COURT OF APPEAL FOR ONTARIO

CITATION: Fareau v. Bell Canada, 2023 ONCA 303
DATE: 20230502
DOCKET: C70691

Harvison Young, Thorburn and Copeland JJ.A.

BETWEEN

Vanessa Fareau and Ransome Capay

Plaintiffs (Appellants)

and

Bell Canada and His Majesty the King in Right of Ontario

Defendants (Respondents)

Jody Brown, Mohsen Seddigh, David Sterns, Kirsten L. Mercer and Geetha Philipupillai, for the representative appellants, Vanessa Fareau and Ransome Capay

Paul Le Vay and Carlo di Carlo, for the respondent Bell Canada

Christopher P. Thompson, S. Zachary Green and Andi Jin, for the respondent His Majesty the King in Right of Ontario

Heard: February 21, 2023

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated April 26, 2022, with reasons reported at 2022 ONSC 2479.

Thorburn J.A.:

1. OVERVIEW

[1] Between 2013 and 2021, inmates in Ontario correctional facilities were only permitted to make collect telephone calls and only on a phone service provided by Bell Canada ("Bell").

[2] Her Majesty the Queen in Right of Ontario ("Ontario") awarded Bell the contract to provide those telephone services. Ontario received a percentage commission from Bell pursuant to Bell's contract with Ontario.

[3] The appellant Vanessa Fareau spent time in an Ontario correctional facility. She alleges that during that time, she faced significant hardship in maintaining contact with her loved ones because of the rates charged by Bell.

[4] The appellant Ransome Capay is the father of Adam Capay, who was detained in solitary confinement in Ontario for more than four years. Mr. Capay alleges that the cost of the collect calls from his son caused him considerable stress and hurt his ability to maintain contact with his son.

[5] The appellants seek to bring a class action on behalf of prisoners in Ontario correctional facilities and everyone who paid for collect calls originating from such facilities during the relevant period.

[6] They claim that Bell charged unreasonable and unconscionable telephone rates for sending and receiving long-distance calls from provincial correctional facilities.

[7] The appellants plead various causes of action: (1) unjust enrichment against both Bell and Ontario; (2) breach of consumer protection legislation and unconscionable contracts against Bell only; and (3) and breach of fiduciary duty and the imposition of an *ultra vires* indirect tax against Ontario alone.

[8] The appellants brought a certification motion, and Bell and Ontario brought cross-motions seeking a stay or dismissal of the action on the basis that the claims were within the jurisdiction of the Canadian Radio-television and Telecommunications Commission ("CRTC").

[9] The central issue before the motion judge was not whether the appellants should be entitled to seek relief for allegedly excessive telephone rates, but which claims should be allowed to proceed and before whom.

[10] On the certification motion, the motion judge found that it was plain and obvious that: (1) the claim that the commission paid to Ontario was an indirect *ultra vires* tax, and (2) the claim against Bell and Ontario pursuant to s. 72(1) of the *Telecommunications Act*, S.C. 1993, c. 38, disclosed no cause of action. Before this court, the appellants do not challenge the dismissal of the claim for breach of the *Telecommunications Act*.

[11] The motion judge granted a permanent stay of the remaining claims of (1) unjust enrichment claim against Bell and Ontario, (2) breach of consumer protection legislation and unconscionable contract claims against Bell, and (3) breach of fiduciary duty against Ontario on the basis that the pith and substance

of the appellants' claims were within the jurisdiction of the CRTC, it was therefore appropriate to defer to the jurisdiction and expertise of the CRTC, and meaningful remedies were available from the CRTC.

[12] The appellants challenge the dismissal of their *ultra vires* tax claim on the basis that the charges amounted to an indirect tax on class members. They also challenge the permanent stay of the remaining claims. One of their key arguments in challenging the permanent stay is that the motion judge erred in his jurisdiction analysis by failing to take into account that the CRTC had declined to, or forbore from, regulating long-distance rates since 1997. In their submission, a party with a private law cause of action has recourse to the court when the CRTC has forborne from regulation.

[13] For the reasons that follow, I would uphold the motion judge's decision to dismiss the appellants' *ultra vires* tax claim. However, I would substitute a temporary stay in place of a permanent stay of the remaining claims (save for the *Telecommunications Act* claim that was dismissed and is not the subject of this appeal).

[14] The temporary stay will remain in place pending the CRTC's decision to either address the reasonableness of the rates or decline to do so and upon the later of (1) expiration of applicable timelines for appeal or judicial review of the CRTC decision, or (2) completion of judicial review or the exhaustion of appeals related to any such CRTC decision, should the parties so choose. In the event that the

CRTC declines jurisdiction, subject to completion of review or appeals, the stay will be lifted. In the event that CRTC accepts jurisdiction on the merits of the claims, subject to completion of review or appeals, the stay will become permanent with the exception of the claim for breach of fiduciary duty, which will remain subject to a temporary stay. The temporary stay for the breach of fiduciary duty claim will be lifted and the court may determine whether there is a claim for breach of fiduciary duty, and or allow the claim to proceed after (1) the CRTC declines jurisdiction, or (2) if the CRTC accepts jurisdiction to adjudicate reasonable rates, upon completion of review and appeals of the CRTC decision and with the benefit of the CRTC's appraisal of reasonable rates, if applicable.

[15] Before engaging in my analysis of the issues, I will set out the powers of the CRTC and the relevant evidence.

2. THE POWERS OF THE CRTC

(a) Statutory Scheme: the *Telecommunications Act*

[16] The CRTC is Canada's national telecommunications regulator. Its governing statute is the *Telecommunications Act* (the "*Act*").

(b) The CRTC's power to regulate telephone rates

[17] Section 47 of the *Act* provides that the CRTC exercise its powers and perform its duties with a view to implementing the policy objectives identified in s. 7 of the

Act and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with s. 27 of the *Act*.

[18] The policy objectives identified in s. 7 include facilitating the orderly development throughout Canada of a telecommunications system, rendering reliable and affordable telecommunications services throughout Canada, and fostering increased reliance on market forces.

[19] The primary means by which the CRTC implements its policy objectives is through s. 25 of the *Act*, which requires Canadian carriers to provide telecommunication services in accordance with "a tariff filed with and approved by the [CRTC] that specifies the rate or the maximum or minimum rate, or both, to be charged for the service."

[20] For the CRTC to approve a rate that a carrier proposes, s. 27(1) of the Act provides that the rate must be "just and reasonable". Section 27(2) provides that no carrier may "unjustly discriminate" in providing a service, and s. 27(3) provides that the CRTC may make findings of fact as to whether a carrier has complied with s. 27 and certain other provisions of the *Act*. In assessing whether a rate is just and reasonable, the CRTC "may adopt any method or technique that it considers appropriate": s. 27(5).

[21] The CRTC's broad mandate was recognized by the Supreme Court in *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, at para. 36:

> A central responsibility of the CRTC is to determine and approve just and reasonable rates to be charged for telecommunications services. Together with its rate-setting power, the CRTC has the ability to impose *any* condition on the provision of a service, adopt *any* method to determine whether a rate is just and reasonable and require a carrier to adopt *any* accounting method. It is obliged to exercise all of its powers and duties with a view to implementing the Canadian telecommunications policy objectives set out in s. 7. [Emphasis in original.]

(c) CRTC's remedial powers

[22] Section 32(g) of the *Act* specifically provides that the CRTC may "determine any matter and make any order relating to the rates, tariffs or telecommunications services of Canadian carriers", absent any applicable provision in that part of the *Act*.

[23] In addition, s. 60 empowers the CRTC to grant "the whole or any portion of the relief applied for in any case". It may also "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."

[24] In *Penney v. Bell Canada,* 2010 ONSC 2801, 93 C.P.C. (6th) 306, Strathy J. (as he then was) cited, at para. 139, Telecom Decision CRTC 2004-8, noting that the CRTC has exercised jurisdiction to order relief "on what is effectively a class-wide basis". He also observed, at para. 188, that the CRTC's remedial powers can apply retroactively "[w]here the CRTC finds that the rates charged by a carrier are

improper or unauthorized or that a carrier has failed to provide a service in accordance with its tariff."

(d) The power to forbear

[25] Section 34 of the *Act* gives the CRTC the power to forbear or refrain from exercising its regulatory power to set rates in the following circumstances:

[26] Under s. 34(1), it may decide to forbear, in whole or in part, if it finds that to do so would be consistent with its policy objectives.

> 34(1) The [CRTC] may make a determination to refrain, in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 in relation to a telecommunications service or class of services provided by a Canadian carrier, where the [CRTC] finds as a question of fact that to refrain would be consistent with the Canadian telecommunications policy objectives. [Emphasis added.]

[27] Under s. 34(2), the CRTC may also forbear to the extent it considers appropriate, conditionally or unconditionally if it finds that there is sufficient competition to protect users:

> 34(2) Where the [CRTC] finds as a question of fact that a telecommunications service or class of services provided by a Canadian carrier is or will be subject to competition sufficient to protect the interests of users … [Emphasis added.]

[28] Finally, s. 34(3) precludes the CRTC from making a decision to forbear if doing so would unduly impair competitiveness:

> 34(3) … if the [CRTC] finds as a question of fact that to refrain would be likely to impair unduly the establishment or continuance of a competitive market for that service or class of services. [Emphasis added.]

[29] Parties may bring an application asking the CRTC to reconsider its decision to forbear, with a view to seeking a determination from the CRTC under s. 27(1) of the *Act* that a rate is unjust or unreasonable: see, for example, Telecom Decision CRTC 2002-37.

(e) CRTC decision to forbear re: long-distance rates

[30] In Telecom Decision CRTC 1997-19, the CRTC partially forbore from regulating rates for long-distance calls under s. 25, and only reserved the right to assess whether rates in "non-equal access areas" were "just and reasonable" or "unjustly discriminate[d] or g[a]ve an undue or unreasonable preference": see s. 27(1) and (2) of the *Act*.

[31] The appellants claim that "non-equal access areas" refers to a geographic area not serviced by equal access switches. The respondents submit that the term refers to areas where callers, such as the prisoners this case, do not have access to the competing long-distance network of their choice. I will return to this issue below.

(f) CRTC decision regarding inmate services

[32] The CRTC determined that a separate regulatory regime would govern all inmate telephone services across the country. Under Item 292 (Inmate Service) of

Bell's General Tariff[1] ("GT 292"), correctional institutions may place restrictions on inmates' use of phones. GT 292 also makes reference to rates as follows:

> (c) Inmate service calls are rated in the same manner as calls originating from other public telephones except that payment options may be limited based on the requirements of the institution, technological limitations and Company collection policies.

3. RELEVANT EVIDENCE

(a) Telephones in Ontario correctional facilities

[33] As the motion judge identified, prisoners in Ontario correctional facilities make approximately 15,000 collect telephone calls per day. All calls are made through the Offender Telephone Management System ("OTMS").

(b) Request for Proposals and Contract between Ontario and Bell

[34] In 2012, Ontario issued a Request for Proposals ("RFP") to solicit telecommunication providers to bid for the provision of OTMS services at Ontario's correctional facilities.

[35] The RFP stipulated that the objectives of the OTMS were to have telephone services provided to inmates in a controlled and regulated environment in order to, among other things:

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1 Tariffs set out the terms pursuant to which a telecommunications company will provide its services, including rates, charges and conditions. The provider will prepare a tariff and submit it to the CRTC for review and approval before the tariff can be implemented, pursuant to s. 25 of the *Act.*

- protect victims of crime, witnesses and other members of the public from harassment and intimidation by inmates while in correctional facilities;
- restrict the ability of inmates to conduct criminal activity while in the care and custody of the province; and
- provide inmates with reasonable access to telephone services for the purpose of maintaining connections with family, legal counsel and with community organizations and agencies.

[36] In light of those objectives, the RFP required a successful bidder to have the capability to place certain restrictions on the use of telephones in correctional facilities. Those restrictions included limits on (a) the lengths of calls made, (b) call destinations, and (c) the use of calling cards or toll numbers to prevent inmates from circumventing calling restrictions.

[37] Bell submitted a bid. In its bid, Bell represented, consistent with GT 292, that its telephone services would be provided at an identical call rate and connection fees as those it charged in the local community.

[38] Ultimately, Bell won the contract to provide telephone services for all of Ontario's correctional facilities from June 1, 2013 to July 29, 2021, which is the class period.

[39] During that period, inmates in Ontario's correctional institutions were only permitted to make outgoing collect calls through the OTMS service provided by Bell. To place a call, the inmate dialled using a payphone. The call was vetted by

a control centre and the call could be blocked for security reasons. If the call went through, the recipient of the call was asked by means of a programmed recording whether they wished to accept the call but was not advised of the rates to be charged. Each call was limited to 20 minutes.

[40] For local calls, Bell charged a flat rate of $1, regardless of duration up to 20 minutes. Long-distance calls were charged at approximately $1.00 per minute or more plus a $2.50 connection fee. Bell's evidence was that any call made from 8 a.m. to 6 p.m. to a distance greater than 81 miles would be billed at $1.33 per minute plus the connection fee of $2.50. The motion judge found the rates were four times higher than those charged to inmates in other provinces.

[41] Notably, Ontario levied a commission percentage on revenues from the OTMS system. While the precise rate is not available (as it was redacted from the contract provided), the RFP required the successful bidder to pay a commission to Ontario that was not less than 25% of gross revenues from the provision of services.[2]

(c) The appellants and their experience using the OTMS

[42] As noted, Ms. Fareau and Mr. Capay are representative plaintiffs in the proposed class action.

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2 The RFP's selection criteria stated that the bidder with the highest proposed commission percentage would receive the highest points in the third stage of the evaluation process (out of five stages).

[43] Ms. Fareau was incarcerated at the Ottawa-Carleton Detention Centre in 2015 for two months while awaiting bail. During that time, she made collect calls to her children and others to arrange childcare and personal matters. She was never convicted.

[44] After her release, she continued to pay for collect calls from her nephew and friend who remained incarcerated. She incurred monthly telephone bills of hundreds of dollars. She gave evidence that she experienced "significant financial and emotional hardship in making phone calls to [her] loved ones because of the amounts charged."

[45] Ransome Capay is a registered status member and resident of the Lac Seul First Nation. His son Adam was held in solitary confinement for more than four years until his charges were stayed. Mr. Capay often received several calls a day from his son that resulted in monthly bills of over $1,000 per month.

[46] Mr. Capay gave evidence that the telephone bills had a negative effect on him:

> Paying phone bills became a source of crushing stress, anxiety, and financial difficulty for Mr. Capay and his family. The stress and anxiety was compounded by the complete lack of choice and unknown cost each month. The cost of phone calls negatively impacted Mr. Capay's ability to maintain contact with his son.

4. THE APPELLANTS' CLAIMS

[47] In their Amended Fresh as Amended Statement of Claim, the appellants plead that their action arises from "unconscionable" telephone service rates. They further claim that "[t]o maintain phone contact with family and the outside world, Prisoners had one option, and one option only: Collect Calls to landlines at exorbitant and unconscionable prices extracted from anyone who accepted the calls or otherwise paid for them."

[48] They seek various remedies, including: declaratory relief; statutory and general damages not exceeding $152 million; $10 million in punitive, exemplary and aggravated damages; restitution in an amount equivalent to the monies paid by the Class to make phone calls through the OTMS; and the disgorgement of profits.

[49] In particular, they plead the following causes of action:

Claims against Bell	Claims against Ontario
1) Breach of s. 72 of the Telecommunications Act	1) Breach of s. 72 of the Telecommunications Act
2) Unjust enrichment	2) Unjust enrichment
3) Breach of consumer protection legislation	---
4) Unconscionable contracts	---
---	3) Imposition of an *ultra vires* tax
---	4) Breach of fiduciary duty

5. THE MOTION JUDGE'S DECISION

[50] As noted above, the issue before the motion judge was not whether the appellants should be entitled to seek relief for allegedly unconscionable telephone rates; it was which claims should be allowed to proceed and before whom.

[51] The motion judge first dealt with the appellants' certification motion. He considered and concluded that it was plain and obvious that two of the claims, the *ultra vires* tax claim and the s. 72(1) *Telecommunications Act* claim, failed to disclose a cause of action and should be dismissed. He did not consider any of the other criteria for certification. Instead, he went on to decide the jurisdiction motions.

[52] In arguing the issue of jurisdiction, all parties referred to the test from *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. The first step of the *Weber* analysis requires the court to consider the scope of the tribunal's jurisdiction. The second step is to examine the essential character of the dispute. The third step is to ask whether the matter falls within the tribunal's exclusive jurisdiction, or if not, whether the tribunal is the preferable forum for its resolution: *Penney*, at para. 149.

[53] Consistent with the test, the motion judge first discussed the jurisdiction of the CRTC. He noted the CRTC's "expansive jurisdiction to regulate the telecommunications industry", including setting rates for collect calls. He also recognized that pursuant to s. 34 of the *Act*, the CRTC may forbear from setting rates, noting that "[t]he CRTC … may exercise a discretion to forego setting the

rates when it is satisfied that there is a competitive marketplace adequate for the task": at para. 95; see also para. 26.

[54] Second, he considered the essential character of the dispute. He found that the "pith and substance" of all the appellants' causes of action (other than those that disclosed no cause of action) was rates, which was within the "wheelhouse of the CRTC's broad jurisdiction to resolve disputes and its broad remedial authority": at para. 96. Determining the reasonableness of rates was a central responsibility of the CRTC.

[55] Third, he found that the CRTC was the preferable forum for resolution. He explained why at para. 99:

> Once again, a conclusion is painfully obvious. The pith and substance of the Plaintiffs' remaining causes of action are: (a) within the jurisdiction of the CRTC to resolve; (b) meaningful remedies are available from the CRTC; (c) the subject matter of the dispute is at the heart of the telecommunications scheme administered by the CRTC; (d) the CRTC has the subject matter expertise to decide the dispute and the Superior Court of Justice does not; and (e) a ruling by the Superior Court runs the risk of discombobulating the national policies and administration of telecommunications service providers. In these circumstances, a superior court ought to stay its jurisdiction and defer to the jurisdiction and expertise of the CRTC.

[56] He therefore concluded that it would not be an appropriate exercise of the Superior Court's jurisdiction to proceed with those causes of action that had not been struck and ordered that they be permanently stayed.

6. ANALYSIS

[57] I begin my analysis of the issues, with a review of the *ultra* vires tax claim.

The First Issue: Did the motion judge err by dismissing the appellants' claim that the commissions paid to Ontario were an ultra vires tax?

[58] The appellants allege that the commissions Bell paid to Ontario amounted to an indirect tax on class members, which is impermissible under the *Constitution Act, 1867*. Specifically, they plead that the "Commissions constituted an unlawful indirect tax *ultra vires* the Province of Ontario".

[59] The Supreme Court has most recently summarized the characteristics of a tax in *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 S.C.R. 131, at para. 22:

> In *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, Duff J. (as he then was) identified the characteristics of a tax (pp. 362-63). In [*Eurig Estate (Re),* [1998] 2 S.C.R. 565], Major J. summarized the *Lawson* characteristics of a tax at para. 15:
>
> > Whether a levy is a tax or a fee was considered in *Lawson*, supra. Duff J. for the majority concluded that the levy in question was a tax because it was: (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose.

[60] The appellants submit that they have pleaded the necessary elements under this four-part test. In particular, they have pleaded:

> The Commissions were enforceable by law under statutory authority granted to the Minister. Unless the Class Members agreed to the Collect Call rates unilaterally imposed by the Defendants, inclusive of the Commissions, the Prisoner Class members could not make a call and the Payor Class members could not receive a call from a Prisoner in an Ontario Facility.
>
> Bell imposed the telephone fees on the Plaintiffs and the Class on authority given to it by the Minister through the Contract. The Minister administered the OTMS, including the Contract, under the general authority given to it by the legislature through the [*Ministry of Correctional Services Act,* R.S.O. 1990, c M.22] to operate Ontario Facilities.
>
> Therefore, the Crown, as represented by the Minister, was a public body levying the Commissions in a public authority, and intended the Commissions to be collected for a public purpose. The revenue obtained from the Commissions was used for the public purpose of defraying the costs of government administration in general, and not simply to offset the costs of the OTMS.

[61] The motion judge concluded that it was plain and obvious that the appellants did not have a cause of action against Ontario for the recovery of *ultra vires* taxes.

[62] He recognized that "[t]o determine the characterization of the government charge, it is necessary to determine its fundamental nature, its 'pith and substance'", in other words "its dominant, primary and most important characteristic as distinguished from its incidental features."

[63] He found that it was plain and obvious that the commissions were not a tax at all, but rather a proprietary charge. It was therefore unnecessary to analyze whether the commissions were an indirect or direct tax, or whether they were *intra vires* licence fees, user fees or regulatory charges.

[64] In concluding that the commissions were not a tax, the motion judge found that they were analogous to the charge imposed in *Toronto Distillery Company Ltd. v. Ontario (Alcohol and Gaming Commission)*: 2016 ONCA 960, 135 O.R. (3d) 637, aff'g 2016 ONSC 2202, 130 O.R. (3d) 612. In *Toronto Distillery*, a percentage-based payment from a vendor to the government in respect of sales made to consumers was found to be either a proprietary charge or a contractual payment.

[65] The motion judge quoted from para. 8 of this court's decision in *Toronto Distillery*:

> Furthermore, we agree .. that the markup is not a tax because the appellant agreed to it in its contract. It is well-established that obligations under a contract arise from the voluntary agreement of the parties, while the obligation to pay a tax does not. Under the contract, the LCBO owns the spirits in the appellant's store. As owner of the goods, the LCBO must have the right to determine the prices for which they are sold, including the markup. It follows that the markup is not an exercise of the government's public authority but of its private law rights. [Emphasis added.]

[66] Drawing on this passage, he noted that "contractual payments made to a government authority are a private law matter and not a public law matter of taxation because taxes are imposed by a government without a taxpayer's consent while contracts are a matter of voluntary agreement between the parties to the contract." Contractual payments do not "satisfy the indicia of tax being an imposed obligation."

[67] The appellants submit that the motion judge made three errors in his analysis. First, rather than applying the "plain and obvious test", he decided the merits of the appellants' claim. Second, he erred in finding that the levy was a proprietary charge, a point that was not even argued. Third, he erred in deciding that a contract between Bell and Ontario was dispositive of the claim on behalf of the class against Ontario.

[68] I would reject these arguments.

[69] The motion judge was alive to the threshold for striking a claim. He recognized that the "plain and obvious" test calls on courts to read the claim as generously as possible because cases should, if possible, be disposed of on their merits at trial: see *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at paras. 87-88. However, he also recognized that "the power to strike hopeless claims is 'a valuable housekeeping measure essential to effective and fair litigation'": *Babcock*, at para. 18, citing *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 19.

[70] As for the appellants' second submission, I see no error in the motion judge's conclusion that the commissions were a proprietary charge. In the context of the constitutional limitations on taxation, nothing turns on whether a given payment is best characterized as a "proprietary charge" or a "contractual payment", since neither is a tax. Neither involves the element of compulsion, which is a threshold requirement for characterizing a payment as a tax: *620 Connaught*, at para. 22.

[71] Nor do I accept that there is a procedural fairness concern because the proprietary charge issue was not specifically argued. The core argument advanced by Ontario before the motion judge was that Bell paid the commission to Ontario subject to voluntary private law obligations and not under legislative compulsion.

[72] Finally, the motion judge did not err in taking into account the contract between Bell and Ontario in determining that it is plain and obvious the commissions were not a tax. It is clear, as a matter of law, that a payment made pursuant to a contract is not in the nature of a tax, which involves a payment compelled by or under a statute: see, for e.g., *Unfiltered Brewing Inc. v. Nova Scotia Liquor Corporation*, 2019 NSCA 10, 431 D.L.R. (4th) 416; *Steam Whistle Brewing Inc. v. Alberta Gaming and Liquor Commission*, 2018 ABQB 476, 428 D.L.R. (4th) 697; *Toronto Distillery*, 2016 ONCA 960, aff'g 2016 ONSC 2202; and *QCTV Ltd. v. Edmonton (City)* (1983), 48 A.R. 255 (Q.B.), aff'd 1984 ABCA 311, 58 A.R. 182.

[73] While I accept that the appellants were not party to the agreement between Bell and Ontario, and had no choice but to pay if they wanted to make a phone call, this does not change the fact that payment of commissions was a matter of contract law and not a public law matter: the payments were payable by Bell to Ontario pursuant to a contract and, as the respondent Ontario stresses, Bell's contractual obligation to pay the commissions existed regardless of whether Bell

successfully collected any revenue from payors. If Bell failed to pay, Ontario's only recourse would have been a contract claim.

[74] Accordingly, I would affirm the dismissal of the *ultra vires* tax claim.

The Second Issue: Did the motion judge err by deferring jurisdiction to the CRTC and permanently staying the unjust enrichment, unconscionable contract and breach of consumer legislation claims?

[75] I now turn to the motion judge's adjudication of the claim of unjust enrichment as against Bell and Ontario, and the claims of unconscionable contract and breach of provincial consumer protection legislation as against Bell only.

[76] The central issue is whether the CRTC assumed jurisdiction over the setting of these rates.

The Parties' Submissions

[77] The parties agree that the motion judge was required to apply the analysis set out in *Weber* to determine the issue of jurisdiction, that is: to consider the scope of the tribunal's jurisdiction, the essential character of the dispute, and whether the matter falls within the tribunal's exclusive jurisdiction, or if not, whether the tribunal is a preferable forum for its resolution: *Penney*, at para. 149. They disagree however, as to whether the CRTC assumed or forbore from assuming jurisdiction of the rates and if so, how that plays into the *Weber analysis*.

[78] The appellants claim the motion judge failed to consider the fact that the CRTC forbore from exercising its jurisdiction to determine these rates and that, as such, they have recourse to the court to assert a private law cause of action: citing *Bell Canada c. Aka-Trudel*, 2018 QCCA 829, leave to appeal dismissed, 2019 CanLII 11818 (SCC);*Morin c. Bell Canada*, 2012 QCCS 4191.

[79] They note that in Telecom Decision CRTC 1997-19, the CRTC generally forbore from regulating long-distance rates though it reserved the right to ensure that long-distance rates were just and reasonable in “non-equal access areas”. The appellants submit that this is not a case that falls within the “non-equal access area” exception to forbearance as that exception refers to a geographic area that is not serviced by equal access switches.

[80] The appellants further claim that since the CRTC forbore from deciding these rates, the “CRTC allowed the market to set those rates”. They note that Bell’s own witness, Pierre-Luc Hébert, swore that “following TD CRTC 1997-19, Bell no longer required CRTC approval of its rates for long-distance calls.” Instead, “rates were left to the market to determine. This included rates for long distances calls made on payphones.”

[81] The respondents claim the CRTC did not forbear from deciding these rates. They submit that “the CRTC expressly reserved for itself the powers under s. 27(1) of the *Telecommunications Act* to assess whether rates are just and reasonable in

'non-equal access areas'" and that "non-equal access areas" refers to areas where callers do not have access to a competing long-distance network of their choice.

[82] These Class members do not have access to a competing long-distance network of their choice and as such, setting these rates fits within the exception to forbear.

[83] Furthermore, the respondents submit that, to the extent that there is a dispute about what is meant by a "non-equal access area", that is an issue that should be left to the CRTC to determine.

[84] The appellants claim that, in any event, the motion judge erred in not conducting a "preferability analysis" (which is required under s. 5(1)(d) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 ("CPA") when determining whether a class proceeding should be certified). They claim that had the motion judge done such an analysis, he would have had to address the fact that the CRTC generally does not hear disputes about long-distance calls. Rather, they are referred to the Commission for Complaints for Telecom-television Services Inc. ("CCTS"). In response, the respondents submit that no such assessment is necessary in applying the *Weber* analysis.

Analysis of the Motion Judge's Reasons

[85] The decision to stay a proceeding is a discretionary decision that is normally entitled to deference. A discretionary decision may however be interfered with if it

was “based on a wrong principle, a failure to consider a relevant principle or a misapprehension of the evidence”: *Brown v. Hanley*, 2019 ONCA 395, at para. 24.

[86] In addressing the issue of jurisdiction, the motion judge began by correctly noting that the CRTC has a legislative mandate to determine calling rates, to decide whether they are “just and reasonable”, and to award damages where they are not: see ss. 25, 27 and 32 of the *Act*.

[87] Although setting rates such as these is within the jurisdiction of the CRTC, the motion judge also noted that, under s. 34 of the *Act*, the CRTC “may exercise a discretion to forego setting the rates when it is satisfied that there is a competitive marketplace adequate for the task.”

[88] Second, he characterized the pith and substance of the proposed class action as whether the rates charged to Class members were unreasonable and/or unconscionable and held that these “causes of action are in the wheelhouse of the CRTC’s broad jurisdiction to resolve disputes and its broad remedial authority.”

[89] Third, he held that there was good reason and it was therefore appropriate for the Superior Court to defer jurisdiction to the CRTC as,

> The pith and substance of the Plaintiffs’ remaining causes of action are: (a) within the jurisdiction of the CRTC to resolve; (b) meaningful remedies are available from the CRTC; (c) the subject matter of the dispute is at the heart of the telecommunications scheme administered by the CRTC; (d) the CRTC has the subject matter expertise to decide the dispute and the Superior Court of Justice does not; and (e) a ruling by the Superior Court runs the risk of discombobulating the national

> policies and administration of telecommunications service providers. In these circumstances, a superior court ought to stay its jurisdiction and defer to the jurisdiction and expertise of the CRTC.

[90] In addressing the issue of forbearance, the motion judge did not determine whether in this case, the CRTC forbore its power to regulate long-distance rates on collect calls made from correctional institutions by invoking Telecom Decision CRTC 1997-19, or whether GT 292's statement limiting the rates for inmate calls to those originating from other public telephones constitutes a willingness to regulate just and reasonable rates. Nor did he consider whether, if the CRTC forbore, it has the power to reconsider that decision.

[91] However, it appears from his statement that "meaningful remedies are available from the CRTC", that he believed that either the CRTC did not forbear or that even if it had, the CRTC could reconsider its decision to forbear.

[92] Given that a central issue in this case is whether the CRTC forbore from exercising its jurisdiction, the Quebec cases of *Aka-Trudel* and *Morin*, cited by the appellants are distinguishable, because those cases were based on Quebec private law causes of action between a consumer and a licensee under the Act relating to late payment fees (*Aka-Trudel*), and termination fees and service cancellation fees (*Morin*). In both cases, the CRTC had forborne from regulating these fees as it pertained to that service provider in Quebec. As such, the only

issue in those cases was what forbearance meant in terms of the Superior Court's jurisdiction: see *Aka-Trudel*, at paras. 23-26; *Morin*, at paras. 41-61.

[93] While I agree with the motion judge's analysis of the CRTC's jurisdiction and the pith and substance of these claims, I find that he erred in not taking into account the possibility that the CRTC may be precluded from or may elect not to adjudicate whether long-distance rates charged to class members are just and reasonable.

[94] For the reasons set out below, I find that, while some strong arguments were raised in support of the CRTC assuming jurisdiction, forbearance is in question and one that is most appropriately decided by the CRTC since it requires consideration of the CRTC's regulatory scheme and their prior regulatory decisions.

[95] First, the appellants submit that the words "non-equal access areas" in Telecom Decision 2018-84 refer to unequal access to switches in a specific geographic area and not unequal access to other long-distance providers, though the words are not clearly defined in CRTC 2018-84. The decision provides that,

> While there are other types of long distance services available in the wireline long distance market, such as long distance plans, and other options available online and through wireless services, the record of this proceeding does not permit the Commission to adequately assess the impact of BCS on the downstream retail wireline long distance market. However, the record of this proceeding suggests that a significant portion of casual long distance end-users are customers who make small volumes of long distance calls and customers that may be unable to afford or access other communications

> technologies (e.g. online and wireless services). These customers would likely be more impacted if BCS were no longer mandated. Casual long distance calling offered through BCS may, in many cases, be a very effective and affordable way for certain vulnerable customer segments to fulfill their telecommunications needs, and continuing to mandate BCS would contribute to the welfare of these customers. In light of the above, the Commission finds that the policy considerations considered above support the continued mandating of BCS.

[96] Second, there is the significance of GT 292, at paragraph (c). That paragraph provides that "[i]nmate service calls are rated in the same manner as calls originating from other public telephones" which are set by the market. The appellants claim this constitutes forbearance of the CRTC setting the rates in favour of the market setting rates.

[97] The respondents disagree. They claim the CRTC has maintained jurisdiction as the rates charged for inmate service calls must be matched to the rate charged for other public telephones. They claim that even if those rates are set by the market, this does not necessarily mean that the CRTC forbore, as s. 34(1) of the *Act* simply provides that the CRTC "may [*not* must] make a determination to refrain, in whole or in part and conditionally or unconditionally".

[98] Third, even if the CRTC did forbear from regulating these calls, the respondents have pointed to one instance where the CRTC reconsidered its forbearance decision: see Telecom Decision CRTC 2002-37.

[99] Unless the CRTC is held to have forborne from regulating these rates, it has the jurisdiction and the mandate to determine just and reasonable rates and has

broad authority to order damages payable for the failure to do so. Moreover, the CRTC may order remedies on a class-side basis, including retroactive relief: *Penney*, at para. 139, citing Telecom Decision CRTC 2004-8.

[100] However, if the CRTC declines to assume jurisdiction to determine whether the rates were just and reasonable either because it cannot or chooses not to do so, a permanent stay would leave the appellants without adjudication of the issue of the reasonableness of the rates charged either by the CRTC or the Superior Court.

[101] Thus, while I agree with most of the motion judge's analysis, I find that he erred in not considering the possibility that the CRTC may not adjudicate whether long-distance rates were just and reasonable. As such, I would substitute a temporary stay for the permanent stay ordered by the motion judge.

[102] A stay is consistent with the case law affirming that courts ought not to exercise jurisdiction where adjudication requires consideration of a regulatory scheme administered by a specialized tribunal that deals with national policies and the administration of telecommunication services across the country: see, e.g., *Mahar v. Rogers Cablesystems Ltd*. (1995), 25 O.R. (3d) 690 (Ont. Gen. Div.); *Sprint Canada Inc. v. Bell Canada* (1999), 86 C.P.R. (3d) 285 (Ont. C.A.), aff'g (1997) 79 C.P.R. (3d) 31 (Ont. Gen. Div.); *Penney; Bazos v. Bell Media Inc*., 2018 ONSC 6146, 143 O.R. (3d) 417. There is also a concern about having provincial

courts resolving telecommunication issues with national implications. As Sharpe J. (as he then was) stressed in *Mahar*, at para. 35:

> The principle established by the case law, in particular [*British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd*., [1995] 2 S.C.R. 739], of the deference due to the decisions of the CRTC on legal matters within its jurisdiction seems to me significant. … In some ways, however, the case at bar presents a more serious challenge to the integrity of the regime established by Parliament. If the applicant's submissions were accepted and this court were to decide the case, there would, in effect, be an alternate forum for the determination of an important aspect of the relationship between suppliers of cable services and subscribers. A superior court would be deciding that issue without the benefit of the opinion of the CRTC. Because this is but one of ten provincial superior courts the spectre of various approaches from various provincial courts is raised. Assumption of jurisdiction by this court would not only evade the CRTC, it would also remove the case from the authority of the Federal Court of Appeal which is mandated to review the CRTC. The net result would be to disrupt the scheme envisaged by Parliament for the interpretation of the Regulations…[Emphasis added.]

[103] At the same time, a temporary stay, unlike a permanent stay, ensures that the appellants and the Class will not be left without a forum for the adjudication of their claims, which is consistent with the principle of access to justice. Ordering a temporary stay will provide the CRTC with the opportunity to address the forbearance issue and then possibly, decide whether the rates were just and reasonable.

[104] I note that while Bell argued in favour of maintaining the permanent stay, counsel for Bell fairly conceded in oral argument that a temporary stay was a “door that was open” if the court found that there was a reason to interfere with the motion judge’s discretionary decision.

[105] Finally, as for the appellants’ preferability argument, I disagree that the motion judge erred in not conducting a preferability analysis under s. 5 of the CPA in disposing of the jurisdiction motions. Under s. 5(1)(d), a court shall consider if “a class proceeding would be the preferable procedure for the resolution of the common issues.” If the appellants end up returning to the Superior Court upon the lifting of the temporary stay, they may renew their request for certification and at that point it will be up to the certification judge to apply the s. 5 certification test.

[106] I would therefore substitute the motion judge’s permanent stay with a temporary stay to be lifted, should the parties so choose, on the terms set out at paragraph 14 above.

The Third Issue: Did the motion judge err in permanently staying the claim for breach of fiduciary duty?

[107] The third issue is whether the motion judge should have permanently stayed the fiduciary claim.

The Appellants' Pleading

[108] The appellants plead that Ontario owed an ad hoc fiduciary duty to those imprisoned in correctional facilities in Ontario during the class period. In particular, they plead:

> - They were prisoners at the mercy of Ontario for their telephone communication needs.
> - Ontario undertook, explicitly or implicitly, to act in the best interests of prisoners with respect to their access to a communications system with their family and communication members.
> - Ontario had scope for the exercise of discretion or power, which it could and did unilaterally exercise to affect the prisoners' legal or substantial practical interests.

[109] They plead that Ontario breached this fiduciary duty by: (1) failing to ascertain that Bell complied with its contractual obligations and did not extract unconscionable rates; (2) putting its own interest in receiving maximum commissions ahead of the prisoners' interest in having a meaningful and affordable means of communication; and (3) failing to provide the prisoners with a meaningful and affordable means of communication with the outside world.

[110] In the alternative to damages, the appellants seek disgorgement of profits made as a result of breaches of fiduciary duties. The plead that "[d]isgorgement … would serve a compensatory purpose."

[111] Their proposed common issues include two issues related to breach of fiduciary duty:

> (1) Did the Crown owe the plaintiffs and/or Class Members who were Prisoners in Ontario Facilities a fiduciary duty? [and]
>
> (2) If the Crown owed a fiduciary duty, did the Crown breach that duty by allowing Bell to charge the rates and other amounts on Collect Calls through the OTMS?

The Parties' Submissions

[112] The appellants claim the motion judge gave no reason for his decision to permanently stay the appellants' fiduciary duty claim.

[113] The appellants plead breach of a narrow fiduciary relationship between Ontario and those imprisoned in Ontario. They claim that prisoners were at the mercy of Ontario for their telephone communication needs, Ontario undertook, explicitly or implicitly, to act in the best interests of prisoners in respect of their access to a communications system, and Ontario had scope for the exercise of discretion or power, which it unilaterally exercised to affect the prisoners' legal or substantial practical interests.

[114] They claim that Ontario breached this duty by putting Ontario's own interest in receiving maximum commissions ahead of the prisoners' interest in having affordable means of communication, and by failing to require Bell to provide reasonable and affordable telephone service.

[115] They claim the Superior Court should hear their claim for breach of fiduciary duty, since even if the preferred forum for adjudicating reasonable rates is the CRTC, and the CRTC has not forborne from adjudicating this dispute, the CRTC has no jurisdiction to deal with equitable claims such as breach of fiduciary duty.

[116] Ontario acknowledges that the CRTC cannot decide a fiduciary duty claim. However, it submits that it is the essential character of the dispute, not the cause of action itself that should determine where it should be heard. The motion judge found that the pith and substance of all claims stayed was rates.

[117] In the alternative, Ontario submits that this court should dismiss the fiduciary claim as it does not raise a reasonable cause of action.

Analysis of the Decision to Permanently Stay the Claim for Breach of Fiduciary Duty

[118] The motion judge held that, while the appellants framed one of their claims as a breach of fiduciary duty, the essence of this claim was the failure to provide reasonable rates for inmates in their care. He also noted that “meaningful remedies are available from the CRTC” and that “courts have recognized that where the adjudication of a dispute would require a consideration of the legislative scheme administered by the CRTC, then the court ought not to exercise any jurisdiction to hear the matter even where some of the relief being sought may not precisely be available from the CRTC.”

[119] He stayed the fiduciary claim (along with the balance of the appellants' causes of action), noting that the appellants, "cannot back away from the circumstance that the pith and substance, heart and soul, and letter and spirit of their proposed class action is rates."

[120] There is good reason for the motion judge to have exercised his discretion in categorizing the fiduciary claim as falling under the rate-regulating purview of the CRTC.

[121] The breach of fiduciary duty claim, at its core, raises questions about rate-setting and the allocation of certain proceeds derived from those rates, and the Supreme Court has identified that addressing such quarrels is a "polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake": *Bell Aliant*, at para. 38. Indeed, "[p]ursuing policy objectives through the exercise of its rate-setting power is precisely what s. 47 [of the *Act*] requires the CRTC to do in setting just and reasonable rates": *Bell Aliant*, at para. 74.

[122] The issue of whether the rates were reasonable and just should therefore be brought to the CRTC to decide if it forbore from all regulation of long-distance calls to and from correctional institutions, and if it did, whether it has the ability to reconsider its own decision to forbear. If the CRTC decides that issue and or adjudicates the issue of reasonable rates, the Superior Court will be in a position to decide whether there is a cause of action for fiduciary duty, which could proceed

in Ontario. Buttressed by the CRTC's broad remedial powers, such an approach ensures that the appellants are not at risk of a real deprivation of ultimate remedy.

[123] As such, I would vary the permanent stay to a temporary stay until such time as the CRTC elects to decide whether to forbear or to decide whether the rate was just and reasonable. Once the temporary stay is lifted, the appellant could seek certification of this and the other causes of action that have been temporarily stayed.

7. CONCLUSION

[124] For the above reasons, I would dismiss the appeal from the order striking the *ultra vires* tax claim and substitute a temporary for a permanent stay of the other claims. The temporary stay will be lifted, should the parties so choose, on the terms set out at paragraph 14 above.

[125] On consent of the parties, we request that written submission on costs for the appeal, no more than ten pages in length each, be submitted to this court no later than 30 days following the release of these reasons.

Released: May 2, 2023 "A.H.Y"

"Thorburn J.A."
"I agree. A. Harvison Young J.A."
"I agree. J. Copeland J.A."