objet de la demande.
61. (1) The Commission may, in any decision, provide that the whole or any portion of the decision shall come into force on, or remain in force until, a specified day, the occurrence of a specified event, the fulfilment of a specified condition, or the performance to the satisfaction of the Commission, or of a person named by it, of a requirement imposed on any interested person.	61. (1) Le Conseil peut, dans ses décisions, prévoir une date déterminée pour leur mise à exécution ou cessation d'effet — totale ou partielle — ou subordonner celle-ci à la survenance d'un événement, à la réalisation d'une condition ou à la bonne exécution, appréciée par lui-même ou son délégué, d'obligations qu'il aura imposées à l'intéressé.
(2) The Commission may make an interim	(2) Le Conseil peut rendre une décision

decision and may make its final decision effective from the day on which the interim decision came into effect.	provisoire et rendre effective, à compter de la prise d'effet de celle-ci, la décision définitive.
(3) The Commission may make an *ex parte* decision where it considers that the circumstances of the case justify it.	(3) La décision peut également être rendue *ex parte* si le Conseil estime que les circonstances le justifient.
62. The Commission may, on application or on its own motion, review and rescind or vary any decision made by it or re-hear a matter before rendering a decision.	62. Le Conseil peut, sur demande ou de sa propre initiative, réviser, annuler ou modifier ses décisions, ou entendre à nouveau une demande avant d'en décider.

2. Facts

[9] The Deferral Account Decision was preceded by Telecom Decision CRTC 2002-34 (the "Price Caps Decision") dated May 30, 2002. The Price Caps Decision established various pricing constraints and formulae that would apply to the regulated services of Bell Canada and other incumbent local exchange carriers ("ILECs") for the four year period from June 1, 2002 to May 31, 2006. In Telecom Decision CRTC 2005-69, dated December 16, 2005, the CRTC extended the price cap regime for another year, to May 31, 2007.

[10] The application of the specific pricing formula that the Price Caps Decision established for residential telephone services in non-high cost serving areas ("non-HCSAs", which I understand to mean, generally, urban areas) would have resulted in a rate decrease in any year in which inflation was lower than 3.5%. However, the CRTC did not order a reduction in rates for that class of subscriber, because it was concerned about the impact of such price reductions on emerging local competition in urban areas (the theory being that rates that are too low are a barrier to new entrants to the market). Instead, the CRTC required the ILECs to keep track of the rate reductions that would have been required under the formula, and to add those amounts to a deferral account. The CRTC is

permitted to require telecommunication service providers to adopt a particular method of accounting (paragraph 37(1)(*a*) of the *Telecommunications Act*).

[11] The CRTC did not require the ILECs to maintain the deferral accounts as a trust account or a separate fund. It is undisputed that each ILEC is the legal owner of the funds credited to its deferral account. A deferral account is simply an accumulation of accounting entries. The balance in an ILEC's deferral account represents an asset of the ILEC that is subject to a contingent liability, to be discharged in the manner the CRTC may lawfully direct.

[12] In paragraph 412 of the Price Caps Decision, the CRTC indicated how the balance in an ILEC's deferral account might be dealt with, without excluding other possibilities. That paragraph reads as follows:

> 412. The Commission anticipates that an adjustment to the deferral account would be made whenever the Commission approves rate reductions for residential local services that are proposed by the ILECs as a result of competitive pressures. The Commission also anticipates that the deferral account would be drawn down to mitigate rate increases for residential service that could result from the approval of exogenous factors or when inflation exceeds productivity. Other draw downs could occur, for example, through subscriber rebates or the funding of initiatives that would benefit residential customers in other ways.

[13] The Price Caps Decision left certain issues outstanding in relation to the setting of rates for ILECs for the relevant period. It was contemplated that further submissions would be made in respect of those outstanding issues. In order to ensure that any rate changes arising from events

occurring after June 1, 2002 could be implemented retroactively as of that date, all ILEC rates were designated as interim rates as of June 1, 2002.

[14] No one sought leave to appeal the Price Caps Decision.

[15] In Telecom Decision CRTC 2003-15 dated March 18, 2003, the CRTC dealt with some rating issues that were outstanding after the Price Caps Decision. All outstanding issues relating to the rates for residential local subscribers in non-high cost service areas were settled at that time, and those rates were declared to be final. Paragraph 65 of Telecom Decision CRTC 2003-15 reads in relevant part as follows (my underlining):

> 65. In light of the foregoing:
>
> · the Commission **directs** Bell Canada to:
>
> -- include the $29.1 million in savings allocated to residential local services in non-[high cost service areas] in the price cap deferral account;
>
> […]
>
> · the Commission **approves**, on a final basis, the remainder of Bell Canada's rates other than [two categories of rates that are not in issue in this appeal];
>
> · the Commission **directs** that the approved rates, other than those associated with the contract options for DNA links, are to take effect on 1 June 2002. […]

[16] As I understand Telecom Decision CRTC 2003-15, it is the final determination of the CRTC that the rates then approved for residential local services in non-high cost service areas were just and reasonable. However, those final rates remained subject to the obligation of the ILECs to maintain the deferral accounts as directed in the Price Caps Decision, pending a final determination by the CRTC on the disposition of the balance in those accounts.

[17] On December 2, 2003, Bell Canada filed an application with the CRTC for approval to use the balance in its deferral account to expand high-speed broadband internet service to remote and rural communities. On March 24, 2004, the CRTC issued *Review and disposition of deferral accounts for the second price cap period*, Telecom Public Notice CRTC 2004-1. That notice initiated a public proceeding for which proposals were invited for the disposition of the ILECs' deferral accounts. Bell Canada's broadband expansion proposal was incorporated into that proceeding. That proceeding concluded with the release of the Deferral Account Decision, the decision under appeal, on February 16, 2006.

[18] In the Deferral Account Decision, the CRTC directed the ILECs, including Bell Canada, to allocate a minimum of 5% of the balance in their deferral accounts to improve access to telecommunication services for persons with disabilities. As to the remaining 95% of the balance in the ILECs' deferral accounts, the CRTC said this:

> 112. The Commission notes that in the price cap decisions, rebates to consumers in [non-high cost service areas] were identified as a possible use for the funds in the deferral accounts. The Commission considers that subscriber rebates would be consistent with section 7 of the Act and the objectives set out in the price cap decisions.
>
> 113. The Commission does not consider that providing one-time rebates to subscribers would be equivalent to lowering the ILECs' primary local exchange service rates or that it would defeat the purpose of establishing the deferral accounts. The Commission considers that a one-time rebate will not have a sustained impact on the development of competition in the residential local

services market.

114. However, the Commission has concerns with respect to the implementation of any rebates and the potential inter-generational inequity issues associated with the disposition of the funds in the deferral accounts. The Commission considers that it would be overly complex and not cost-effective to try to estimate a rebate amount proportionate to the amount contributed by an individual subscriber to the deferral accounts. The Commission also considers that the cost of attempting to locate those residential subscribers who were customers during the current price cap period but are no longer customers would likely outweigh any benefits that might be derived from such an exercise.

115. As indicated earlier in this Decision, the Commission intends to clear the funds in the deferral accounts in a manner that contributes to achieving the objectives of the current price regulation framework, including balancing the interests of the three main stakeholders in the telecommunications markets. The Commission considers that initiatives to expand broadband services and to improve accessibility to telecommunications services for persons with disabilities will provide longer-term and more permanent benefits than a one-time rebate.

116. Accordingly, the Commission concludes that each ILEC should, to the greatest extent possible, use funds in their deferral accounts for initiatives to expand broadband services to rural and remote communities and to improve accessibility to telecommunications services for persons with disabilities. The Commission also concludes that should any accumulated balance remain in the ILEC's deferral account after these initiatives have been approved by the Commission, this amount will be rebated to the ILEC's residential local subscribers in [non-high cost service areas].

[19] In paragraph 197 of the Deferral Account Decision, the CRTC also directed any ILEC wishing to pursue broadband expansion within its serving territory to file, by June 30, 2006, a detailed proposal in compliance with certain conditions.

[20] In Telecom Decision CRTC 2008-1 dated January 17, 2008, the CRTC considered Bell Canada's proposal to use its deferral account balance for broadband expansion, but approved it only in part. As a result, the CRTC required Bell Canada to submit, by March 25, 2008, a plan for rebating the balance of its deferral account to residential subscribers in non-high cost serving areas of record as of January 17, 2008.

[21] In practical terms, it is helpful to think of the balance in an ILEC's deferral account as an amount representing the amount of a contingent obligation of the ILEC to use a certain portion of the rates collected from residential local subscribers in non-high cost service areas in the manner that the CRTC would direct. I emphasize that there is no overpayment in fact or in law. The ILECs acted lawfully in charging and collecting the rates permitted by the CRTC. However, but for the need, perceived by the CRTC, to encourage competitors to enter the market for residential local subscribers in non-high cost service areas, the permitted rate would have been lower.

[22] The effect of the Deferral Account Decision is that each ILEC is obliged to spend 5% of the balance in its deferral account on improved accessibility for disabled persons. Each ILEC could choose whether or not to invest the remaining 95% in broadband expansion in rural and remote communities. An ILEC wishing to invest in such broadband expansion would be obliged to submit

its investment proposal to the CRTC. If the broadband expansion as finally approved would cost at least 95% of the balance in the deferral account, nothing would be rebated to subscribers. If the broadband expansion as finally approved would cost less than 95% of the balance in the deferral account, then an amount equal to the remainder would be rebated to residential local subscribers in non-high cost service areas. An ILEC choosing not to invest in broadband expansion would be obliged to rebate 95% of the balance in its deferral account to residential local subscribers in non-high cost service areas.

[23] The word “rebate” normally means a refund or repayment of money to the person who paid it. However, in the Deferral Account Decision the word “rebate” is used in a slightly different sense, to connote a method, yet to be determined, whereby the amount to be “rebated” is used to benefit the relevant class of subscribers as it is constituted on some date after May 31, 2007 (in the case of Bell Canada, the chosen date in January 17, 2008; see Telecom Decision CRTC 2008-1). For example, a “rebate” might be made by a one-time credit, after May 31, 2007, to the accounts of persons who as of some future date are residential local subscribers in non-high cost service areas. Alternatively, a “rebate” might be made by means of a reduction in the rates payable by those subscribers for some future period.

[24] Even if this matter progresses to the point where the CRTC approves a particular rebate methodology to be used by Bell Canada, a person who was a residential local subscriber in a non-high cost service area between June 1, 2002 and May 31, 2007, but who is not a subscriber on

January 17, 2008, will not benefit from the “rebate”. The benefit to a particular subscriber may or may not reflect that subscriber’s proportionate share of the balance in the deferral account.

[25] In Appeal A-516-06, Bell Canada (supported by the respondents Bell Alliant Regional Communications Limited Partnership and Arch Disability Law Centre) seeks an order quashing the part of the Deferral Account Decision that requires Bell Canada to rebate a portion of its deferral account to local subscribers in non-high cost serving areas. Bell Canada has never challenged the part of the Deferral Account Decision that requires a portion of its deferral account to be used to improve accessibility to telecommunications services for persons with disabilities. The Bell Canada appeal is opposed by the CRTC, National Anti-Poverty Organization, Consumers’ Association of Canada, and Public Interest Advocacy Centre.

[26] In Appeal A-517-06, the Consumers seek an order quashing the part of the Deferral Account Decision that requires a portion of the deferral accounts to be used to expand broadband services to rural and remote communities. The Consumers also seek an order directing the CRTC to order a rebate of the balance in the deferral accounts (except the 5% that the CRTC ordered to be used to improve accessibility to telecommunications services to persons with disabilities). The Consumers appeal is opposed by the CRTC and by Bell Canada, Telus Communications Inc., Telus Communications (Québec) Inc. and MTS Allstream Inc.

[27] The Consumers originally sought an order requiring the full balance of the deferral accounts to be rebated, including the 5% that the CRTC ordered to be used to improve accessibility to

telecommunications services for persons with disabilities. However, at the hearing of their appeal, the Consumers abandoned their challenge to the legal authority of the CRTC to direct that a portion of the deferral accounts be used to improve accessibility to telecommunications services for persons with disabilities. All parties now agree that the CRTC had the jurisdiction to make that order.

3. Standard of Review

[28] Both appeals raise issues of statutory interpretation going to the jurisdiction of the CRTC to make the Deferral Account Decision. All parties submit that the standard of review is correctness, relying on a number of cases, including *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140, at paragraph 32 (per Justice Bastarache, writing for the majority), *Barrie Public Utilities v. Canadian Cable Television Assn*., [2003] 1 S.C.R. 1, at paragraphs 9 to 19 (per Justice Gonthier, writing for the majority). *ATCO Gas* and *Barrie Public Utilities* were decided by the Supreme Court of Canada after *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. In this case I am prepared to accept the common view of all parties that the standard of review is correctness.

[29] However, it should be noted that, with respect to the determination of the standard of review on questions of statutory interpretation like those raised in this appeal, this case may not be distinguishable from the more recent decision of the Supreme Court of Canada in *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650. In that case Justice Abella, writing for the majority, held that in the case of an appeal from the Canadian Transportation Agency on a question of the interpretation of the Agency's governing statute, the

standard of review is reasonableness (see paragraphs 98 to 100; see also *Canadian Pacific Railway Company v. Canadian Transportation Agency*, 2008 FCA 42).

4. Discussion

[30] In the discussion below, I deal first with the Consumers appeal, and then with the Bell Canada appeal.

(a) The Consumers appeal

[31] The Consumers argue that the CRTC has no legal authority to order the establishment of deferral accounts at all, but having done so it was not entitled to order the balance of the deferral accounts to be used for anything but rebates to the local residential subscribers in non-high cost service areas (and, given the concession at the hearing of the appeal, for improved accessibility to telecommunication services for persons with disabilities).

(i) Preliminary point – whether the Consumers appeal is too late

[32] The CRTC argues that it is not open to the Consumers at this stage to argue that the CRTC had no legal authority to order the creation of the deferral accounts, because that point was finally determined in the Price Caps Decision. There is considerable merit in this argument. However, for the reasons that follow, I do not accept it.

[33] The Consumers have appealed one decision in a series of related decisions issued by the CRTC. The CRTC chose that procedure for obvious practical reasons, but the result is to create a difficulty for potential appellants who may not be prejudiced by the determination of a specific issue

in one decision in the series, but may be prejudiced by a subsequent decision in the series based on that determination. In my view, in the unusual circumstances of this case, the Consumers did not act unreasonably in awaiting the Deferral Account Decision before seeking leave to appeal, and then raising their arguments about the propriety of the creation of the deferral account. That is because, until the Deferral Account Decision was issued, it remained uncertain what the CRTC would order in relation to the disposition of the deferral account balance.

(ii) Arguments in the Consumers appeal

[34] I summarize as follows the argument of the Consumers. In setting rates that are "just and reasonable" as required by subsection 27(1) of the *Telecommunications Act*, the CRTC must take into account what is necessary, but only what is necessary, to ensure that the rates are fair to the consumer and will result in a fair rate of return to the telecommunication service provider. In the Price Caps Decision, the CRTC determined that for residential telephone services in non-high cost serving areas, the pricing formula in the Price Caps Decision would result in a price decrease in any year in which inflation was lower than 3.5%. That was tantamount to finding that the pricing formula resulted in a rate that was not just and reasonable for those subscribers. In failing to order that the rates be decreased accordingly, and in ordering instead that deferral accounts be established to accumulate the excess rates, the CRTC erred in law because, in relying on a consideration that is irrelevant to rating (the encouragement of competitors), it fixed rates in excess of what it had determined was "just and reasonable". Then, in permitting that excess to be used for broadband expansion for remote and rural communities, rather than requiring the excess to be rebated to the same class of subscribers who paid the rates, the CRTC erred in law again by taking into account a consideration that is irrelevant to a rating decision.

[35] In my view, the Consumers argument fails at the first step. Because of the combined operation of section 47 and section 7 of the *Telecommunications Act* (quoted above), the CRTC's rating jurisdiction is not limited to considerations that have traditionally been considered relevant to ensuring a fair price for consumers and a fair rate of return to the provider of telecommunication services. Section 47 of the *Telecommunications Act* expressly requires the CRTC to consider, as well, the policy objectives listed in section 7 of the *Telecommunications Act*. What that means, in my view, is that in rating decisions under the *Telecommunications Act*, the CRTC is entitled to consider any or all of the policy objectives listed in section 7.

[36] In the Price Caps Decision, the CRTC justified its determination not to order the suggested 3.5% reduction, and instead to order the creation of deferral accounts, on the basis that this would enhance competitiveness (paragraph 7(c) of the *Telecommunications Act*) and foster increased reliance on market forces (paragraph 7(f) of the *Telecommunications Act*). In the later Deferral Account Decision, when the CRTC permitted the balance in the deferral accounts to be used for broadband expansion in remote and rural areas, it did so as a measure that would tend to increase access to high quality telecommunications services in rural areas (paragraph 7(b) of the *Telecommunications Act*). Thus, in both instances, the CRTC based its decision on factors that it is permitted by section 7 to take into account.

[37] In my view, none of the jurisprudence cited by the Consumers casts doubt on my conclusions as to the scope of the CRTC's jurisdiction in rate setting. To illustrate that point, I will discuss the two principal cases upon which the Consumers rely.

[38] The first case is *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186. The issue in that case was whether a utility rate setting authority had chosen a rate of return that was too high because it relied on evidence that should not have been admissible, or acted on insufficient evidence. The case generally is cited for this statement at page 192-3 (per Lamont J.):

> The duty of the Board was to fix fair and reasonable rates; rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested. By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise.

This statement confirms the classic definition of "fair and reasonable" in the context of a common form of rate-setting regime.

[39] The second case is *ATCO Gas* (cited above), which the Consumers say is an example of an unsuccessful attempt by a rate-setting body to use an irrelevant consideration in setting rates. In that case Justice Bastarache, writing for the majority, said this at paragraph 71:

> The Board was seeking to rectify what it perceived to be a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation.

[40] *ATCO Gas* involved an order made by the Alberta Energy and Utilities Board to approve the sale of an asset of a gas utility, subject to the condition that the proceeds of sale were to be used in part to benefit ratepayers by way of a future reduction in the rate base. It was clear that the Board had the authority under subsection 26(2) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5, to approve or

disapprove the sale of the asset. However, the utility argued that the Board had no jurisdiction to impose a condition directing the use of the proceeds of sale as it did. Although there was no provision in the *Gas Utilities Act* that permitted the Board to attach conditions to an order under subsection 26(2) approving the sale of an asset, the Board argued that the requisite authority was implicit in paragraph 15(3)(d) of the *Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17, which said that, with respect to any order made by the Board, it could "make any further order and impose any additional conditions that the Board considers necessary in the public interest". Justice Bastarache held that the Board had erred in interpreting paragraph 15(3)(d) of the *Alberta Energy and Utilities Board Act* as importing into subsection 26(2) of the *Gas Utilities Act* the power to impose conditions on an order approving a sale.

[41] In my view, *Northwestern Utilities* and *ATCO Gas* are distinguishable from this case because they deal with statutory schemes that contain nothing analogous to sections 7 and 47 of the *Telecommunications Act*. As explained above, in those provisions, Parliament has expressly given the CRTC the mandate, in the exercise of its jurisdiction to approve rates for telecommunications services, to take into consideration the Canadian telecommunications policy objectives listed in section 7. The range of considerations that are relevant to CRTC rating decisions is considerably broader than the range of considerations expressed or implicit in the statutory schemes considered in *Northwestern Utilities* or *ATCO Gas*. It follows that that the Consumers appeal must fail.

(b) The Bell Canada appeal

[42] The Bell Canada appeal is based on the decision of the Supreme Court of Canada in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1

S.C.R. 1722 (*Bell Canada 1989*). Bell Canada cites that case as authority for the proposition that the CRTC has no jurisdiction to engage in retrospective rate making with respect to final rates, and argues that the Deferral Account Decision is retrospective rate making.

[43] The CRTC says that the Deferral Account Decision is not retrospective rate making because it does not revise or revisit prior approved rates. The CRTC characterizes the Deferral Account Decision as prospective in nature and effect, the culmination of the procedure laid out in the Price Caps Decision, in which the CRTC indicated that the deferral accounts were to be established and dealt with as the CRTC would direct in a subsequent decision.

[44] If the CRTC's characterization of the Deferral Account Decision is correct, it cannot be challenged on the basis of *Bell Canada (1989)* and the present Bell Canada appeal must fail. Therefore, it is necessary to consider *Bell Canada (1989)* in some detail.

[45] When *Bell Canada (1989)* was decided, the statutory scheme for the regulation of rates for telecommunication services consisted of the *Railway Act*, R.S.C. 1985, c. R-3, and the *National Transportation Act*, R.S.C. 1985, c. N-20. That statutory scheme included provisions analogous to sections 24, 25, 27, 61 and 62 of the *Telecommunications Act*, but nothing analogous to section 47 or section 7 of the *Telecommunications Act*.

[46] In 1984, Bell Canada applied to the CRTC for a general rate increase to prevent a serious deterioration in its financial situation. On December 19, 1984, the CRTC granted a 2% rate increase

on an interim basis effective January 1, 1985, reflecting a rate of return of 13.7%. At that time the CRTC also indicated that the rates would be reviewed when complete financial information was available for 1985 and 1986. In 1985 Bell Canada's financial situation improved. Nevertheless Bell Canada asked the CRTC to give the 2% rate increase immediate final approval. The CRTC refused final approval and indicated that it would investigate further.

[47] Ultimately the CRTC was not persuaded that the 2% increase was justified and, in a decision dated August 14, 1985, required Bell Canada to file revised tariffs effective September 1, 1985 to suspend the increases. At that stage, the rates for the period from January 1 to August 31, 1985, as well as the rates for September 1, 1985 to December 31, 1986, were interim rates.

[48] In October of 1985, Bell Canada discontinued its application for a general rate increase. However, the CRTC determined that it would nevertheless continue with its review of the rates for 1985 and 1986, and in particular would consider Bell Canada's cost of equity for those years and 1987. Those issues were the subject of hearings in 1986, resulting in a decision dated October 14, 1986 (Decision 86-17), in which the CRTC determined that Bell Canada had excess revenues for 1985 and 1986 totalling $206 million and would have further excess revenues in 1987. The CRTC also determined that Bell Canada could not retain the $206 million excess revenue, and ordered the excess amount for 1985 and 1986 to be credited to subscribers of record as of October 14, 1986 (I will refer to that as the "rebate order"). The estimated excess revenue for 1987 was dealt with through a general rate reduction for 1987.

[49] The Supreme Court of Canada held that the rebate order was lawful because it was made when the 1985 and 1986 rates were interim rates. Justice Gonthier, writing for the Court, described as follows the issue before the Court (at page 1749 – my emphasis):

> As indicated above, the [CRTC] has examined the period during which interim rates were in force, i.e. from January 1, 1985 to October 14, 1986, for the purpose of ascertaining whether these interim rates were in fact just and reasonable. Following a factual finding that these rates were not just and reasonable, the one-time credit order now contested before this Court was made in order to remedy this situation. Thus, the effect of Decision 86-17 was not retroactive in nature since it does not seek to establish rates to replace or be substituted to those which were charged during that period. The one-time credit order is, however, retrospective in the sense that its purpose is to remedy the imposition of rates approved in the past and found in the final analysis to be excessive. Thus, the question before this Court is whether the appellant has jurisdiction to make orders for the purpose of remedying the inappropriateness of rates which were approved by it in a previous interim decision.

[50] There is a critical distinction between the facts of this case and the facts considered in *Bell Canada (1989)*. In that case, the rebate order was made to remedy a situation that arose when the rates established for 1985 and 1986 were later found to exceed what was just and reasonable. In theory, if those rates had been designated "final rates" prior to the rebate order, Bell Canada could have argued that the CRTC had fulfilled its mandate to determine the just and reasonable rates for 1985 and 1986, and could not change them retroactively or employ the device of a subscriber rebate to achieve the same result. However, those were not the facts before the Court. In fact, when the CRTC finally determined the rates to be excessive, the rates were still interim rates, and there had been no determination that they were just and reasonable. For that reason, it was open to the CRTC to use the rebate order to deprive Bell Canada of the excess.

[51] *Bell Canada (1989)* does not deal with the situation that arose in this case. The order in this case is intended to dispose of the balance of a mandatory deferral account. That account is derived from a portion of rates that were designated final (Telecom Decision CRTC 2003-15), which meant that they have been finally determined to be just and reasonable. However, the designation of those rates as final did not and could not detract from the Price Caps Decision, which remained in effect.

[52] The Price Caps Decision required Bell Canada to credit a portion of its final rates to a deferral account, which the CRTC had clearly indicated would be disposed of in due course as the CRTC would direct. There is no dispute that the CRTC is entitled to use the device of a mandatory deferral account to impose a contingent obligation on a telecommunication service provider to make expenditures that the CRTC may direct in the future. It necessarily follows that the CRTC is entitled to make an order crystallizing that obligation and directing a particular expenditure, provided the expenditure can reasonably be justified by one or more of the policy objectives listed in section 7 of the *Telecommunications Act*.

[53] It was clear from the outset that Bell Canada would be obliged to use the balance of its deferral account in accordance with the CRTC's subsequent direction, and that the subsequent direction could include one or more different uses for the money, including a subscriber rebate. Under the deferral account regime as it finally evolved, Bell Canada had the opportunity to propose a use for the balance in its deferral account that would accord with a specific policy objective designated by the CRTC (broadband expansion in remote and rural areas), failing which it would be obliged to make a subscriber rebate.

[54] As I read the Deferral Account Decision, the subscriber rebate was a secondary alternative that was made when Bell Canada did not make an acceptable proposal for an expenditure on broadband expansion. The CRTC said that in these circumstances, a subscriber rebate would be consistent with section 7 of the *Telecommunications Act* and the objectives set out in the Price Cap Decisions (Deferral Account Decision, paragraph 112). It has not been suggested that the CRTC has misinterpreted or misapplied section 7.

[55] It might be said that an order designating a rate as an interim rate, and an order designating a rate as a final rate but imposing a deferral account obligation like the one imposed in this case, have the same practical effect if the deferral account is ultimately used to fund a subscriber rebate. In broad terms, either technique may involve a determination as to whether or not the telecommunication service provider should be permitted to use some part of its own money as it sees fit. However, they are technically different. *Bell Canada (1989)* illustrates the lawful use of an interim rate decision as a basis for a retrospective rate reduction. In my view, this case illustrates the lawful use of a deferral account as the foundation for a later order as to a required or approved expenditure. The subscriber rebate in this case did not, in intent or in effect, reduce retrospectively any rates that had been determined to be just and reasonable. It was therefore entirely prospective. It follows that the Bell Canada appeal must fail.

5. Costs

[56] At the hearing of the appeals, all parties indicated that they are not seeking costs.

6. Conclusion

[57] I would dismiss both appeals without costs.

"K. Sharlow"
J.A.

"I agree.
J. Richard C.J."

"I agree.
Marc Noël J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-516-06
STYLE OF CAUSE:	Bell Canada v. Canadian Radio-Television and Telecommunications Commission et al
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 23 and 24, 2008
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	RICHARD C.J. NOËL J.A.
DATED:	March 7, 2008

APPEARANCES:

Neil Finkelstein Catherine Beagan Flood	FOR THE APPELLANT Bell Canada
John Laskin Afshan Ali	FOR THE RESPONDENT Canadian Radio-Television and Telecommunications Commission
Daniel M. Campbell, Q.C.	FOR THE RESPONDENT Bell Aliant Regional Communications
Michael Janigan John Lawford	FOR THE RESPONDENT Consumers' Association et al
Michael Koch	FOR THE RESPONDENT MTS Allstream Inc.
Debra McAllister Lana Kerzner John Lowe	FOR THE RESPONDENT Arch Disability Law Centre (ARCH) FOR THE RESPONDENT

Michael Ryan Stephen Schmidt	Telus Communications Inc

SOLICITORS OF RECORD:

Blake Cassels & Graydon LLP Toronto, Ontario	FOR THE APPELLANT Bell Canada
Torys LLP Toronto, Ontario	FOR THE RESPONDENT Canadian Radio-Television and Telecommunications Commission
Cox Hanson O'Reilly Matheson Halifax, Nova Scotia	FOR THE RESPONDENT Bell Aliant Regional Communications
c/o Public Interest Advocacy Centre Ottawa, Ontario	FOR THE RESPONDENT Consumers' Association et al
Goodmans LLP Toronto, Ontario	FOR THE RESPONDENT MTS Allstream Inc.
Arch Disability Law Centre Toronto, Ontario	FOR THE RESPONDENT Arch Disability Law Centre (ARCH)
Burnet, Duckworth & Palmer LLP Calgary, Alberta	FOR THE RESPONDENT Telus Communications Inc
Allan P. Seckel, Q.C. Attorney General of British Columbia Victoria, B.C.	FOR THE RESPONDENT
Saskatchewan Telecommunications Regina, Saskatchewan	FOR THE RESPONDENT Saskatchewan Telecommunications
Canadian Association of the Deaf Ottawa, Ontario	FOR THE RESPONDENT Canadian Association of the Deaf

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Michael Koch	FOR THE RESPONDENT MTS Allstream Inc.
John Lowe Michael Ryan Stephen Schmidt	FOR THE RESPONDENT Telus Communications Inc.

SOLICITORS OF RECORD:

c/o Public Interest Advocacy Centre Ottawa, Ontario	FOR THE APPELLANT Consumers' Association et al
Blake Cassels & Graydon LLP Toronto, Ontario	FOR THE RESPONDENT Bell Canada
Torys LLP Toronto, Ontario	FOR THE RESPONDENT Canadian Radio-Television and Telecommunications Commission
Cox Hanson O'Reilly Matheson Halifax, Nova Scotia	FOR THE RESPONDENT Bell Aliant Regional Communications
Arch Disability Law Centre Toronto, Ontario	FOR THE RESPONDENT Arch Disability Law Centre (ARCH)
Goodmans LLP Toronto, Ontario	FOR THE RESPONDENT MTS Allstream Inc.
Burnet, Duckworth & Palmer LLP Calgary, Alberta	FOR THE RESPONDENT Telus Communications Inc.
Allan P. Seckel, Q.C. Attorney General of British Columbia Victoria, B.C.	FOR THE RESPONDENT
Saskatchewan Telecommunications Regina, Saskatchewan	FOR THE RESPONDENT Saskatchewan Telecommunications
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