Federal Court of Appeal | Cour d'appel fédérale

Date: 20240722

Docket: A-299-21

Citation: 2024 FCA 121

CORAM: **DE MONTIGNY C.J.**
STRATAS J.A.
MACTAVISH 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

Heard at Ottawa, Ontario, on April 24, 2023.

Judgment delivered at Ottawa, Ontario, on July 22, 2024.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: DE MONTIGNY C.J.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction and the basic facts

[1] Teksavvy Solutions Inc. appeals from a decision of the Canadian Radio-television and Telecommunications Commission: CRTC-2021-181. In this decision, the CRTC varied a 2019

decision: Telecom Order CRTC 2019-288. In the 2019 decision, the CRTC set certain rates, as described below.

[2] Here, the setting of rates is in pursuit of a larger regulatory policy. To promote competition in the offering of internet services to the public, the CRTC requires telecommunications companies to provide Teksavvy, and other competing internet service providers, access to their internet facilities and infrastructure: Telecom Regulatory Policy CRTC 2015-326. Once they have access, Teksavvy and others can provide internet access to their own retail customers.

[3] In return for gaining access to internet facilities and infrastructure, Teksavvy and others must pay rates to the telecommunications companies. This is only fair, as the telecommunications companies have planned, built and maintained their facilities and infrastructure—often with great innovation and considerable cost in an environment fraught with risk.

[4] Some, including the respondents, were unhappy with the 2019 decision. To them, the rates that the CRTC set were too low. So they applied for leave, were granted leave, and appealed against the 2019 decision to this Court. Teksavvy opposed the appeal. This Court dismissed the appeal: *Bell Canada v. British Columbia Broadband Association*, 2020 FCA 140, [2021] 3 F.C.R. 206. This left the 2019 decision in place.

[5] But that was only one little chapter in this saga. And it was far from the last.

[6] The CRTC can review and vary its decisions: *Telecommunications Act*, S.C. 1993, c. 38, s. 62. Some of those unhappy with the 2019 decision, including the respondents, asked the CRTC to vary it. They pointed out flaws in it, most particularly the CRTC's costing methodology that, they said, caused serious harm and undercut certain purposes set out in the Act.

[7] In a seventy-five page, highly detailed and technical decision—the decision Teksavvy seeks to quash in this appeal—the CRTC decided to change or vary its 2019 decision: CRTC 2021-181. The CRTC had "substantial doubt" as to the correctness of the rates it had set. Indeed, in its view, the 2019 decision was well wide of the mark: the decision was substantially incorrect on 13 of 14 issues.

[8] The result? Gone were the favourable rates that Teksavvy and others like it had in the 2019 decision. In its place were higher rates that bore some similarity to those the CRTC previously set in 2016: Telecom Decision CRTC 2016-117. The CRTC found that the higher rates were supported under a particular cost methodology and for a number of policy reasons.

[9] The CRTC was not alone in its dissatisfaction with the 2019 decision. The Governor in Council was also unhappy. One year after the 2019 decision, in an Order in Council dated August 13, 2020, it criticized the 2019 decision for, among other things, failing to "appropriately balance the objectives of the wholesale services framework" and "undermin[ing] investment in high-quality networks": Order in Council, PC 2020-0553 (13 August 2020).

[10] Understandably unhappy with the CRTC's reversal of the 2019 decision, Teksavvy sought and was granted leave to appeal it to this Court.

[11] For the reasons that follow, I would dismiss Teksavvy's appeal with costs.

B. The permissible scope of this appeal

[12] Rate-setting and how to go about rate-setting are matters of discretion and policy founded on industry appreciation and specialized technical study—matters resting at the very core of the CRTC's exclusive jurisdiction under the *Telecommunications Act*. They are something very much in the wheelhouse of the CRTC and are alien to us. For the most part, as an appeal court, we mainly handle matters of law and related matters such as procedural fairness. For the most part, we do not decide the merits of matters, especially those that draw on industry appreciation and specialized technical study.

[13] For this reason, Parliament has restricted us to a very limited role. Under subsection 64(1) of the Act, we can deal with only "question[s] of law or of jurisdiction" and, even then, only with leave. This Court's decision in *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573 tells us much about this limit.

[14] The phrase "question[s] of law" in subsection 64(1) of the Act means purely legal questions and extricable legal principles, not factually suffused and discretionary questions of

mixed law and fact, and still less, questions of fact: *Emerson* at paras. 20-28 (decided under a substantially similar provision, s. 41(1), in the *Canada Transportation Act*, S.C. 1996, c. 10).

[15] The word "jurisdiction" in subsection 64(1) of the Act includes concerns about whether a CRTC proceeding was conducted fairly: *Emerson* at paras. 14-19.

[16] Often we will deny leave to appeal because the party seeking to appeal has not raised a question we can consider. When that happens, the appeal is doomed to fail or cannot be said to be "fairly arguable": *Apotex Inc. v. Allergan Inc.*, 2020 FCA 208 at para. 8; *Lukács v. Swoop Inc.*, 2019 FCA 14; *Lufthansa German Airlines v. Canadian Transportation Agency*, 2005 FCA 295, 346 N.R. 79 at para. 9; *Canada (Minister of Human Resources Development) v. Rafuse*, 2002 FCA 31, 222 F.T.R. 160 at para. 12; *Martin v. Canada (Minister of Human Resources Development)* (1999), 252 N.R. 141, 178 F.T.R. 159 (F.C.A.) at para. 7.

[17] But even where we grant leave, this issue always remains live: whether we have a "question of law or of jurisdiction" before us under subsection 64(1) goes to our subject-matter jurisdiction. We cannot take on things that Parliament forbids us to take: see *Emerson* at para. 9, citing *Green v. Rutherforth* (1750), 27 E.R. 1144, 1 Ves. Sen. 462, at 471; *Penn v. Lord Baltimore* (1750), 27 E.R. 1132, 1 Ves. Sen. 444, at 446; *Attorney General v. Lord Hotham* (1827), 38 E.R. 631, 3 Russ. 415; *Thompson v. Sheil* (1840), 3 Ir. Eq. R. 135. And of even longer standing is the principle of legislative supremacy, one corollary of which is that Parliament's laws bind courts, just like everyone else: *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, 125 D.L.R. (3d) 1 at 805-806 S.C.R.; *Reference re Secession*

of Quebec, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at paras. 71–72; *Ref. re Remuneration of Judges of the Prov. Court of P.E.I.; Ref. re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577 at para. 101.

[18] In considering our jurisdiction in cases like this, we must remain on high alert. The say-so of a party that a "legal test" or "the Act" is involved is not enough. "Skilful pleaders" who are "armed with sophisticated wordsmithing tools and cunning minds" can express grounds in such a way as to make them sound like legal questions "when they are nothing of the sort": *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557 at para. 49. Put another way, "the mere say-so of a party that a 'legal test' is implicated" or the expression of grounds of appeal "in an artful way to make them appear to raise legal questions when they do not" is "insufficient to found an appeal": *British Columbia Broadband* at para. 51.

[19] Instead, we must look at the substance of what is being raised, not the form. See generally *JP Morgan* at paras. 49-50, cited in *Emerson* at para. 29; *British Columbia Broadband* at para. 51.

[20] In this appeal, Teksavvy gamely offers a number of grounds for setting aside the CRTC's rates decision and phrases them as legal issues to get past the limitation in subsection 64(1). However, in my view, Teksavvy's real concern is disagreement with the policy adopted by the CRTC and the discretion it exercised in setting the rates, matters that we are powerless to address.

C. Must the CRTC's decision be quashed because the CRTC erred in law by not using any "method" or "technique" in setting the rates?

[21] Teksavvy submits that the CRTC committed an error of law by failing to apply any "method" or "technique" in establishing the revised rates. Teksavvy formulates its submission in that way in order to cast this ground as an error of law. In my view, in reality, Teksavvy takes issue with the methods and techniques adopted by the CRTC that led it to adopt rates that Teksavvy does not like—matters that cannot be raised in an appeal to this Court.

[22] In this case, the CRTC was to set rates. The rates have to be "just and reasonable": *Telecommunications Act*, s. 27(1). This is a "factually suffused question of mixed law and fact", one that cannot be entertained in an appeal under subsection 64(1) of the Act: *British Columbia Broadband* at para. 66. Indeed, it is a question filled with broad policy considerations set out in the Act and discretions exercised by expert decision-makers, not objective legal principle: *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764; *Allstream Corp. v. Bell Canada*, 2005 FCA 247, 338 N.R. 177 at paras. 27-28, 31 and 34.

[23] Subsection 27(5) of the Act reinforces this, using language that is just about as broad as can be conceived: the CRTC "may adopt any method or technique that it considers appropriate [to set rates], whether based on a carrier's return on its rate base or otherwise". In the words of the Supreme Court, the CRTC "may set rates that are just and reasonable for the purposes of the *Telecommunications Act* through a diverse range of methods, taking into account a variety of different constituencies and interests": *Bell Aliant* at para. 48. As this Court said in *TELUS Communications Inc. v. Canada (Radio-television and Telecommunications Commission)*, 2004

FCA 365, [2005] 2 F.C.R. 388 at paragraph 49, “it is difficult to envisage a broader power than the one given to ensure that rates are just and reasonable at all times”.

[24] Teksavvy submits that the terms “method” and “technique” in subsection 27(5) of the Act mean that the CRTC must adopt a “concrete procedure that can be calculated using observable evidence or data”.

[25] In my view, the text, context and purpose of subsection 27(5) do not require the CRTC to adopt such a procedure. Instead, the words seem aimed at ensuring that the CRTC use some defensible, articulable methodology in setting rates to ensure good decision-making standards and accountability. Put conversely, subsection 27(5) aims at preventing the CRTC from arbitrarily inventing numbers just because it says so, forcing everyone else to trust it.

[26] I offer several reasons in support of that conclusion and against Teksavvy’s submission.

[27] The text of subsection 27(5) states that in setting a rate that is “just and reasonable”, the CRTC “may” adopt “any” method or technique—words both permissive and open ended. Teksavvy’s interpretation seeks to constrain the CRTC far more than the statutory language does.

[28] The plain meaning of “method” and “technique” is broader and more general than Teksavvy’s constrained meaning that requires rigid concreteness, calculability and a solely objective basis. A “method” is just a way of doing something. And a “technique” is nothing more than a particular way of doing something.

[29] The setting of “just and reasonable” rates in this context is not something that tumbles out of a calculator once the numbers are punched in. Instead, it is suffused by policy considerations, informed by multiple, often conflicting inputs, over which reasonable minds may differ, including regulatory experience, subjective weighings and assessments, factual appreciation, and many rival methodologies. How to arrive at a rate involves more than the processing of information objectively and logically against fixed, legal criteria. Rather, it is a complex, multifaceted decision involving sensitive weighings of information, impressions and indications using criteria that may shift and be weighed differently from time to time depending upon changing and evolving circumstances and regulatory experience. See, for example, the similar rate-setting context discussed in *CMRRA-SODRAC Inc. v. Apple Canada Inc.*, 2020 FCA 101 at paras. 49-50.

[30] The idea that a “method” or “technique” must always be concrete, calculable and based solely on objective data simply does not fit the practical reality of the exercise under subsection 27(5) of the Act.

[31] Here, the CRTC did not pluck figures from the air or throw darts at a dartboard. Instead, it relied on the 2016 decision that set rates and the “Phase II Costing Methodology”, a method or technique it thought about and adopted for reasons that made sense to it on the evidence and based on its regulatory experience and policy appreciation: see the decision under appeal at paras. 293-297 and 304.

D. As a matter of law, are there enforceable "legitimate expectations" in this case?

[32] Teksavvy submits that the CRTC led Teksavvy to have an expectation that the CRTC would conduct an exhaustive costing exercise in establishing the revised rates. It cites the CRTC's statement that final rates would be established based on a "full assessment and review of costing inputs and costing methodologies": Telecom Order 2016-396 at para. 26.

[33] Bell Canada submits that this statement was nothing more than a promise that the final rates would be based on a full record and, in the end, they were. It says that the statement was not a promise to follow any particular process or an undertaking to alter its well-established practices in variation proceedings such as this. I agree. The statement that is said to be responsible for an enforceable legitimate expectation on the part of Teksavvy does not create the result Teksavvy seeks to enforce.

[34] The respondents say that Teksavvy is impermissibly conducting an "assault on the methods selected by the CRTC and its assessment of the evidence" in order to quibble with the rates set. That wording ironically comes from this Court's decision rejecting a similar attempt by many of these same respondents to quash the 2019 decision by transforming a policy disagreement—not litigable in this court—into a legal matter: *British Columbia Broadband* at para. 67.

[35] This much is certain: Teksavvy's submission fails on multiple grounds.

[36] First, it relies too heavily on a single statement at a single point of time. The CRTC's decision in this case was not made in isolation. Rather, it was the latest chapter in a complex, ongoing regulatory dispute.

[37] There are times when a regulatory decision is merely the latest chapter in a saga where many chapters are written. There are also times when regulatory statements, conduct or decisions are so intimately related to earlier events that they cannot be taken in isolation. In those situations, the Court must evaluate the matter in light of the whole context, not just an isolated event. See *Bell Canada v. 7262591 Canada Ltd. (Gusto TV)*, 2016 FCA 123, 17 Admin. L.R. (6th) 175 at paras. 13-15; *Canadian National Railway Company v. Canada (Transportation Agency)*, 2023 FCA 245 at para. 16; *David Suzuki Foundation v. Canada (Health)*, 2019 FC 1637 at para. 36; *Office and Professional Employees International Union v. Cougar Helicopters Inc.*, 2019 FCA 231 at para. 10.

[38] In this case, the exhaustive costing exercise to establish the revised rates had already been done, in the three-year rate-setting process that started in 2016 and culminated in the 2019 decision. In 2016, the CRTC analyzed cost studies submitted by facilities-based carriers and made adjustments based on the Commission's application of the "Phase II Costing Methodology", a well-established framework developed by the CRTC. It was in that context that the statement was made: the CRTC noted that "[t]he establishment of the final rates will be based on a full review and assessment of the relevant cost inputs and costing methodologies": Telecom Order CRTC 2016-396 at paras. 23 and 26.

[39] Over the next three years, culminating in the 2019 decision, that is exactly what the CRTC did. It received enormous amounts of information and materials and dozens of submissions from industry participants, forming a record of thousands of pages of complex and highly technical information, which was placed before this Court in the appeal of the 2019 decision in *British Columbia Broadband*, above.

[40] Post 2019, the CRTC did not need to repeat or expand the extensive rate-setting process it had already engaged in. It concluded that the complex costing analysis it had conducted in the 2016-2019 period, along with certain additions to the record before it in the variation proceeding, allowed it to find that the rates decided upon in the 2016 decision were "just and reasonable", with some adjustments. Teksavvy concedes as much: memorandum of fact and law at paras. 60-61; see also the CRTC's decision at para. 304. There were other important regulatory objectives at work here too: the completion of the transition "to the adoption of disaggregated wholesale HSA service" and the provision of critical certainty and finality. And given that the process of complex costing analysis had already been done, Teksavvy had no legitimate expectation that it would be needlessly repeated after the 2019 decision.

[41] In fact, there are a number of decisions where, due to the issue and circumstances before it and the nature of its past work, the CRTC has not re-done analyses or conducted fresh analyses and has finalized what were previously interim rates: Telecom Decision CRTC 2006-14 (29 March 2006) at paras. 53-54; Telecom Regulatory Policy CRTC 2013-180 (28 March 2013) at paras. 37 and 98-99; Telecom Order CRTC 2020-224 (15 July 2020) at paras. 6, 9 and 11-12; Telecom Decision 97-8 (1 May 1997) at paras. 190, 192, 227; Telecom Order CRTC 99-1127 (8

December 1999) at paras. 36-38, 55, 60, 62, 64 and 69-70; Telecom Order CRTC 2007-20 (25 January 2007) at para. 179; Telecom Decision CRTC 2007-77 (31 August 2007) at paras. 17-19. This Court has suggested that the CRTC "is given a great amount of latitude in determining which method or technique it will use in determining the appropriateness of the rate": *Allstream* at para. 30.

[42] Second, as a matter of law, Teksavvy's submission fails on multiple fronts.

[43] To be held to its representations, a public authority must, among other things, make representations that are clear, unambiguous and unqualified such that "had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement": *Canada v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504 at paras. 68-69. I am not satisfied that the representation here, general as it was, is as clear as Teksavvy submits.

[44] As well, it must be recalled that "legitimate expectations" is only one of the factors to be considered in determining whether procedural fairness was met: *Canada (Attorney General) v. Honey Fashions Ltd.*, 2020 FCA 64, 445 D.L.R. (4th) 522 at para. 51. Teksavvy had a full and fair opportunity to participate in the entire regulatory process before the CRTC, including by addressing the costing errors and proposed rates that the respondents had identified, and it exercised that opportunity. Here, overall, procedural fairness was met.

[45] Further, where an administrative decision-maker "exercises discretionary power in the public interest", it might have to take legitimate expectations into account but "does not

necessarily [have to] fulfil them": *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5, [2006] 1 S.C.R. 227 at para. 48.

[46] Only procedural expectations are protected, not substantive expectations such as an expectation that a particular methodology would be followed: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 97; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, 83 D.L.R. (4th) 297 at 557. The alleged legitimate expectation here is a substantive one, that a particular rate-setting method would be followed.

[47] The application of the doctrine of legitimate expectations in this context is particularly problematic in light of the CRTC's ability under section 62 of the Act to "review and rescind or vary any decision made by it". The CRTC has the power to reverse an earlier wrong or unwise decision and should not be fettered by statements it may have made in a different context at a different time by a different author.

[48] Finally, if Teksavvy had a legitimate expectation that the process leading up to the decision under review would mirror the three-year rate-setting process conducted between 2016 and 2019 and if that expectation were procedural in nature, Teksavvy should have made that position known to the CRTC while it was considering its decision. Here, Teksavvy raises this issue for the first time on appeal. As shall be seen in the discussion on the next issue, that it is not open to it.

[49] Before leaving the subject of procedural fairness, Teksavvy raises one additional procedural point. It submits that the CRTC never advised the parties during the variation proceeding that it might finalize the rates. But Bell Canada in its application requested that very relief. The issue was live and Teksavvy had ample notice of it and a full opportunity to participate.

E. Was the CRTC impermissibly biased such that its decision should be quashed?

[50] Teksavvy submits that the CRTC was impermissibly biased in this case. This sort of procedural ground can be raised in an appeal under subsection 64(1) of the Act because it goes to "jurisdiction": *Emerson*, above.

[51] In support of its bias allegation, Teksavvy cites certain public comments in speeches the Chair of the CRTC delivered. In those comments, the Chair stressed the importance of facilities-based competition, *i.e.*, making telecommunications companies provide access to Teksavvy and other competitors to their facilities for a fee.

[52] This complaint has no merit. The Chair was doing nothing more than setting out the longstanding and frequently expressed policy position of the CRTC in general terms. As the Chair of a high-profile regulatory body, it was appropriate for him to communicate the policies of the regulator, as had been adopted in CRTC decisions and notices. Such communication can be constructive and in the public interest: *Zündel v. Canada (Attorney General)*, [1999] 4 F.C. 289, 175 D.L.R. (4th) 512 (T.D.) at paras. 28-30, aff'd (2000), 195 D.L.R. (4th) 394, 30 Admin.

L.R. (3d) 82 (C.A.) at para. 3. By no means was the Chair expressing a preference for the specific positions taken by parties in a specific file before the CRTC, nor was he communicating a permanent, irrevocable policy preference.

[53] Further, the Chair made the impugned public comments before the decision under appeal was made by the CRTC. The comments were known to Teksavvy. But Teksavvy did not raise any objection or complaint to the CRTC before the CRTC made its decision. For reasons developed in more detail below, it was incumbent on Teksavvy to object to the comments on a timely basis, not wait until the decision against it had been made.

[54] Teksavvy raises another incident that it says gives rise to a reasonable apprehension of bias, one that on different facts and circumstances could indeed be problematic. Teksavvy says that the Chair of the CRTC met with a senior officer of the respondent, Bell Canada, while the matter leading to the decision in issue here was pending before the CRTC. For good measure, Teksavvy adds that the Chair attended ten other meetings with industry officials between November 2019 and the date of the decision under appeal. It is unclear whether the Chair attended alone or with other CRTC officials.

[55] For a number of reasons, this allegation of bias fails.

[56] Bell filed a report under the *Lobbying Act*, R.S.C. 1985, c. 44 (4th Supp.), and listed the purpose of the meeting as “broadcasting”, not “telecommunications”. The lobbying report is the

only roughly contemporaneous record of what was discussed at the meeting. This is evidence that the rates applications in this telecommunications matter were not discussed.

[57] Another fundamental obstacle lies in Teksavvy's way on this submission: waiver. Knowing about the Chair's meeting with the senior officer of Bell Canada while the rates applications were pending, Teksavvy did not raise the issue with the CRTC. Instead, it kept the issue to itself until the CRTC released its decision, a decision that went against it.

[58] It is trite law that a party that knows of a procedural flaw, defect or irregularity with an administrative process must raise it with the administrative decision-maker as soon as reasonably possible. Failure to do so constitutes waiver of the flaw, defect or irregularity. It cannot be raised in a judicial review or a statutory appeal of the administrative decision. See *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488 at para. 48; *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006 at para. 113; *Telus Communications Inc. v. Telecommunications Workers Union*, 2005 FCA 262, 257 D.L.R. (4th) 19 at paras. 43-49; *Kozak v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, [2006] 4 F.C.R. 377 at para. 66.

[59] There are many good reasons supporting this legal rule.

[60] Raising an issue with the administrative decision-maker as soon as reasonably possible gives the decision-maker a chance to review the situation and correct any mistake or oversight it

has made before any prejudice results. Where a mistake or oversight cannot be corrected, steps might nevertheless be taken that can mitigate any prejudice.

[61] If the issue matters to a party—and is not merely trivial—and if it has arguable merit, one would expect that a party would raise it as soon as reasonably possible.

[62] Finally—and in making this point, I cast no aspersions on Teksavvy here, which genuinely and in good faith pursued this submission—it is unseemly for a party to notice that a mistake or oversight has been made and then hide in the weeds, ready to pounce should the case go against it. Such a party has no real interest in correcting the mistake or oversight but rather wishes, for tactical reasons, to take out some insurance against an adverse result. Our administrative law never rewards purely tactical behaviour that benefits a party to the detriment of the larger public interest or the proper administration of justice.

[63] Thus, as Teksavvy did not raise the issue of this meeting while the CRTC was still considering its rates decision, it cannot raise the issue in this appeal.

[64] Before closing on this issue, this Court has a general power of supervision over federal tribunals and it would be remiss if it did not offer a word or two about meetings between a regulator and a frequent party before it, such as the one in this case.

[65] Meetings between regulators and regulatees outside of the hearing room are a tricky area.

[66] At one end of the spectrum are meetings that are in the public interest, particularly where the regulator has a policy-making mandate and the regulator and the regulatee are in a long term relationship. Regulators need to understand the industry they regulate and the parties in it, their challenges, needs, aspirations, and plans. And regulatees need to understand the motivations of regulators, their view of the public interest and their need to protect it. It is evident from the register maintained under the *Lobbying Act*, most regulatees in sectors such as this engage in these meetings. It is accepted that they are part of doing business. For good measure, the preamble to the *Lobbying Act* has declared lobbying to be a "legitimate activity". And the CRTC's Code of Conduct correctly recognizes that "[f]ormal and informal contacts with parties with an interest in the communications industry are essential to maintaining and enhancing our expertise and knowledge".

[67] At the other end of the spectrum are meetings to discuss live issues coming before the regulator or already before the regulator for hearing and decision. In effect, these meetings are means by which secret submissions can be offered outside of the hearing room, away from the eyes and ears of other parties to the hearing and the public. This subverts fairness and should not happen.

[68] Somewhere in the middle are social gatherings. The CRTC's Code of Conduct permits attendance at social events and other meetings between CRTC members and industry representatives as long as CRTC members do not discuss matters before the CRTC during the events. But this can still invite unwelcome questions that can multiply, with mounting risk.

[69] Looking at this case as an example, why were the two together? What was discussed? Why were just the two of them there without any witnesses? Quite simply, meetings between two people, one a regulator and one a regulatee, without any independent witnesses or other evidence to substantiate why the meeting happened and what was discussed can be a recipe for trouble.

[70] In the evidentiary record before us is a CRTC policy that offers good practical guidance on this issue. It recognizes the benefits of regulator-regulatee meetings. But it also flags the risks and offers some ways the risks can be mitigated. For example, among other things, the policy suggests that a senior Commission staff person be present at such meetings. It also suggests that the purposes of the meeting be confirmed in writing.

[71] In the end, though, based on the paucity of evidence in this case, the informed, reasonable and right-minded person, viewing the matter realistically and practically and having thought the matter through, would not conclude that there was an actual or apprehended lack of impartiality on the part of the Chair: *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716; *S. (R.D.)* at para. 31.

F. Postscript

[72] Recognizing that the decision under appeal was pregnant with policy considerations, Teksavvy filed an expedited petition with the Governor in Council seeking to have the decision overturned and to have the rates set in the 2019 decision reinstated.

[73] On May 19, 2022, the Governor in Council declined to act, noting that the CRTC had properly reversed its 2019 decision because of "a series of material errors across different cost factors" and applauding the "stability" the decision creates: Order in Council, PC No. 2022-0535 (May 19, 2022).

[74] That decision, based on policy considerations rather than issues of law or jurisdiction, has been irrelevant to this Court's disposition of Teksavvy's appeal.

[75] In closing, I would like to offer my appreciation to counsel on all sides whose submissions were skilfully made and who maximized the interests of their clients throughout.

G. Proposed disposition

[76] I would dismiss the appeal with costs.

"David Stratas"
J.A.

"I agree.
Yves de Montigny C.J."

"I agree.
Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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