Date: 20090831

Docket: A-227-09

Citation: 2009 FCA 255

Present: **SHARLOW J.A.**

BETWEEN:

TELUS COMMUNICATIONS COMPANY

Appellant

and

THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION, BELL CANADA, PUBLIC WORKS GOVERNMENT SERVICES CANADA, MTS ALLSTREAM, ROGERS CABLE COMMUNICATIONS INC., and COALITION OF COMMUNICATIONS CONSUMERS

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 31, 2009.

REASONS FOR ORDER BY: SHARLOW J.A.

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REASONS FOR ORDER

SHARLOW J.A.

[1] Telus Communications Company (Telus) has appealed, with leave of this Court, two decisions of the Canadian Radio-Television and Telecommunications Commission (the CRTC). The completion of the agreement as to the contents of the appeal book requires the resolution of a dispute about certain documents that Telus wishes to obtain from the CRTC. Before me is a motion by Telus for an order requiring the CRTC to provide the documents. The motion is opposed by the CRTC and by Bell Canada.

Background

[2] Some of the background facts are disputed. The following summary is intended to be a simplified and neutral description. It is not intended and should not be taken as an expression of any opinion as to the resolution of any of the points under appeal.

[3] For some years, Bell Canada provided Public Works with a managed private telecommunications network for the Department of National Defence pursuant to an arrangement referred to as a "customer specific arrangement" or CSA. By virtue of Telecom Decision CRTC 2002-76 dated December 12, 2002 (*Regulatory safeguards with respect to incumbent affiliates, bundling by Bell Canada and related matters*), Bell Canada began to provide those services pursuant to a tariff.

[4] The Bell Canada CSA was to expire in June of 2007. In 2006, Public Works commenced a competitive bidding process to determine the provider of those services after that date. Before the bidding process was complete, the tariff for the Bell Canada CSA was amended to provide for 18 month to month extensions that could and eventually did result in its term being extended to December 15, 2008. That was intended to accommodate the need for a transition between Bell Canada and the successful bidder, if it was not Bell Canada.

[5] In June of 2007, Telus was named as the successful bidder. At some point it became apparent that the transition to Telus would take longer than anticipated, and therefore that Public Works would require Bell Canada's services after December 15, 2008. However, Bell Canada and

Public Works could not agree on the terms upon which Bell Canada would provide those services after December 15, 2008. On November 10, 2008, Public Works applied to the CRTC for a determination pursuant to section 27 of the *Telecommunications Act*, S.C. 1993, c. 38, of the terms of service after December 15, 2008. Section 27 reads in relevant part as follows:

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.
(2) No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.	(2) Il est interdit à l'entreprise canadienne, en ce qui concerne soit la fourniture de services de télécommunication, soit l'imposition ou la perception des tarifs y afférents, d'établir une discrimination injuste, ou d'accorder — y compris envers elle-même — une préférence indue ou déraisonnable, ou encore de faire subir un désavantage de même nature.

[6] The CRTC made an interim order requiring Bell Canada to continue to provide services to Public Works after December 15, 2008 on the existing CSA terms, pending disposition of the Public Works application. The CRTC indicated that the CRTC's decision, once made, would be effective as of December 16, 2008.

[7] The precise nature of the interest of Telus in the Bell Canada application is a matter of some controversy. The Public Works application named Telus, MTS Allstream and Rogers Communications Inc. as interested parties. Those parties were permitted to make submissions, as was the Coalition of Communications Consumers.

[8] It appears from the Telus submissions to the CRTC that Telus had an interest in the Bell Canada application because the resulting CRTC decision might be a precedent. The submission of Telus to the CRTC addresses, among other things, the principles to be applied in setting rates for the services required during a transition between two telecom service providers to a single customer requiring unique and complex telecom services.

[9] Telus also asserted a specific interest in the arrangement between Bell Canada and Public Works because, as the designated successor to Bell Canada, it would necessarily play a part in the very transition under consideration and might well be in a position to provide useful evidence or make useful submissions on the evidence submitted by Bell Canada and Public Works.

[10] I note that at least one of Bell Canada's submissions to the CRTC states that Telus was subject to a contractual obligation to indemnify Public Works for transition costs resulting from delays that were the fault of Telus. Whether there is such an indemnity, and if so, the precise terms, does not appear in the record. However, Telus may well be concerned about the argument of Bell Canada that the CRTC should not be unduly concerned about imposing costs on Public Works (and thus Canadian taxpayers) because some of the compensation sought by Bell Canada might be borne by Telus.

[11] The following excerpt from the reasons for the Bell Canada decision comprises the CRTC's description of the hearing process:

12. In a letter dated 19 December 2008, the Commission established an expedited oral public hearing to resolve the bilateral dispute between Bell Canada, as the provider of the services, and [Public Works], as the purchaser. The Commission stated that only submissions from [Public Works] and Bell Canada were needed to provide the required information as to the services required and the rates, terms, and conditions that should apply. The Commission indicated that the written submissions of [Telus], MTS Allstream, and the Coalition would be taken into consideration in making the final determination. [Telus] did not object to this process. Given the confidential nature of many of the matters to be discussed, parties were advised that portions of the oral hearing would be held *in camera*.

13. The Commission issued interrogatories to Bell Canada and [Public Works] to help evaluate their proposals and submissions. These included interrogatories to Bell Canada regarding its costs for providing the Transition Services.

14. The initial oral hearing session was held on 22 January 2009 before a panel of three Commissioners. One portion of the session dealt with the Commission's jurisdiction and the other portion dealt with the appropriate rates and terms for provision of the Transition Services. At the conclusion of the session, the parties were encouraged to negotiate a settlement rather than have the Commission render a judgment. The Commission considered that the parties were in a better position to resolve this matter and suggested the two "bookends" between which a solution should be found. The Commission noted that if the matter could not be resolved by the two parties, it would choose between the two bookends mentioned at the conclusion of that session.

15. Further sessions of the oral hearing took place on 27, 29, and 30 January 2009. Bell Canada and [Public Works] each filed two revised proposals during this period.

16. Late on 28 January 2009, [Telus] filed a letter with the Commission requesting that the proceedings be adjourned for one week and that [Telus] be permitted to file evidence on DVACS services costs and the transition, which could be tested by the Commission and other parties.

17. By letter dated 29 January 2009, the Commission denied [Telus'] request. The Commission noted, among other things, that

    - [Telus] had had ample opportunity to comment, and had provided fulsome submissions, on [Public Works'] application;

    - [Telus] had not contested the Commission's decision of 19 December 2008 that further evidence from [Telus] was not required;

    - [Telus] had had ample opportunity to comment on the process followed in the proceeding, but its request came well over a month after the process was established and after two sittings of the oral public hearing; and

    - [Telus] is a sophisticated and experienced participant in Commission proceedings.

18. The Commission concluded that it was incumbent upon [Telus] to make any objections known at the earliest possible opportunity and not on the eve of the Commission's decision.

19. In its letter, the Commission also rejected [Telus'] assertion that its participation was necessary to correct the record of the proceeding regarding DVACS services and the transition.

20. The final oral hearing session took place on 30 January 2009. The two parties had not reached a negotiated settlement by that time. Having considered the parties' final proposals, the Commission selected the one submitted by Bell Canada. The Commission considered it to be the appropriate choice under the circumstances and noted that it would provide written reasons for its decision within three weeks. The Commission stated that this decision is effective as of 16 December 2008.

[12] What is not apparent from this summary is that the parties do not agree on the procedure followed by the CRTC in its disposition of the Bell Canada application. Telus takes the position that the CRTC did not make a determination of the rate that would be "just and reasonable" pursuant to section 27 of the *Telecommunications Act*, but simply adopted as its decision a choice between two competing proposals, which Telus argues is an improper exercise of the CRTC's statutory mandate. The CRTC and Bell Canada take the opposite position on how the decision was made, and its propriety.

[13] Nor do Telus and the CRTC agree on the nature of the proceeding before the CRTC. Telus says that it expected the CRTC to follow a procedure that would include a public hearing at which consideration would be given to the submissions of interested parties on the principles to be applied to the transition issues. However, the CRTC seems to have regarded the proceedings as no more than a mechanism for resolving a dispute between two parties, Public Works and Bell Canada, in which the interest of other parties was limited.

[14] As a result of the CRTC's characterization of the proceedings as involving a bilateral dispute, Telus was not permitted to participate in the portion of the oral hearings (the "*in camera* proceedings") at which the substantive issues were discussed. The submissions of Bell Canada and Public Works were provided to each other with some relatively minor redactions, but they were provided to Telus and the other parties in a heavily redacted form. Apparently, major portions of the submissions of Bell Canada and Public Works, as well as everything said in the *in camera*

proceedings, were designated as confidential pursuant to subsection 39(1) of the *Telecommunications Act*, and have not been disclosed by the CRTC pursuant to subsection 39(4).

[15] On January 30, 2009, the CRTC issued its decision on the merits of the Bell Canada application (the Bell Canada decision). That decision was made primarily on the basis of the information submitted and arguments made in the *in camera* proceedings. On February 20, 2009, the CRTC issued its reasons for the Bell Canada decision, entitled "Telecom Decision CRTC 2009-85, *Public Works and Governments Services Canada – Application for a Commission determination regarding telecommunications services provided by Bell Canada*". Telus was provided only with a public version of the reasons, from which much of the substantive factual information is redacted.

[16] On January 29, 2009, the CRTC issued Broadcasting and Telecom Information Bulletin CRTC 2009-38, entitled "*Practices and procedures for staff-assisted mediation, final offer arbitration, and expedited hearings*". That practice bulletin states, among other things, the procedure to be followed for final offer arbitration. According to Telus, the CRTC had never previously used final offer arbitration as a technique in telecom rate hearings. Telus also asserts that the CRTC issued this practice bulletin with no advance notice, and without giving interested parties any opportunity to make submissions. Telus takes the position that the CRTC, in its decision on the merits in this case, actually employed final offer arbitration even though it had only published the relevant practice bulletin on the day before the decision. The CRTC takes the position that final offer arbitration was not used in this case.

[17] Telus sought and was granted leave to appeal the Bell Canada decision as well as the issuance of the January 29, 2009 practice bulletin. I paraphrase the grounds of appeal as follows:

The Bell Canada Decision

1. The CRTC breached its duty of fairness in the proceedings by
   a) denying Telus standing to participate in the oral hearing,
   b) withholding relevant information from Telus,
   c) changing procedures midway through the process,
   d) using arbitrary procedures to reach the Bell Canada decision,
   e) refusing an adjournment to allow Telus to participate, and
   f) failing to issue adequate reasons.
2. In using final offer arbitration to set rates, the CRTC
   a) exceeded its jurisdiction,
   b) fettered its discretion,
   c) took into account irrelevant considerations,
   d) failed to set just and reasonable rates, and
   e) abdicated its statutory duty.

The Practice bulletin decision

3. In adopting the Practice bulletin, the CRTC:
   a) enacted rules of practice and procedure without publishing them in the *Canada Gazette* and without giving interested parties any opportunity to comment, contrary to section 67(1)(*b*) of the *Telecommunications Act*
   b) breached its duty to consult, and
   c) adopted a procedure for final arbitration that is outside its jurisdiction and fetters its discretion.

[18] In the notice of appeal, Telus included a request pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106 (which is applicable to this appeal because of Rule 350), that the CRTC provide a certified copy of the following documents in the possession of the CRTC and not in the possession of Telus:

> (a) complete Transcripts of Hearing, including all in camera proceedings with only specific costing data redacted;
>
> (b) all submissions made by Bell Canada and [Public Works] to the CRTC with only specific costing data redacted;
>
> (c) the CRTC's Reasons with only specific costing data redacted;
>
> (d) all CRTC's staff briefing papers respecting the use of final offer arbitration relevant to the [Bell Canada] decision;
>
> (e) CRTC staff briefing papers which were before the CRTC prior to its decision to issue the [practice bulletin dated January 29, 2009];
>
> (f) documentation regarding the CRTC's consideration of final offer arbitration prior to issuing the [practice bulletin dated January 29, 2009].

[19] The CRTC was required by Rule 318 either to comply with this request or advise of any objection it had to complying with it. By letter dated June 23, 2009, the CRTC advised the Administrator and the parties that it objected to producing the requested documents for the following reasons:

a) The material described in items (a), (b) and (c) is designated as confidential pursuant to section 39 of the *Telecommunications Act*, and is irrelevant to the issues on appeal.

b) The material requested in item (d) does not exist.

c) The request for the material described in items (e) and (f) is overly broad and constitutes a fishing expedition, and also is irrelevant to the issues on appeal.

[20] By letter dated June 23, 2009, Bell Canada indicated that it supported the position of the CRTC.

The Telus motion

[21] On July 17, 2009, Telus submitted the notice of motion and the motion record that is now before me. Telus is seeking an order compelling the CRTC to provide the following documents:

a) in respect of the Bell Canada decision:

i) complete transcripts of the *in camera* portions of the hearing with only specific costing and pricing data redacted;

ii) all submissions made by Bell Canada and Public Works to the CRTC with only specific costing and pricing data redacted;

iii) the CRTC's reasons for decision issued on February 20, 2009, with only specific costing and pricing data redacted; and

b) in respect of the issuance of the practice bulletin, all documentation and the CRTC staff briefing papers which were before the CRTC leading to its decision to issue the practice bulletin.

[22] The CRTC and Bell Canada oppose the motion, generally on the basis that the information sought by Telus is irrelevant, inadmissible pursuant to subsection 39(6) of the *Telecommunications Act*, or both. Bell Canada also argues that Telus should not be entitled to seek the disclosure of these documents because it did not object on a timely basis to the designation of the information as confidential. In respect of the practice bulletin appeal, the CRTC also argues that Telus is engaging in an impermissible fishing expedition.

Discussion

[23] I will deal first with the objections of the CRTC and Bell Canada based on confidentiality, and then the objections based on relevance.

Objections based on subsection 39(6) of the *Telecommunications Act*

[24] Rule 317 requires the CRTC to accede to the request of Telus to produce all documents that are relevant to this appeal, provided they are in the possession of the CRTC and not in the possession of Telus. The CRTC and Bell Canada, citing subsection 39(6) of the *Telecommunications Act*, object to the production of documents containing information that has been designated confidential pursuant to subsection 39 of the *Telecommunications Act* and that has not been disclosed or ordered to be disclosed pursuant to subsection 39(4).

[25] Subsection 39(1), (4) and (6) of the *Telecommunications Act* read as follows:

39. (1) For the purposes of this section, a person who submits any of the following information to the Commission may designate it as confidential:	**39.** (1) Pour l'application du présent article, la personne qui fournit des renseignements au Conseil peut désigner comme confidentiels :
(*a*) information that is a trade secret;	*a*) les secrets industriels;
(*b*) financial, commercial, scientific or technical information that is confidential and that is treated consistently in a confidential manner by the person who submitted it; or	*b*) les renseignements financiers, commerciaux, scientifiques ou techniques qui sont de nature confidentielle et qui sont traités comme tels de façon constante par la personne qui les fournit;
(c) information the disclosure of which could reasonably be expected	*c*) les renseignements dont la communication risquerait vraisemblablement soit de causer à une autre personne ou elle-même des pertes ou profits financiers appréciables ou de
(i) to result in material financial loss or gain to any person,	
(ii) to prejudice the competitive	

position of any person, or (iii) to affect contractual or other negotiations of any person.	nuire à sa compétitivité, soit d'entraver des négociations menées par cette autre personne ou elle-même en vue de contrats ou à d'autres fins.
[…]	[…]
(4) Where designated information is submitted in the course of proceedings before the Commission, the Commission may disclose or require its disclosure where it determines, after considering any representations from interested persons, that the disclosure is in the public interest.	(4) Le Conseil peut effectuer ou exiger la communication de renseignements désignés comme confidentiels fournis dans le cadre d'une affaire dont il est saisi s'il est d'avis, après avoir pris connaissance des observations des intéressés, qu'elle est dans l'intérêt public.
[…]	[…]
(6) Designated information that is not disclosed or required to be disclosed under this section is not admissible in evidence in any judicial proceedings except proceedings for failure to submit information required to be submitted under this Act or any special Act or for forgery, perjury or false declaration in relation to the submission of the information.	(6) Les renseignements désignés comme confidentiels, à l'exception de ceux dont la communication a été effectuée ou exigée aux termes du présent article, ne sont pas admissibles en preuve lors de poursuites judiciaires sauf en cas de poursuite soit pour défaut de communiquer des renseignements en application de la présente loi ou d'une loi spéciale, soit pour faux, parjure ou fausse déclaration lors de leur communication.

[26] In my view, it is not open to the CRTC and Bell Canada to rely on subsection 39(6) of the *Telecommunications Act* as the sole basis for resisting the motion to produce the requested documents for use in this appeal. I reach that conclusion based on the language of subsection 39(6) as well as its purpose.

[27] In my view, the language of subsection 39(6) is not broad enough to cover the present case. Generally, a document is "admissible in evidence" if it meets the legal criteria for a document that may be taken into account by a court as the trier of fact. In this appeal, the documents are not intended to be used for that purpose. Rather, Telus is requesting the documents for use in the record

of this appeal so that it may use the documents to support its challenge to a decision of the CRTC that is based on information contained in the documents. Nor do I accept that Parliament intended subsection 39(6) to be used to shield the CRTC from its obligation to produce documents that are relevant to an appeal from one of its decisions.

[28] It follows that the motion of Telus should be determined on the basis of whether the requested documents are relevant to the issues on appeal.

[29] That is not to say that the confidentiality designation of the information found in the documents is to be disregarded. If any documents that are found to be relevant contain information that has been designated as confidential, the disclosure of those documents will be delayed in order to provide time for a motion pursuant to Rule 151 to treat the material as confidential. I assume that such a motion would be made by Bell Canada, as the party primarily interested in maintaining the confidentiality of the information in question. However, I do not foreclose the possibility that such a motion may also be made by the CRTC.

Objections of Bell Canada based on the lack of a timely objection

[30] I am not persuaded that Telus should be precluded from seeking the requested documents because it did not raise any objections before the CRTC to the designation of information as confidential. As I understand the record, Telus may not have been in a position to appreciate the extent of its exclusion from the process until the CRTC rendered its decision. In these circumstances it seems to me that Telus had no grounds at the outset for objecting to the initial designation of the

information as confidential. It was only after the decision was made that Telus had grounds for challenging the decision of the CRTC not to make or permit the disclosure of the designated information.

Relevance – documents relating to the appeal of the Bell Canada decision

[31] The appeal of the Bell Canada decision challenges, among other things, the basis upon which the Bell Canada decision was made. In that regard, the appeal raises a number of issues about the Bell Canada decision, for example, whether the CRTC fettered its discretion, took into account irrelevant considerations, or failed to consider whether the chosen rates were just and reasonable. The grounds of appeal also raise a question as to whether Telus should have been permitted to participate in the substantive portions of the hearing because of its specific interest as the successor service provider and its involvement in the provision of services during the transition from Bell Canada to Telus.

[32] In respect of the dispute on these issues, Telus argues that the complete transcripts of the hearing (including the *in camera* portions), all submissions made by Bell Canada and Public Works to the CRTC, and the reasons (in each case with only specific costing and pricing data redacted), are relevant to its appeal. In my view, there is considerable merit to the position of Telus on this point.

[33] The CRTC and Bell Canada argue that all of the grounds of appeal can be determined based only on the publicly available documents. They may well prove to be correct on this point, but they are speaking from the point of view of someone who knows the entire record. At this stage, I find it

impossible, based on the motion records before me, to accept the conclusion that the requested documents will not assist the Court in determining the issues under appeal. For example, without understanding how the CRTC arrived at its decision on the rates in question, how is it possible to determine whether the CRTC should have considered submissions that Telus might have made if it had been given greater access to the process? How is it possible to determine whether the CRTC had a basis for finding that the chosen proposal would provide for rates that were just and equitable?

[34] I am compelled to conclude that the documents requested in relation to the Bell Canada decision are relevant and should be provided.

Relevance – appeal relating to the practice bulletin

[35] I do not reach the same conclusion in relation to the appeal relating to the practice bulletin. Broadly speaking, the appeal raises the issue as to whether it was open to the CRTC, as a matter of law, to adopt the portions of the practice bulletin that deal with final offer arbitration, and alternatively whether it was open to the CRTC to do so without public notice and consultation. In that regard, Telus is seeking staff briefing papers and other documentation that was before the CRTC when it decided to issue the practice bulletin.

[36] I am unable to see how documents relating to the decision to issue the practice bulletin could have any bearing on those issues. In my view, the appeal of that decision can be adequately dealt with by considering only the contents of the practice bulletin, the applicable statutory provisions and the jurisprudence.

Conclusion

[37] For these reasons, the motion of Telus for the disclosure of documents will be allowed in part. There will be no costs of this motion.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-227-09
STYLE OF CAUSE:	Telus Communications Company v. The Canadian Radio-Television and Telecommunications Commission et al

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	SHARLOW J.A.
DATED:	August 31, 2009

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