

Federal Court of Appeal



Cour d'appel fédérale

Date: 20120821

Docket: A-152-12

Citation: 2012 FCA 222

Present: STRATAS J.A.

BETWEEN:

BCE INC., BELL CANADA and BELL MOBILITY INC.

Appellants

and

TELUS COMMUNICATIONS COMPANY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 21, 2012.

REASONS FOR ORDER BY:

STRATAS J.A.



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REASONS FOR ORDER

STRATAS J.A.

[1] Before the Court are two motions. These motions have been brought within this appeal. The appeal is from Decision 2011-765 of the CRTC, dated December 12, 2011.

[2] In order to understand the two motions, a brief summary of the events leading up to the motions is needed.

A. Decision 2011-765, the decision under appeal

[3] In Decision 2011-765, the CRTC found that Bell gave itself an “undue preference” contrary to an earlier CRTC order. Bell did this by negotiating for itself the exclusive right to broadcast National Hockey League and National Football League programming on mobile devices.

[4] As part of Decision 2011-765, the CRTC ordered that Bell file a follow-up report with the CRTC “outlining the steps it would take to ensure TELUS access to the programming.”

B. Post-decision events before the CRTC

[5] As required by the CRTC, Bell filed a follow-up report dated January 31, 2012.

[6] The CRTC considered Bell’s follow-up report. It issued a decision dated February 29, 2012 entitled “Follow-up Report to Broadcasting Decision CRTC 2011-765” (the “CRTC’s later decision”).

[7] In the CRTC’s later decision, it said it was satisfied with Bell’s follow-up report.

C. Post-decision events before this Court

[8] Bell sought leave to appeal Decision 2011-765 to this Court. This Court granted leave to appeal. The appeal is now pending before this Court.

[9] Shortly after this Court granted leave to appeal, Bell brought a motion to this Court for an order permitting it to include three documents in the appeal book as fresh evidence: certain licence agreements, Bell's follow-up report, and a letter dated January 19, 2012 from the National Football League.

[10] On June 22, 2012, this Court dismissed Bell's motion: 2012 FCA 191.

[11] Among other things, this Court was of the view that the licence agreements sought to be adduced as fresh evidence could have been presented to the CRTC before it made its decision. Accordingly, the licence agreements were ruled inadmissible.

[12] As for the other two documents, they both postdated Decision 2011-765 the decision under appeal. Bell wanted them admitted as fresh evidence to show that if the CRTC were aware of the facts in them, it would have decided differently. In its ruling of June 22, 2012, this Court held that evidence of these facts could have been presented to the CRTC before it made its decision. Accordingly, it ruled that these two documents were also ruled inadmissible.

D. A new issue on appeal: mootness

[13] In the motion materials now before the Court, TELUS says that the CRTC's later decision and Bell's follow-up report render the appeal moot.

[14] TELUS has not given any detailed explanation why this is the case, nor in its responding materials has Bell given any explanation why this is not the case.

[15] Based on the material before me, it would seem that mootness is now a new issue that will be placed before the panel hearing this appeal.

E. The motions

[16] In support of the submissions on mootness that it wishes to make at the hearing of the appeal, TELUS seeks an order admitting the CRTC's later decision into evidence. TELUS says that the CRTC's later decision establishes mootness, and could dispose of the appeal.

[17] Bell consents to the admission of the CRTC's later decision on the condition that two other documents also be admitted: an abridged copy of Bell's follow-up report which led to the CRTC's later decision, and an abridged copy of the January 19, 2012 letter from the National Football League. Bell alleges that these two documents are interrelated with and necessary to understand the

later decision. Accordingly, Bell has brought a motion seeking the admission of these two documents into the appeal.

[18] In response to Bell's motion, TELUS takes no position on the admission of these two documents. However, it draws the Court's attention to statements Bell makes in its written submissions. Those statements suggest that Bell views the two documents as being relevant to the merits of the appeal, as opposed to only the mootness issue.

F. Analysis

[19] Taking the two motions together, and consistent with the foregoing summary, the parties seek that three documents be admitted into this appeal:

- (1) an abridged copy of Bell's follow-up report;
- (2) the CRTC's later decision in response to that report; and
- (3) an abridged copy of the January 19, 2012 letter from the National Football League.

[20] It is apparent that there is no real controversy here. There is a mootness issue that the panel hearing the appeal will have to determine. The parties do not take issue with the fact that these documents bear in some way upon the mootness issue.

[21] Accordingly, this Court shall issue an order providing that these three documents shall be included into the appeal book and be admissible on appeal only for the purposes of the mootness issue.

[22] I underscore that these three documents shall be admissible only on the mootness issue. In its order June 22, 2012, this Court ruled that Bell's follow-up report and the January 19, 2012 letter from the National Football League are not admissible on the larger merits of the appeal of Decision 2011-765, the decision under appeal. That ruling remains in effect and no cause has been shown to depart from it.

[23] As for the CRTC's later decision, it is also not admissible on the larger merits of the appeal. No argument has been made to me that it is relevant to the larger merits of the appeal. It is only relevant to the mootness issue.

[24] These three documents, which are admissible only for the purposes of the mootness issue, are different in nature from the other documents in the appeal book, which are admissible on the larger merits of the appeal of Decision 2011-765. Therefore, the three documents should be filed in a separate appeal book entitled "Additional documents relevant to the mootness issue only."

[25] Obviously, nothing in these reasons shall be taken as expressing a view on the merits of the mootness issue or the significance of any of the three documents.

G. Postscript

[26] These motions could have been avoided. If TELUS believed that post-decision developments rendered this matter moot, it could have brought a motion, returnable to the panel hearing the appeal, for an order dismissing the appeal on account of mootness. In support of its motion, it could offer whatever evidence it considered to be relevant to the motion. Bell could do likewise. The evidence would appear in the parties' motion records and be separate from the evidence properly admissible on the larger merits of the appeal.

H. Disposition of the motions

[27] An order shall issue granting the motions and admitting the three documents in accordance with these reasons. I shall provide a deadline for the filing of the agreement on contents of the appeal book, and thereafter the deadlines specified under the *Federal Courts Rules* shall apply. Costs shall be reserved to the panel hearing the appeal.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-152-12

STYLE OF CAUSE:

BCE Inc., Bell Canada and Bell
Mobility Inc. v. Telus
Communications Company

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

STRATAS J.A.

DATED:

August 21, 2012

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