

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N :

VANESSA FAREAU and RANSOME CAPAY

Plaintiffs  
(Appellants)

- and -

BELL CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants  
(Respondents)

Proceeding under the *Class Proceedings Act, 1992*

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**FACTUM OF THE APPELLANTS**

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July 28, 2022

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## **PART I - THE APPELLANTS AND THE APPEAL**

1. The appellants, Vanessa Fareau and Ransome Capay, are representative plaintiffs in a proposed class proceeding against Her Majesty the Queen in Right of Ontario (“**Ontario**”) and Bell Canada (“**Bell**”). The appellants appeal from the Order of the Honourable Justice Perell of the Superior Court of Justice dated April 26, 2022, dismissing some of their rights of action and permanently staying the balance of their action in favour of the Canadian Radio-television and Telecommunications Commission (“**CRTC**”).

## **PART II - OVERVIEW – NATURE OF CASE AND ISSUES**

### **A. Nature of the case**

2. The appellants bring this action over the provision of telephone services in Ontario correctional facilities between 2013 and 2021. Bell was the exclusive provider of the phone service, a vital service for prisoners. The appellants allege that Bell imposed unconscionable collect calling rates on a captive class of consumers. The calling rates that Bell imposed on the class were many times higher than the rates charged in other provincial jails and up to dozens of times higher than the rates now charged in correctional facilities by the new telephone service provider. These unconscionable rates deprived prisoners of a vital lifeline to their loved ones, or severely limited those interactions.

3. The appellants advance consumer protection claims against Bell. It is undisputed that Bell did not disclose to consumers the exorbitant rates for the calls until a bill was delivered. The failure to advise of rates is contrary to provincial consumer protection legislation requiring that material information be disclosed to consumers to permit meaningful choice and avoid bill shock.

4. In granting the supply monopoly to Bell, Ontario was concerned above all with the

commissions that it would levy on each phone call. Ontario extracted more than 25% on gross revenue from each call that the appellants and the class made. The commissions were an indirect levy on the class.

5. The appellants allege that the commissions were an unconstitutional indirect tax *ultra vires* the province. The appellants also allege that Ontario had an *ad hoc* fiduciary duty in relation to the provision of telephone services to prisoners whose means of communicating with the outside world was the prison phone system. The appellants allege that Ontario breached that duty by prioritizing its own financial interests over the interests of the class in having meaningful access to telephones.

#### **B. Nature of the issues**

6. The motion judge summarily dismissed two of the appellants' causes of action. He then permanently stayed the fiduciary duty claim against Ontario as well as the remaining rights of action asserted against Bell. He declined to exercise the Superior Court of Justice's jurisdiction over all remaining claims. He determined the CRTC to be the forum to decide all claims.

7. The motion judge erred in law and in principle in disregarding the fact that the CRTC had expressly forborne from regulating the long-distance rates at issue. In Decision 1997-19, the CRTC forbore from regulating long-distance collect call rates under s. 25 and forbore most of its regulatory powers under s. 27 of the *Telecommunications Act*.<sup>1</sup> The long-distance phone rates at issue in this case have not been regulated since 1997.<sup>2</sup>

8. The motion judge's decision conflicts with jurisprudence from the Quebec Court of Appeal

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<sup>1</sup> S.C. 1993, c. 38. Telecom Decision CRTC 1997-19 ("[CRTC Decision 1997-19](#)"), ¶¶ 23-25, Appeal Book and Compendium ("**ABC**"), Tab 25, p. 615.

<sup>2</sup> [CRTC Decision 1997-19](#), ABC, Tab 25.

on the issue of superior court jurisdiction when the CRTC has forborne its regulatory powers. The Quebec Court of Appeal has found that when the CRTC chooses not to regulate a sector, parties necessarily have recourse to a superior court.<sup>3</sup> If the decision below stands, it will create divergent provincial approaches to when deference to a federal tribunal is appropriate. Moreover, the decision to permanently stay this action makes it unlikely that the claims will ever be heard and resolved in a forum that can provide class-wide redress.

9. The motion judge incorrectly dismissed the *ultra vires* tax claim against Ontario. On a pleadings motion, the motion judge decided the merits of the claim incorrectly and on a ground that had not been argued before him or raised with the parties: he erroneously found that the commissions were a proprietary charge, which had no basis in the record or caselaw. The motion judge also erred in staying the appellants' *ad hoc* fiduciary duty claim against the province in favour of a federal tribunal that has no jurisdiction over the claim.

### **PART III -SUMMARY OF FACTS**

#### **C. Background of the claim**

10. Telephone calls in Ontario correctional facilities are provided through a single system, the Offender Telephone Management System (“OTMS”). Bell operated the OTMS between June 1, 2013 and July 29, 2021 (*i.e.*, the class period). The OTMS only permitted prisoners to make outgoing collect calls.<sup>4</sup>

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<sup>3</sup> *Bell Canada c Aka-Trudel*, [2018 QCCA 829](#) (CanLII), leave to appeal to the Supreme Court dismissed: *Bell Canada, et al. vs. Louis Aka-Trudel, et al.*, [2019 CanLII 11818](#) (SCC). (“*Aka-Trudel*”), ¶ 24, Book of Authorities of the Appellants (“BOA”), Tab 8; *Morin c. Bell Canada*, [2012 QCCS 4191](#) (CanLII) (“*Morin*”), ¶¶ 46-47, BOA, Tab 23.

<sup>4</sup> Reasons for Decision of Perell, J dated April 26, 2022 (“**Reasons for Decision**”), ¶¶ 32-33, 48, ABC, Tab 3, pp. 27, 28.

11. The appellants allege against Bell that: (a) the collect calls constituted contracts of adhesion whereby Bell imposed unconscionable rates on the class; (b) Bell breached provincial consumer protection legislation, which required advance disclosure of material facts, including rates to consumers; and (c) Bell was unjustly enriched by the overcharge. The appellants allege against Ontario that: (a) the commission charged on gross revenues was an *ultra vires* tax; (b) Ontario breached an *ad hoc* fiduciary duty; and (c) Ontario was unjustly enriched.<sup>5</sup> The appellants seek statutory and equitable remedies, including disgorgement and restitution.

**D. The appellants**

12. Ransome Capay is a First Nations individual living on the Lac Seul reserve. Mr. Capay's son, Adam, was held in solitary confinement for 4.5 years until a court stayed all charges.<sup>6</sup> While in solitary, Adam could only speak to his family through the OTMS. Mr. Capay often received several calls a day from his son. At times, Mr. Capay's bills from Bell exceeded \$1,000 per month.

13. For example, on July 21, 2016, Bell charged Mr. Capay \$27.91 for a 20-minute call from Kenora to Lac Seul.<sup>7</sup> A comparable call using the new Ontario prison phone provider would cost approximately \$1.22 in total.<sup>8</sup> On July 12, 2016, Mr. Capay's son called home eight times. The cost for Mr. Capay to speak with his son for 2.5 hours that day was \$146.50.<sup>9</sup> This amount far

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<sup>5</sup> The appellants asserted a statutory cause of action under s. 72(1) of the *Telecommunications Act* against both defendants, which the motion judge dismissed. The appellants do not appeal that finding.

<sup>6</sup> Affidavit of Ransome Capay sworn December 15, 2020 (“**Capay Affidavit**”), ¶ 3, ABC, Tab 8, pp. 89-90.

<sup>7</sup> Capay Affidavit, Exhibit “G”, Pages from bill dated January 17, 2017, ABC, Tab 12, p. 109.

<sup>8</sup> Exhibit “A” to the Supplementary Affidavit of Nadine Blum affirmed May 13, 2021 – Freedom of Information Letter and Synergy Contract (“**FOI Letter / Synergy Contract**”), ABC, Tab 18, p. 486.

<sup>9</sup> Capay Affidavit, Exhibit “E”, Bell Bill dated July 17, 2016, ABC, Tab 10, p. 102.

exceeded the entire *monthly* charge for the residential phone service that Mr. Capay had with Bell (which was \$59.78).<sup>10</sup>

14. Vanessa Fareau was incarcerated at the Ottawa-Carlton Detention Centre in 2015 for approximately 2 months while awaiting bail. While detained, she made collect calls to her children and others to arrange childcare and other personal matters.<sup>11</sup> Once released, Ms. Fareau continued to pay for collect calls from her nephew and a friend who were detained in Ontario facilities. For example, on November 23, 2017, Bell billed Ms. Fareau \$24.28 for a 19-minute call between the Toronto South Detention Centre and Gatineau.<sup>12</sup> Ms. Fareau incurred multiple monthly bills with hundreds of dollars in collect calls.<sup>13</sup> For example, in February 2018, Ms. Fareau's phone bill included \$635.78 in charges owed for prison calls.<sup>14</sup>

15. The proposed class is all prisoners in Ontario correctional facilities and those who paid for a collect call originating from an Ontario facility during the class period; *i.e.*, while Bell supplied the service.

**E. Ontario's request for proposals and Bell's selection as supplier**

16. On September 28, 2012, Ontario issued a request for proposals ("**RFP**") to solicit bids for

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<sup>10</sup> Capay Affidavit, ¶¶ 5-7, ABC, Tab 8, pp. 90-91; Capay Affidavit, Exhibit "B": Bell bill dated September 20, 2013, ABC, Tab 9, p. 96.

<sup>11</sup> Affidavit of Vanessa Fareau sworn December 17, 2020 ("**Fareau Affidavit**"), ¶ 3, ABC, Tab 6, pp. 10-11.

<sup>12</sup> Fareau Affidavit, Exhibit B: Videotron bill dated February 2, 2018, ABC, Tab 7, p. 86.

<sup>13</sup> Further Answers to Undertakings of Vanessa Fareau dated September 28, 2021, Tab 1 – Feb 2, 2018, ABC, Tab 30, p. 671.

<sup>14</sup> *Ibid.*

the OTMS service.<sup>15</sup> The RFP was not subject to the supervision, approval or any involvement of the CRTC. Bell submitted an RFP proposal on November 20, 2012 (the “**Proposal**”).<sup>16</sup> Bell represented that its telephone services for prisoners would be at an “identical call rate and connection fees including all time of day and mileage discounts as are experienced by Bell residential customer[s].”<sup>17</sup>

17. Bell won the competition. In 2013, Bell entered into a contract with Ontario to operate the OTMS (the “**OTMS Agreement**”).<sup>18</sup> Under the OTMS Agreement, Bell “shall establish the calling rates for local and long-distance calls from all telephones”.<sup>19</sup>

18. Bell charged the following rates:

- (a) Long-distance calls: Long-distance calls were charged at approximately \$1.00 per minute or more plus a \$2.50 connection fee.<sup>20</sup> Bell’s evidence was that any call made from 8 AM to 6 PM to a distance greater than 81 miles would be billed at \$1.33 per minute plus the connection fee of \$2.50.<sup>21</sup>
- (b) Local calls: \$1.00 flat rate regardless of duration, to a maximum of 20 minutes.

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<sup>15</sup> Affidavit of Paul Gortana affirmed June 30, 2021 (“**Gortana Affidavit**”), Exhibit “A”: Request for Proposal issued September 28, 2012 (“**RFP**”), ABC, Tab 20, pp. 510-573. See p. 512 for the Invitation to Proponents.

<sup>16</sup> Affidavit of Nadine Blum affirmed December 21, 2020 (“**Blum Affidavit**”), Exhibit “A”: Documents obtained by Michael Spratt from the Ministry of Community Safety and Correctional Services (“**MCSCS Documents**”), ABC, Tab 15, pp. 333-365.

<sup>17</sup> Blum Affidavit, Exhibit “A”, MCSCS Documents, ABC, Tab 15, p. 336.

<sup>18</sup> Gortana Affidavit, ¶¶ 4-5, ABC, Tab 19, pp. 504-505; RFP, ABC, Tab 20, pp. 510-573.

<sup>19</sup> MCSCS Documents, ABC, Tab 15. p. 321.

<sup>20</sup> Reasons for Decision, ¶¶ 35 and 37, ABC, Tab 3, p. 27.

<sup>21</sup> Gortana Affidavit, Exhibit “B”: Charts downloaded from [www.bell.ca](http://www.bell.ca) containing costing information for collect and long distance calls, ABC, Tab 21.

19. The CRTC has set a \$1.00 flat rate cap on local collect calls and does not regulate long-distance rates. There is no allegation that the flat rate local call cap was breached.

20. Based on undisputed evidence,<sup>22</sup> the motion judge found that the defendants never disclosed calling rates to the class, until the call was billed long after the fact.<sup>23</sup>

#### **F. Ontario's levy on the phone calls**

21. Ontario levied a commission percentage on each phone call made on the OTMS.<sup>24</sup> The exact percentage of Ontario's actual commissions has been redacted from public disclosure.<sup>25</sup> However, Ontario's RFP stated: "The Commission Percentage Rate proposed must be no less than 25% of the Gross Revenue generated by both the OTMS and conventional public pay telephones."<sup>26</sup> The RFP's selection criteria stated that the bidder with the highest proposed commission percentage would receive the highest points in the evaluation process.<sup>27</sup>

22. None of the levied commissions offset any cost of providing the OTMS. The OTMS Agreement required that Bell pay the levy to the Ontario Minister of Finance, the minister responsible for income tax<sup>28</sup> and other provincial taxation.<sup>29</sup>

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<sup>22</sup> Gortana Affidavit, ¶ 10, ABC, Tab 19, pp. 506-507; Cross-Examination of Pierre-Luc Hébert ("Hébert Transcript"), Q. 61-65, ABC, Tab 28, pp. 657-659; Fareau Affidavit, ¶ 17, ABC, Tab 6, p. 83; Capay Affidavit, ¶ 11, ABC, Tab 8, p. 92.

<sup>23</sup> Reasons for Decision, ¶ 36, ABC, Tab 3, p. 27.

<sup>24</sup> RFP, ABC, Tab 20, p. 512.

<sup>25</sup> Blum Affidavit, ¶ 2, ABC, Tab 14, pp. 281-282.

<sup>26</sup> RFP, ABC, Tab 20, p. 532, see 2.4 Commission Paid to the Ministry on p. 532.

<sup>27</sup> RFP, ABC, Tab 20, p. 539.

<sup>28</sup> *Income Tax Act*, R.S.O. 1990, c. I.2, s 1.

<sup>29</sup> See e.g., *Land Transfer Tax Act*, R.S.O. 1990, c. L.6, s 1; *Mining Tax Act*, R.S.O. 1990, c. M.15, s 1; *Provincial Land Tax Act*, 2006, S.O. 2006, c. 33, Sched. Z.2, s 1; *Race Tracks Tax Act*, R.S.O. 1990, c. R.1, s 1; *Retail Sales Tax Act*, R.S.O. 1990, c. R.31, s 1; *Tax Incentive Zones Act (Pilot Projects)*, 2002, S.O. 2002, c. 22, Sched. B, s 1; *Tax Increment Financing Act*, 2006,

**G. The operation of the OTMS**

23. The process of making a phone call was the same in every correctional facility:
- (a) A prisoner picked up a Bell phone in a facility and entered the phone number;
  - (b) A computer determined if the call fell into an excepted category (in order to avoid harassment or witness tampering, etc.);
  - (c) If the call was permitted, the recipient of the call heard an automated message, asking if the recipient wanted to accept the call; and
  - (d) If the recipient accepted the call, it would be billed to the recipient.<sup>30</sup>
24. Long-distance calls formed the bulk of charges to the class because they were billed by the minute. For eight facilities, the monthly calls consisted of an estimated \$782,700 in long-distance calls and \$107,710 in local calls.<sup>31</sup>

**H. Rates charged by other provinces and new OTMS**

25. During the class period, no other provincial or federal prison in Canada charged rates as high as those charged by Bell or operated on an exclusively collect call basis. Bell's rates were approximately four times higher than rates charged in other provincial jails.<sup>32</sup> Other provinces also

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S.O. 2006, c. 33, Sched. Z.7, s 1; *Taxation Act, 2007*, S.O. 2007, c. 11, Sched. A, s 1; *Taxpayer Protection Act, 1999*, S.O. 1999, c. 7, Sched. A, s 2; *Tobacco Tax Act*, R.S.O. 1990, c. T.10, s 1.

<sup>30</sup> Hébert Affidavit, ¶¶ 37, 42 and 45, ABC, Tab 23, pp. 602, 604, 605; Hébert Transcript, Q. 61-65, ABC, Tab 28, pp. 657-659; Transcript of Cross-Examination of Paul Gortana held August 12, 2021 (“**Gortana Transcript**”), Q. 43-65, ABC, Tab 29, pp. 662-666.

<sup>31</sup> RFP, ABC, Tab 20, p. 556, assuming \$1.00 per minute for long distance.

<sup>32</sup> Blum Affidavit, Exhibit “C”: Chart of prison telephone rates across Canada, ABC, Tab 17, pp. 376-380.

offered a pre-paid calling option, providing consumers a choice and prior rate information.<sup>33</sup>

26. Bell ceased providing services under the OTMS in 2021. A new supplier, Synergy Inmate Phone Services, took over. Under Synergy's contract with Ontario, the rates for calls in the OTMS were reduced drastically. Comparable Synergy calls are 16-32 times cheaper than Bell. Synergy charges 3 to 6 cents per minute for a Canada-United States-wide long-distance call.<sup>34</sup> International collect calls are charged at 1 cent per minute.<sup>35</sup> Synergy charges no connection fee on any collect calls.<sup>36</sup> The appellants' class period ends when Synergy took over from Bell.

### **I. Motion judge's decision**

27. The motion judge heard the appellants' certification motion and the defendants' jurisdiction motions together.

28. The motion judge found that the pith and substance of the dispute was about rates and held that the Superior Court should defer to the CRTC. The motion judge granted the defendants' cross-motions on jurisdiction and permanently stayed the appellants' action.

29. The motion judge dismissed the appellants' cause of action in respect of:

- (a) a statutory cause of action asserted against Ontario and Bell under s. 72(1) of the *Telecommunications Act* for breach of a decision of the CRTC on giving callers notice of collect call rates—a finding that the appellants do not appeal; and

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<sup>33</sup> *Ibid*, ABC, Tab 17, pp. 376-380. Synergy charges a flat rate of between \$0.44-\$0.54 for a local call.

<sup>34</sup> FOI Letter / Synergy Contract, ABC, Tab 18, p. 486

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid*.

- (b) a claim against Ontario that the charging and receipt of Ontario's levy on OTMS calls constituted an unconstitutional tax ultra vires the province.

30. The motion judge decided the cause of action issue under the s. 5(1)(a) analysis of the *Class Proceedings Act, 1992*,<sup>37</sup> which requires that the pleadings disclose a cause of action. He provided no reasons or analysis on the remaining causes of action against Ontario or Bell. The motion judge permanently stayed the remaining causes of action and did not consider the other aspects of the certification test.

31. The motion judge did not find that the CRTC had exclusive jurisdiction over the dispute, nor was this asserted by Bell. Rather, he ruled that the Superior Court should decline jurisdiction in favour of the CRTC, and in so doing erred.<sup>38</sup>

#### **PART IV - STATEMENT OF ISSUES, LAW & AUTHORITIES**

32. This appeal raises two issues:

- (a) Did the motion judge err by deferring jurisdiction to the CRTC and permanently staying the appellants' claim against Ontario and Bell?
- (b) Did the motion judge err by dismissing the appellants' claim that Ontario's levy was an *ultra vires* tax?

#### **A. Standard of review and basis for appellate jurisdiction**

33. The permanent stay of an action and dismissal of a cause of action are final and

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<sup>37</sup> S.O. 1992, c. 6.

<sup>38</sup> Reasons for Decision, ¶¶ 99-100, ABC, Tab 3, p. 38.

appropriately before the Court of Appeal.

34. The jurisdictional decision is reviewed on a standard of correctness.<sup>39</sup> The motion judge's failure to apply the correct legal test on jurisdiction and certification constitutes an error of law.<sup>40</sup> The deference to the CRTC is also reviewable on a standard of correctness. Although jurisdictional deference to a tribunal would ordinarily involve an exercise of discretion, the motion judge's failure to consider or apply the applicable law before reaching this decision is an error in principle that is subject to correctness review.<sup>41</sup>

35. Whether a plaintiff has a cause of action under s. 5(1)(a) of the *Class Proceedings Act* or Rule 21 is a question of law reviewable on a standard of correctness.<sup>42</sup>

**B. The motion judge erred in declining to exercise jurisdiction in favour of the CRTC**

**(i) The required jurisdictional analysis**

36. The motion judge was required to apply the following test on the jurisdiction motion:

- (a) What is the substance of the tribunal's jurisdiction?
- (b) What is the essential character of the dispute and does it fall within the exclusive jurisdiction of the tribunal? and
- (c) If both the court and tribunal have jurisdiction over the dispute, is the statutory

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<sup>39</sup> *Fontaine v. Canada (Attorney General)*, [2020 ONCA 688](#) ("*Fontaine*"), at ¶ 30, BOA, Tab 16.

<sup>40</sup> *Fontaine*, at ¶ 30, BOA, Tab 16.

<sup>41</sup> *1318847 Ontario Limited v. Laval Tool & Mould Ltd.*, [2017 ONCA 184](#), at ¶ 81, BOA, Tab 2.

<sup>42</sup> *Bowman v. Ontario*, [2022 ONCA 477](#), at ¶ 26, BOA, Tab 10.

tribunal the preferred forum for the resolution of the dispute?<sup>43</sup>

37. The motion judge erred by disregarding the impact of forbearance on the scope of the CRTC's regulatory jurisdiction and by not conducting any preferability analysis as between the CRTC and a class proceeding. In failing to follow the correct analysis, the motion judge erred.

**(ii) Motion judge's decision conflicts with established federal jurisprudence in Quebec**

38. The motion judge's decision directly contradicts both the Quebec Court of Appeal and Quebec Superior Court on the same subject matter. Quebec courts have held that when the CRTC has forborne from regulation, a plaintiff with a private law cause of action has recourse to the court.

39. In *Bell Canada c. Aka-Trudel*, the plaintiff brought a class action against Bell after Bell unilaterally raised interest rates on overdue accounts.<sup>44</sup> As in the case at bar, the CRTC had forborne from regulating late fees.<sup>45</sup> Bell argued that the dispute was at the heart of the CRTC's jurisdiction because the dispute turned on the fair and reasonable nature of the rates and late fees.<sup>46</sup> In permitting the class action to proceed, the Quebec Court of Appeal referred to the unregulated nature of the charges and rejected Bell's argument that *by forbearing* from regulating the CRTC had actually *exercised* regulatory jurisdiction. The court stated:

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<sup>43</sup> *Penney v. Bell Canada*, [2010 ONSC 2801](#) ("**Penney**"), at ¶ 149, BOA, Tab 26; *Allarco Entertainment 2008 Inc. v. Rogers Communications Inc.*, [2009 CanLII 68464 \(ON SC\)](#) ("**Allarco**"), at ¶ 25, BOA, Tab 4; *Weber v. Ontario Hydro*, [1995 CanLII 108 \(SCC\)](#) ("**Weber**"), BOA, Tab 33.

<sup>44</sup> *Aka-Trudel*, at ¶ 7, BOA, Tab 8.

<sup>45</sup> *Aka-Trudel*, at ¶ 23, BOA, Tab 8.

<sup>46</sup> *Aka-Trudel*, at ¶ 16, BOA, Tab 8.

Contrary to the appellants' argument, the question is not whether or not the CRTC exercises its jurisdiction by refraining from regulating. In the absence of regulation, it is then difficult to see what the CRTC could reproach [Bell] with.... Rather, it is a question of noting that no decision or regulation of the CRTC is directly or indirectly challenged by the Respondent's action, which could contravene the rule prohibiting collateral attacks.

Clearly, as Justice Savard (then at the Superior Court) explained in *Morin c. Bell Canada*, 2012 QCCS 4191, at paras. 46-47, 57, and on which the impugned judgment is based, **the market is then left to regulate business, which necessarily involves recourse to the courts.** (Emphasis added)

The action is therefore distinct from *Re Mahar and Rogers Cablesystems Limited*, [1995] O.J. 3711 (On Gen. Div.); *Sprint Canada Inc. v. Bell Canada*, [1997 CanLII 12379 \(ON SC\)](#), [1997] OJ 4772 (On Gen. Div.); *B & W Entertainment Inc. c. Telus Communications Inc.*, [2004] O.J. 4564 (On. SCJ); *Shaw Cablesystems (SMB) Ltd. et al. v. MTS Communications Inc. et al.*, [2006 MBCA 29](#); *MTS Allstream Inc. v. Telus Communication Co.*, [2009 ABCA 372](#); *Penney v. Bell Canada*, [2010 ONSC 2801](#). In all these cases, an analysis of the true nature of the remedies revealed that each, in their own way, invoked or conflicted with a legislative provision, a decision or a regulation of the CRTC.

On the other hand, a dispute based primarily on a question of private law falls within the jurisdiction of the civil courts, to the exclusion of the specialized tribunal, which does not have the power to order the relief sought.<sup>47</sup> [translation]

40. The appellate holding in *Aka-Trudel* is directly applicable to this case given the decision of the CRTC to forbear from regulating long-distance rates. Ontario courts have cited *Aka-Trudel* and articulated its holding as applicable to cases in which the CRTC has forborne from regulation, distinguishing it from cases concerning regulated conduct:

The CRTC had refrained from regulating the late fees associated with the telecommunication services that were in question in [*Aka-Trudel*]. The Quebec

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<sup>47</sup> *Aka-Trudel*, at ¶ [24](#), BOA Tab 8. [emphasis added; unofficial translation]

Court of Appeal held that, as a result, the representative plaintiff necessarily had recourse to the courts.<sup>48</sup>

41. *Aka-Trudel* is cited with approval *Morin c. Bell Canada*, a prior Quebec Superior Court decision. In *Morin*, the plaintiff challenged early termination and service cancellation fees applied in Bell's residential wire telephone services.<sup>49</sup> The plaintiff sought to annul or reduce the fees, including fees that the CRTC had forborne from regulating.<sup>50</sup> Bell argued that only the CRTC could take such an action, and as such the class action should be dismissed for lack of jurisdiction.<sup>51</sup> The Quebec Superior Court rejected Bell's argument that the CRTC maintains complete jurisdiction over rate-setting for services covered by a decision to forbear:

The rates of the services covered by a decision to forbear are therefore established according to the rules of the market and are consequently subject to the rules of law that apply to that market, including those in the C.C.Q. and the *Consumer Protection Act*.

In the Court's view, **the Act does not contain any clear provision stating that, even though the CRTC does not set rates for services covered by the decision to forbear, it nevertheless has jurisdiction to rule on whether the rates established by carriers according to the rules of the market are lawful.**<sup>52</sup> [CanLII Translation]

42. As in *Morin*, the CRTC's regulatory powers in this case are spent, and the appellants must have recourse to the province's Superior Court of Justice. Deferring to the CRTC in the face of forbearance puts Ontario's law at direct odds with settled law in Quebec.

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<sup>48</sup> *Bazos v. Bell Media Inc.*, [2018 ONSC 6146](#), at ¶ 48, BOA, Tab 7.

<sup>49</sup> *Morin*, at ¶¶ 5-11, BOA, Tab 23.

<sup>50</sup> *Morin*, at ¶ 17, BOA, Tab 23.

<sup>51</sup> *Morin*, at ¶ 18, BOA, Tab 23.

<sup>52</sup> *Morin*, at ¶¶ 44-47, BOA, Tab 23. [Unofficial English Translation from CanLII; emphasis added]

**(i) The motion judge erred on the scope of CRTC's jurisdiction**

43. The motion judge broadly interpreted the CRTC's scope of powers under ss. 25 and 27 as if the CRTC had never forborne its powers. As stated above, in Decision 1997-19, the CRTC forbore from regulating long-distance collect call rates under s. 25 and forbore most of its regulatory powers under s. 27 of the *Telecommunications Act*.<sup>53</sup>

*(1) Section 25 of the Telecommunications Act*

44. The motion judge held: "Section 25 of the *Telecommunications Act* provides that the rates for any telecommunications services must be approved by the CRTC".<sup>54</sup> The motion judge did not consider that the CRTC expressly forbore from exercising regulatory powers under s. 25 for long-distance rates. Bell's own evidence was 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-distance calls made on payphones."<sup>55</sup>

45. The motion judge held that this is a case about rates "in the wheelhouse of the CRTC's broad jurisdiction",<sup>56</sup> but he omitted that the CRTC has washed its hands of the long-distance rates since 1997.

*(2) Section 27 of the Telecommunications Act*

46. The motion judge held: "Section 27(1) of the *Telecommunications Act* provides that all rates charged by a Canadian carrier for a telecommunications service 'shall be just and

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<sup>53</sup> [Telecom Decision CRTC 97-19](#), ¶¶ 23-25, ABC, Tab 25, p 615.

<sup>54</sup> Reasons for Decision, ¶ 21, ABC, Tab 3, p. 25.

<sup>55</sup> Hebert Affidavit, ¶ 18, ABC, Tab 23, p. 594.

<sup>56</sup> Reasons for Decision, ¶ 96, ABC, Tab 3, pp. 37-38.

reasonable”<sup>57</sup> In Decision 97-19, the CRTC forbore from its power to ensure a rate is “just and reasonable” and only reserved that power for “...areas of the country not served by equal access switches (non-equal access areas)”<sup>58</sup>

47. The CRTC power under s. 27(1) concerning “just and reasonable” rates was inapplicable to this case. The motion judge did not find that the class members were in “non-equal access areas”. Bell tendered no evidence to this effect, and in fact submitted the opposite to the CRTC as of 2007:

Bell Canada submitted that fundamental changes had occurred since the release of Telecom Decisions 97-19... Bell Canada noted that these changes included the ubiquitous roll-out of equal access-capable switches...<sup>59</sup>

Bell Canada submitted that **equal access was available throughout its Ontario and Quebec operating territory**.<sup>60</sup>

48. The motion judge further stated:

Section 27(2) of the *Telecommunications Act* provides that no Canadian carrier shall “unjustly discriminate” in the providing of a service or the charging of a rate or give “undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.”

49. The appellants’ claim is not a discrimination action or one about “undue preferences”. This case does not directly or indirectly engage s. 27(2).

50. The motion judge incorrectly extended the scope of the CRTC’s jurisdiction from regulated matters to forborne matters. Forbearance is referenced in only one paragraph of the motion judge’s reasons in general terms, with no reference to the fact that the CRTC forbore from regulating the

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<sup>57</sup> Reasons for Decision, ¶ 22, ABC, Tab 3, p. 25.

<sup>58</sup> [Telecom Decision CRTC 97-19](#), ¶ 5 and 95, ABC, Tab 25, p. 615.

<sup>59</sup> [Telecom Decision 2007-56](#), at ¶ 8, BOA, Tab 28.

<sup>60</sup> [Telecom Decision 2007-56](#), at ¶ 14, BOA, Tab 28. [emphasis added]

long-distance rates at issue.<sup>61</sup> This clear error at the outset of his jurisdictional analysis taints the foundation for his decision to defer to the CRTC.

**(ii) The motion judge relied on inapplicable caselaw**

51. The motion judge cited a line of cases finding that courts generally defer to the CRTC.<sup>62</sup> However, none of the decisions that he relied upon considered forborne services. The decisions relied on by the motion judge considered either a regulated rate, regulated payment, term of service, or competing CRTC proceedings. For example:

- (a) *Penney v. Bell Canada*:<sup>63</sup> The dispute was over landline installations and considered alleged violations of Bell’s “Terms of Service” and a telephone installation charge, both of which were set and/or approved directly by the CRTC.<sup>64</sup>
- (b) *Allarco Entertainment 2008 Inc. v. Rogers Communications Inc.*:<sup>65</sup> The Court deferred to the CRTC because of competing related proceedings that were ongoing before the CRTC concerning the same subject matter as the civil action.<sup>66</sup>
- (c) *Mahar v. Rogers Cablesystems Ltd.*:<sup>67</sup> This case concerned a dispute over notices for cable service fees. The notices were mandated by the CRTC, and the plaintiff relied on a CRTC code of conduct to support their allegations.<sup>68</sup>

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<sup>61</sup> Reasons for Decision, ¶ 26, ABC, Tab 3, p. 26.

<sup>62</sup> *Ibid*, ¶¶ 97-98, ABC, Tab 3, p. 38.

<sup>63</sup> *Penney*, BOA, Tab 26.

<sup>64</sup> *Penney*, at ¶¶ 137 and 162-164, BOA, Tab 26.

<sup>65</sup> *Allarco*, BOA, Tab 4.

<sup>66</sup> *Allarco*, at ¶ 41, BOA, Tab 4.

<sup>67</sup> *Mahar v. Rogers Cablesystems Ltd.*, [1995 CanLII 7129 \(ON SC\)](#) (“*Mahar*”), BOA, Tab 22.

<sup>68</sup> *Mahar*, at ¶¶ 2, 5-6, 11, BOA, Tab 22.

52. In *Aka-Trudel*, the Quebec Court of Appeal distinguished these cases, and other cases relied on by the motion judge for these reasons. The Quebec Court of Appeal found that these cases do not extend to a situation where the CRTC has, through forbearance, decided not to exercise its regulatory powers.<sup>69</sup>

**(iii) The CRTC has stated it will not hear unregulated disputes**

53. The motion judge’s decision also conflicts with the CRTC’s own statements and practice. The CRTC has confirmed that it generally does not hear disputes over long-distance calls, but rather refers these disputes to another body, the Commission for Complaints for Telecommunication Services Inc. (“CCTS”):

In general, the Commission for Complaints for Telecommunication Services (CCTS) deals with consumer complaints about **forborne telecommunications services, including long-distance calls**, whereas complaints about regulated services are typically dealt with by the Commission.<sup>70</sup>

54. The CCTS was the subject of extensive argument below on the question of preferable procedure under s. 5(1)(d) of the *Class Proceedings Act*. The motion judge’s reasons did not reach this stage of the analysis. The CCTS is an organization funded by the industry, including Bell, to hear telecommunication service complaints from consumers and small business customers.<sup>71</sup> The CCTS “is authorized to receive complaints from Customers **regarding: (i) forborne (unregulated) retail telecommunications services**”.<sup>72</sup>

55. The motion judge made no finding that the CCTS was a preferable procedure, and he could

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<sup>69</sup> *Aka-Trudel*, at ¶ 27, BOA, Tab 8.

<sup>70</sup> Hebert Affidavit, Exhibit “O”: Telecom Regulatory Policy CRTC 2015-546, ¶ 37, ABC, Tab 26, p. 649. [emphasis added]

<sup>71</sup> CCTS Procedural Code, s. 1, BOA, Tab 11.

<sup>72</sup> CCTS Procedural Code, s. 3, BOA, Tab 11. [emphasis added]

not have made such a finding given that:

- (a) the CCTS prohibits representative and collective proceedings;<sup>73</sup>
- (b) a complaint at the CCTS is subject to a one-year limitation period;<sup>74</sup>
- (c) the monetary jurisdiction of the CCTS is capped at \$5,000;<sup>75</sup> and
- (d) the CCTS is not bound by precedent.<sup>76</sup>

**(iv) The fiduciary duty claim against Ontario cannot proceed to the CRTC**

56. As further detailed below, the appellants advance an *ad hoc* fiduciary duty claim against Ontario over how the OTMS was operated. The appellants' allegations against Ontario regarding a breach of its fiduciary duty do not allege a direct or indirect violation of any legislation that the CRTC is empowered to consider.

57. The CRTC's jurisdiction does not encompass a fiduciary duty claim against a provincial crown. The permanent stay of this claim in favour of the CRTC is in fact a dismissal without adjudication.

**(v) Staying the action deprives the appellants of a remedy**

58. The motion judge's stay decision is a stay in favour of no realistic alternative at all. The CRTC is not a viable alternative forum. Having incorrectly expanded the scope of the CRTC's jurisdiction, the motion judge proceeded to incorrectly summarize the adjudicative powers of the CRTC as follows:

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<sup>73</sup> CCTS Procedural Code, s. 6.17, BOA, Tab 11.

<sup>74</sup> CCTS Procedural Code, s.14.1, BOA, Tab 11.

<sup>75</sup> CCTS Procedural Code, s.14.1, BOA, Tab 11.

<sup>76</sup> CCTS Procedural Code, s. 20 and s. 20.1, BOA, Tab 11.

Section 27(3) of the *Telecommunications Act* empowers the CRTC to make determinations, as a question of fact, as to whether: (a) a Canadian carrier has complied with the requirements of s. 27; (b) a Canadian carrier has complied with the requirements of s. 25; and (c) a Canadian carrier has complied with a decision made under s. 24 imposing conditions on the offering and providing of a telecommunications service.

59. The adjudicative powers described above are inapplicable to this case, because:

- (a) the requirements of s. 27 are not at issue given the CRTC's forbearance of its relevant powers under s. 27;
- (b) compliance with s. 25, which requires approval of rates, is not applicable because long-distance rates were completely forborne; and
- (c) no s. 24 condition was engaged because the motion judge found that the appellants' notice claim under s. 72(1) of the *Telecommunications Act*<sup>77</sup> related to rates and was barred by the exception in s. 72(3)<sup>78</sup>—a determination that is not challenged on this appeal.

60. The only analysis of remedies by the motion judge is a conclusory statement that “meaningful remedies are available from the CRTC”.<sup>79</sup> This holding was made in the erroneous context of disregarding forbearance and the CRTC's lack of jurisdiction over a fiduciary duty claim against a provincial crown.

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<sup>77</sup> This cause of action was the only instance where the appellants pleaded that the defendants fell afoul of a CRTC order made under s. 24, which required them to give the class advance notice of the rates that they would be charged. The motion judge found that the claim in fact related to rates, a finding that the appellants do not challenge on appeal. Amended Fresh as Amended Statement of Claim, ¶¶ 53-54, ABC, Tab 4, pp. 61-62.

<sup>78</sup> Reasons for Decision, ¶¶ 87-90, ABC, Tab 3, p. 36.

<sup>79</sup> *Ibid*, ¶ 99, ABC, Tab 3, p. 38.

61. Further, the CRTC does not have the statutory power to review and revise historically unregulated rates.<sup>80</sup> The resolution of this action will require a review of historical free market rates. The CRTC itself has confirmed that it cannot review or regulate rates retroactively.<sup>81</sup>

The prospective nature of a positive approval scheme means that the Commission, which operates under such a scheme, cannot engage in retroactive or retrospective rate-making absent clear statutory authority.<sup>82</sup>

62. An action should not be stayed in favour of an alternative forum if that is in fact a stay in favour of an illusion or legal fiction. Here, deferring to the CRTC for a retrospective dispute over unregulated rates and a fiduciary duty claim against the crown deprives the class of access to justice and any realistic chance at an “ultimate remedy”, an outcome that the Supreme Court of Canada has warned against.<sup>83</sup> In *Kaynes v. BP P.L.C.*,<sup>84</sup> this Court lifted a stay on an Ontario class action in favour of the U.S. court because: “If the stay is not lifted, [the plaintiff] is deprived of the right to have his claim asserted as part of a class action in the U.S. District Court and can only proceed with an individual claim in that court because of choices made by U.S. lead plaintiffs”<sup>85</sup>... “That is a purely procedural barrier that prevents the moving party from having his claim heard on the merits.”<sup>86</sup>

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<sup>80</sup> *Morin*, at ¶ 47, BOA, Tab 23.

<sup>81</sup> Bell Canada – Revenue requirements for 1993 and 1994, Telecom Decision CRTC 93-12, 30 August 1993, BOA, Tab 28.

<sup>82</sup> Bell Canada – Revenue requirements for 1993 and 1994, Telecom Decision CRTC 93-12, 30 August 1993, BOA, Tab 28; *The Canadian Radio-television and Telecommunications Commission v. Bell Canada*, [1989] 1 S.C.R. 1722 (CanLII), BOA, Tab 30.

<sup>83</sup> *Weber*, at ¶ 57, BOA, Tab 33; see also *Shaw Cablesystems (SMB) Ltd v MTS Communications Inc.*, 2006 MBCA 29 (CanLII), at ¶ 33, BOA, Tab 27.

<sup>84</sup> 2016 ONCA 601 (“*Kaynes*”), BOA, Tab 18.

<sup>85</sup> *Kaynes*, at ¶ 19, BOA, Tab 18; See also: *Giustra v. Twitter, Inc.*, 2021 BCCA 466, BOA, Tab 17.

<sup>86</sup> *Kaynes*, at ¶ 16, BOA, Tab 18.

**(vi) The motion judge erred in not conducting a preferable procedure analysis**

63. Even if the CRTC had jurisdiction where it has forborne powers, the Superior Court has concurrent jurisdiction over the causes of action asserted against Bell.

64. In *Penney*, Justice Strathy (as he then was) conducted a full preferable procedure analysis under s. 5(1)(d) of the *Class Proceedings Act* in the context of duelling certification and stay motions.<sup>87</sup> That is the approach that the motion judge should have undertaken here. It was an error in law not to consider preferability when deferring jurisdiction. Had the motion judge engaged in that analysis, he could not have found that the CRTC was a preferable procedure to this class proceeding for the reasons submitted above.

65. The motion judge never weighed any of the factors related to access to justice, judicial economy or behaviour modification required when determining the preferable procedure.<sup>88</sup> A decision to defer a class action to another jurisdiction is only entitled deference when “it involves a weighing [and] a balancing of a number of factors”.<sup>89</sup> The motion judge erred in principle in not doing so.

66. The motion judge provided a cursory list as to why he was deferring to the CRTC.<sup>90</sup> The summary conclusions it contains are incorrect:

- (a) “meaningful remedies are available from the CRTC”: the motion judge never considered what remedies, if any, are available for a claim of disgorgement of

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<sup>87</sup> *Penney*, at ¶¶ 190-193, BOA, Tab 26.

<sup>88</sup> *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949 (“*Fischer*”), BOA, Tab 3.

<sup>89</sup> *Lewis v. WestJet Airlines Ltd*, 2022 BCCA 145, at ¶¶ 46, 50-51, BOA, Tab 21; citing *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 at ¶ 43, 2006 CanLII 913 (C.A.), BOA, Tab 25.

<sup>90</sup> Reasons for Decision, ¶ 99, ABC, Tab 3, p. 38.

historically unregulated charges where the CRTC cannot engage in retrospective rate-making, and no remedies existed *vis-à-vis* the Ontario crown;

- (b) “the CRTC has the subject matter expertise to decide the dispute and the Superior Court of Justice does not”: The CRTC has not engaged in a consideration of long-distance rates for 25 years; the appellants tendered an internationally acknowledged expert with an established methodology that could be employed by the trial judge for the retrospective analysis that is required;<sup>91</sup> and
- (c) “a ruling by the Superior Court runs the risk of discombobulating the national policies and administration of telecommunications service providers”: No national policy is engaged because the action concerns unregulated past rates, unique to the Ontario prison system between 2013 and 2021 and has no implications for any other provider, province, or even Ontario because a new provider is charging a miniscule fraction of what Bell charged the class.<sup>92</sup>

67. Had the motion judge conducted a proper preferable procedure analysis, he would have found that permanently staying this action deprives the class members of any realistic access to justice.

**C. The motion judge erred in staying the appellants’ fiduciary duty claim**

68. The motion judge gave no reason for the decision to permanently stay the plaintiffs’ *ad hoc*

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<sup>91</sup> Exhibit “A” to the Affidavit of Douglas Dawson sworn January 5, 2021 – Methodology Report dated January 5, 2021, ABC, Tab 13.

<sup>92</sup> Reasons for Decision, ¶¶ 99, ABC, Tab 3, p. 38.

fiduciary duty claim against Ontario in favour of the CRTC.<sup>93</sup> As submitted above, the CRTC does not have jurisdiction over a fiduciary duty claim against a provincial crown relating to the exercise of provincial statutory powers.

69. The appellants do not allege that Ontario is in a broad, all-encompassing fiduciary relationship with prisoners.<sup>94</sup> The pleaded duty is narrow in scope. The pleadings focus on the OTMS, and that system's significance to prisoners. The appellants plead the elements of a discrete or *ad hoc* fiduciary duty by Ontario with respect to prisoners' access to a telephone system consistent with appellate caselaw:<sup>95</sup>

- (a) The prisoners were at the mercy of Ontario for their communications needs.<sup>96</sup>
- (b) Ontario undertook, explicitly or implicitly,<sup>97</sup> to act in the best interests of prisoners with respect to their access to a communications system with their family and community members.<sup>98</sup>
- (c) Ontario had scope for the exercise of discretion or power,<sup>99</sup> which Ontario could, and did, unilaterally exercise to affect the prisoners' legal or substantial practical interests.<sup>100</sup>

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<sup>93</sup> *Farej v. Fellows*, [2022 ONCA 254](#) at ¶ 45, BOA, Tab 15

<sup>94</sup> Ontario argued below that a fiduciary relationship did not exist on the basis of some decisions stating that the province is not in a general fiduciary relationship with prisoners.

<sup>95</sup> *The Catalyst Capital Group Inc. v. Dundee Kilmer Developments Limited Partnership*, [2020 ONCA 272](#) (CanLII) ("*Catalyst*"), at ¶ 65, BOA, Tab 31.

<sup>96</sup> Amended Fresh as Amended Statement of Claim, ¶¶ 66-67, ABC, Tab 4, p. 65.

<sup>97</sup> *Catalyst*, at ¶ 65, BOA, Tab 31.

<sup>98</sup> FOI Letter / Synergy Contract, ABC, Tab 18, pp. 372, 286; RFP s. 2.1, ABC, Tab 20, p. 518.

<sup>99</sup> Amended Fresh as Amended Statement of Claim, ¶ 66, ABC, Tab 4, p. 65.

<sup>100</sup> *Ibid*, ¶¶ 65-67, ABC, Tab 4, p. 65.

70. The appellants plead that Ontario breached that *ad hoc* fiduciary duty by:<sup>101</sup>

- (a) putting Ontario's own interest in receiving maximum commissions on phone calls ahead of the prisoners' interest in having a meaningful and affordable means of communication; and
- (b) failing to require that Bell provide such reasonable and affordable telephone service, as undertaken, to the prisoners.

71. Although these issues were the subject of written and oral argument, they were not addressed in the motion judge's reasons. It appears that he concluded that the cause of action should be referred to the CRTC along with the balance of the claims, all of which he permanently stayed.<sup>102</sup>

72. The appellants' claim disclosed a cause of action against Ontario and was plainly outside CRTC jurisdiction. The motion judge erred in permanently staying it.

**D. The motion judge erred in dismissing the appellants' unconstitutional tax claim**

73. The motion judge dismissed the appellants' claim that the commissions percentage that Ontario levied was an unconstitutional indirect tax outside the jurisdiction of the province.<sup>103</sup>

74. Rather than applying the Rule 21 "plain and obvious" test, the motion judge decided the merits of the appellants' claim. In doing so, he relied on a ground that had not been argued or put

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<sup>101</sup> *Ibid*, ¶ 69, ABC, Tab 4, p. 65-66.

<sup>102</sup> Reasons for Decision, ¶ 102, ABC, Tab 3, p. 39.

<sup>103</sup> *Ibid*, ¶ 102, ABC, Tab 3, p. 39.

to the parties by the court: he erroneously found that the levy was a proprietary charge.<sup>104</sup>

75. As this Court recently emphasized in *Bowman*, a proper inquiry under s. 5(1)(a) of the *Class Proceedings Act* is confined to the plain and obvious test applicable on certification and avoids a merits analysis.<sup>105</sup> The motion judge did not apply that standard. Rather, similar to *Bowman*, the motion judge "...lost sight of this distinction. Instead of limiting his analysis to the application of the 'plain and obvious' test, he examined whether the appellants had established that [the commissions were an indirect tax or, as the motion judge found of his own initiative, a proprietary charge]. That over-stepped the proper boundaries of a *Class Proceedings Act* s. 5(1)(a) analysis."<sup>106</sup>

76. In *National Steel Car Limited v. Independent Electricity System Operator*,<sup>107</sup> this Court reversed a similar finding in an *ultra vires* tax claim for the same reason: deciding merits on a pleadings motion without a proper record.<sup>108</sup>

**(i) The unconstitutional tax claim discloses a cause of action**

77. Ontario indirectly charged the class, through Bell, a sum totalling in the millions of dollars.<sup>109</sup> The appellants plead that this levy was an indirect tax, *ultra vires* the province under sections 91-92 of the *Constitution Act, 1867*.<sup>110</sup> The appellants have pleaded the necessary

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<sup>104</sup> *Ibid.*, ¶ 80, ABC, Tab 3, p. 35.

<sup>105</sup> *Bowman v. Ontario*, [2022 ONCA 477](#) ("*Bowman*") at ¶¶ 41-42, BOA, Tab 10.

<sup>106</sup> *Bowman*, at ¶ 42, BOA, Tab 10.

<sup>107</sup> [2019 ONCA 929](#), ("*National Steel Car*"), BOA, Tab 24.

<sup>108</sup> *National Steel Car*, at ¶ 10, BOA, Tab 24.

<sup>109</sup> Ontario's Request for Proposals stated: "The Commission Percentage Rate proposed must be no less than 25% of the Gross Revenue generated by both the OTMS and conventional public pay telephones." RFP, ABC, Tab 20, p. 532. See 2.4 Commission Paid to the Ministry on p. 42.

<sup>110</sup> Alternatively, appellants plead that if the court finds at trial that the commissions were direct taxation *intra vires* the Province, the commissions constituted unlawful taxation having been

elements of the claim under the four-part *Eurig* test.<sup>111</sup> The commissions were: (1) enforceable by law; (2) imposed by the Minister on behalf of Ontario under the authority given to the Minister by the legislature; (3) levied by a public body; and (4) intended for a public purpose.<sup>112</sup>

**(ii) Error in deciding that the commissions were a “proprietary charge”**

78. Ontario did not argue that the commissions were a proprietary charge, and that matter was not briefed or argued below. The motion judge did not ask the parties to address it. He nevertheless summarily found that the levy was a proprietary charge.<sup>113</sup>

79. The motion judge relied on an *obiter* reference to proprietary charges in *620 Connaught Ltd. v. Canada*,<sup>114</sup> relating to the licencing fees for the right to sell liquor.<sup>115</sup> In *620 Connaught Ltd.*, the Supreme Court of Canada did not decide the issue of proprietary charges, stating: “Whether [the fees] could be [a proprietary charge] is better left to be decided **at a time when it is properly raised and argued by the parties**”.<sup>116</sup> The motion judge also referred to *Toronto Distillery Company Ltd. v Ontario (Alcohol and Gaming Commission of Ontario)*,<sup>117</sup> another case relating to fees imposed on liquor owned by the province.<sup>118</sup>

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imposed on the class through a contract between Ontario and Bell, instead of through clear legislative taxation language from the Ontario Legislature. Amended Fresh as Amended Statement of Claim, ¶ 56, ABC, Tab 4, p. 62.

<sup>111</sup> *Eurig Estate (Re)*, [1998 CanLII 801 \(SCC\)](#), (“*Eurig Estate*”) at ¶ 15, BOA, Tab 13; *620 Connaught Ltd. v Canada (Attorney General)*, [2008 SCC 7](#) (“*620 Connaught*”) at ¶ 22, BOA, Tab 1; *National Steel Car* at ¶ 29, BOA, Tab 24.

<sup>112</sup> Amended Fresh as Amended Statement of Claim, ¶¶ 55-64, ABC, Tab 4, pp. 62-64

<sup>113</sup> Reasons for Decision, ¶¶ 80-81, 83, ABC, Tab 3, p. 35.

<sup>114</sup> [2008 SCC 7](#), BOA, Tab 1.

<sup>115</sup> *620 Connaught Ltd.*, at ¶ 49, BOA, Tab 1.

<sup>116</sup> *620 Connaught* at ¶ 49, BOA, Tab 1. [emphasis added]

<sup>117</sup> [2016 ONSC 2202](#), affirmed 2016 ONCA 960 (“*Toronto Distillery*”), BOA Tab 32.

<sup>118</sup> Reasons for Decision, ¶ 83, ABC, Tab 3, p. 35.

80. Regardless of the motion judge's failure to raise the issue with the parties, the motion judge erred in principle in making a finding that the levy here was a proprietary charge. No provincial property existed in this case with respect to which the levy could have attached as a proprietary charge. Both Ontario's RFP and the OTMS Agreement referred to the telephone services as "Deliverables" by Bell.<sup>119</sup> Ontario levied the commissions on a phone service that the class paid for and that was being provided to the class by a third party, Bell.

81. This was not a case such as *Toronto Distillery* where the court on summary judgment applied the correct *Eurig* test and found that the taxation test was met;<sup>120</sup> but the court alternatively found the fees imposed on liquor owned by the province were a proprietary charge because "there is no doubt that the LCBO is the owner and commercial supplier of the spirits in question".<sup>121</sup>

**(iii) Error in deciding that a contract between the defendants was dispositive of the claim**

82. Ontario argued that the commissions were paid under the OTMS Agreement and therefore were a contractual payment (the other alternative finding in *Toronto Distillery*<sup>122</sup>). The motion judge stated:

The authorities establish 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 the taxpayer's consent while contracts are a matter of a voluntary agreement between the parties to the

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<sup>119</sup> RFP s 2.3, ABC, Tab 20, p. 518; FOI Letter/Synergy Contract, ABC, Tab 18, p. 300, 312, see e.g. OTMS agreement ss 1.01, 3.01.

<sup>120</sup> *Toronto Distillery* at ¶ 24, BOA, Tab 32.

<sup>121</sup> *Toronto Distillery* at ¶ 30, BOA, Tab 32.

<sup>122</sup> *Toronto Distillery* at ¶¶ 44-47, BOA, Tab 32.

contract. Thus, contractual payments do not satisfy the indicia of a tax of being an imposed obligation.<sup>123</sup>

83. The motion judge erred in principle in making the merits determination that the existence of a contract between the defendants here made the levies paid by the appellants and the class voluntary. The appellants and class members were not a party to any contract with Ontario. They had no choice but to pay the levy to Ontario, indirectly through Bell, if they wanted to make a phone call.

84. The motion judge's reasoning places form over substance in the constitutional delineation of the powers over taxation.<sup>124</sup> Under the motion judge's analysis, the only thing that stands between a province having the constitutional power to levy indirect taxation is if the province has contracted with a third party to collect that tax. The existence of a contract should not be an automatic defence to an unconstitutional tax claim. Such an approach undermines s. 92(2) of the *Constitution Act, 1867*, which limits provincial jurisdiction to direct taxation.<sup>125</sup> The motion judge's reasoning invites what the Supreme Court of Canada has warned against in cases of *ultra vires* indirect taxation by the provinces and territories:

To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial Legislature **to do indirectly what it could not do directly, and by covert means to impose illegal burdens.**<sup>126</sup>

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<sup>123</sup> Reasons for Decision, ¶ 84, ABC, Tab 3, p. 35.

<sup>124</sup> *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007 SCC 1 \(CanLII\)](#), [2007] 1 SCR 3 (“*Kingstreet*”), at ¶¶ 14-15, BOA, Tab 19.

<sup>125</sup> See e.g. *National Steel Car*, at ¶ 27, BOA, Tab 24; *Kingstreet* at ¶ 4, BOA, Tab 19; *Eurig Estate*, at ¶ 14, BOA, Tab 13.

<sup>126</sup> *Kingstreet* at ¶ 16, BOA, Tab 19, quoting *Amax Potash Ltd. v. Government of Saskatchewan*, [1976 CanLII 15 \(SCC\)](#), [1977] 2 S.C.R. 576, p 590, BOA, Tab 5.

**PART V - ORDER REQUESTED**

85. The appellants respectfully request an order: (i) vacating the order of the motion judge, which permanently stayed the action and dismissed the *ultra vires* tax claim; and (ii) awarding costs of the underlying motions and this appeal to the appellants.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**



July 28, 2022

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**COURT OF APPEAL FOR ONTARIO**

**B E T W E E N :**

**VANESSA FAREAU and RANSOME CAPAY**

**Plaintiffs  
(Appellants)**

**- and -**

**BELL CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

**Defendants  
(Respondents)**

*Proceeding under the Class Proceedings Act, 1992*

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**CERTIFICATE**

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I estimate that two hours will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT TORONTO, ONTARIO this 28th day of July, 2022.



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**SCHEDULE “A”**  
**LIST OF AUTHORITIES**

<i>Tab</i>	<i>Authority</i>	<i>Para #'s</i>
1.	<i>620 Connaught Ltd. v Canada (Attorney General)</i> , <a href="#">2008 SCC 7</a>	<a href="#">22</a> , <a href="#">49</a>
2.	<i>1318847 Ontario Limited v. Laval Tool &amp; Mould Ltd.</i> , <a href="#">2017 ONCA 184</a>	<a href="#">81</a>
3.	<i>AIC Limited v. Fischer</i> , 2013 SCC 69, [2013] 3 S.C.R. 949	
4.	<i>Allarco Entertainment 2008 Inc. v. Rogers Communications Inc.</i> , [2009] O.J. No. 5252, <a href="#">2009 CanLII 68464 (ON SC)</a>	<a href="#">41</a>
5.	<i>Amax Potash Ltd. v. Government of Saskatchewan</i> , <a href="#">1976 CanLII 15 (SCC)</a> , [1977] 2 S.C.R. 576	p. 590
6.	<i>Barker v. Barker</i> , <a href="#">2018 ONCA 255 (CanLII)</a>	<a href="#">18</a>
7.	<i>Bazos v Bell Media Inc</i> , <a href="#">2018 ONSC 6146 (CanLII)</a>	<a href="#">48</a>
8.	<i>Bell Canada c Aka-Trudel</i> , <a href="#">2018 QCCA 829 (CanLII)</a> ; leave to appeal to the Supreme Court dismissed: 2019 CanLII 11818 (SCC)	<a href="#">16</a> , <a href="#">23</a> , <a href="#">27</a> , <a href="#">24</a>
9.	<i>Bell Canada c. Directeur des poursuites criminelles et pénales (Office de la protection du consommateur)</i> , <a href="#">2022 QCCA 408</a>	<a href="#">95-97</a>
10.	<i>Bowman v. Ontario</i> , <a href="#">2022 ONCA 477</a>	<a href="#">26</a> , <a href="#">41-42</a>
11.	CCTS Procedural Code	ss. 1, 3, 6.17, 14.1, 20, 20.1
12.	<i>Elementary Teachers Federation of Ontario v. York Region District School Board</i> , <a href="#">2022 ONCA 476</a>	<a href="#">43</a>
13.	<i>Eurig Estate (Re)</i> , <a href="#">1998 CanLII 801 (SCC)</a> , [1998] 2 SCR 565	<a href="#">14</a> , <a href="#">15</a> , <a href="#">25</a>
14.	<i>Fareau v. Bell Canada</i> , <a href="#">2022 ONSC 2479 (CanLII)</a>	<a href="#">58</a>
15.	<i>Farej v. Fellows</i> , <a href="#">2022 ONCA 254</a>	<a href="#">45</a>
16.	<i>Fontaine v. Canada (Attorney General)</i> , <a href="#">2020 ONCA 688</a>	<a href="#">30</a>
17.	<i>Giustra v. Twitter, Inc.</i> , <a href="#">2021 BCCA 466</a>	

18.	<i>Kaynes v. BP P.L.C.</i> , <a href="#">2016 ONCA 601</a>	<a href="#">16</a> , <a href="#">19</a>
19.	<i>Kingstreet Investments Ltd. v. New Brunswick (Finance)</i> , <a href="#">2007 SCC 1 (CanLII)</a> , [2007] 1 SCR 3	<a href="#">4</a> , <a href="#">14</a> , <a href="#">15</a> , <a href="#">16</a>
20.	<i>Law Society of British Columbia v. Trinity Western University</i> , <a href="#">2018 SCC 32</a> , [2018] 2 S.C.R. 293	<a href="#">116</a>
21.	<i>Lewis v. WestJet Airlines Ltd.</i> , <a href="#">2022 BCCA 145</a>	<a href="#">46</a> , <a href="#">50-51</a> , <a href="#">88-89</a>
22.	<i>Mahar v. Rogers Cablesystems Ltd.</i> , (1995), 25 O.R. 9 (3d) 690 (Gen. Div.), <a href="#">1995 CanLII 7129 (ON SC)</a>	<a href="#">2</a> , <a href="#">5-6</a> , <a href="#">11</a>
23.	<i>Morin c. Bell Canada</i> , <a href="#">2012 QCCS 4191 (CanLII)</a>	<a href="#">5-11</a> , <a href="#">17</a> , <a href="#">18</a> , <a href="#">44</a> , <a href="#">45</a> , <a href="#">46-47</a>
24.	<i>National Steel Car Ltd. v. Independent Electricity System Operator</i> , <a href="#">2019 ONCA 929</a>	<a href="#">10</a> , <a href="#">27</a> , <a href="#">29</a>
25.	<i>Pearson v. Inco Ltd.</i> , <a href="#">2006 CanLII 913 (C.A.)</a>	<a href="#">43</a>
26.	<i>Penney v. Bell Canada</i> , <a href="#">2010 ONSC 2801</a>	<a href="#">125</a> , <a href="#">137</a> , <a href="#">149</a> , <a href="#">162-</a> <a href="#">164</a> , <a href="#">190-</a> <a href="#">193</a>
27.	<i>Shaw Cablesystems (SMB) Ltd v MTS Communications Inc.</i> , <a href="#">2006 MBCA 29 (CanLII)</a>	<a href="#">33</a>
28.	Telecom Decision CRTC 93-12, 30 August 1993	
29.	Telecom Decision <a href="#">2007-56</a>	8, 14
30.	<i>The Canadian Radio-television and Telecommunications Commission v. Bell Canada</i> , <a href="#">1989 CanLII 67 (SCC)</a> , [1989] 1 S.C.R. 1722	
31.	<i>The Catalyst Capital Group Inc. v. Dundee Kilmer Developments Limited Partnership</i> , <a href="#">2020 ONCA 272 (CanLII)</a>	<a href="#">65</a>
32.	<i>Toronto Distillery Company Ltd. v Ontario (Alcohol and Gaming Commission of Ontario)</i> , <a href="#">2016 ONSC 2202</a> , affirmed <a href="#">2016 ONCA 960</a>	<a href="#">24</a> , <a href="#">30</a> , <a href="#">42</a> , <a href="#">44-47</a>
33.	<i>Weber v. Ontario Hydro</i> , <a href="#">1995 CanLII 108 (SCC)</a>	<a href="#">57</a>

**SCHEDULE “B”**  
**RELEVANT STATUTES**

*Class Proceedings Act, 1992, S.O. 1992, c. 6*

**Certification**

**5** (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
  - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

**Idem, subclass protection**

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

- (a) would fairly and adequately represent the interests of the subclass;
- (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2).

### **Evidence as to size of class**

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class. 1992, c. 6, s. 5 (3).

### **Adjournments**

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence. 1992, c. 6, s. 5 (4).

### **Certification not a ruling on merits**

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding. 1992, c. 6, s. 5 (5).

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*Rules of Civil Procedure O. Reg. 575/07, s. 6 (1)*

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## **RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL**

### **Where Available**

#### **To Any Party on a Question of Law**

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

### **To Defendant**

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

**Jurisdiction**

(a) the court has no jurisdiction over the subject matter of the action;

**Capacity**

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

**Another Proceeding Pending**

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

**Action Frivolous, Vexatious or Abuse of Process**

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

**Motion to be Made Promptly**

21.02 A motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs. R.R.O. 1990, Reg. 194, r. 21.02.

**Factums Required**

21.03 (1) On a motion under rule 21.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 15.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 5.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 5.

(4) Revoked: O. Reg. 394/09, s. 5.

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*Telecommunications Act* (S.C. 1993, c. 38)

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**Canadian Telecommunications Policy Objectives**

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

- (a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;
- (b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;
- (c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;
- (d) to promote the ownership and control of Canadian carriers by Canadians;
- (e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;
- (f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;
- (g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;
- (h) to respond to the economic and social requirements of users of telecommunications services; and
- (i) to contribute to the protection of the privacy of persons.

...

### **Conditions of service**

**24** The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.

...

### **Telecommunications rates to be approved**

**25** (1) No Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.

**Filing of joint tariffs**

(2) A joint tariff agreed on by two or more Canadian carriers may be filed by any of the carriers with an attestation of the agreement of the other carriers.

**Form of tariffs**

(3) A tariff shall be filed and published or otherwise made available for public inspection by a Canadian carrier in the form and manner specified by the Commission and shall include any information required by the Commission to be included.

**Special circumstances**

(4) Notwithstanding subsection (1), the Commission may ratify the charging of a rate by a Canadian carrier otherwise than in accordance with a tariff approved by the Commission if the Commission is satisfied that the rate

(a) was charged because of an error or other circumstance that warrants the ratification; or

(b) was imposed in conformity with the laws of a province before the operations of the carrier were regulated under any Act of Parliament.

...

**Just and reasonable rates**

**27** (1) Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.

**Unjust discrimination**

(2) No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

**Questions of fact**

(3) The Commission may determine in any case, as a question of fact, whether a Canadian carrier has complied with this section or section 25 or 29, or with any decision made under section 24, 25, 29, 34 or 40.

**Burden of proof**

(4) The burden of establishing before the Commission that any discrimination is not unjust or that any preference or disadvantage is not undue or unreasonable is on the Canadian carrier that discriminates, gives the preference or subjects the person to the disadvantage.

**Method**

(5) In determining whether a rate is just and reasonable, the Commission may adopt any method or technique that it considers appropriate, whether based on a carrier's return on its rate base or otherwise.

**Exception**

(6) Notwithstanding subsections (1) and (2), a Canadian carrier may provide telecommunications services at no charge or at a reduced rate

(a) to the carrier's directors, officers, employees or former employees; or

(b) with the approval of the Commission, to any charitable organization or disadvantaged person or other person

...

**Forbearance****Forbearance by Commission**

**34** (1) The Commission 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 Commission finds as a question of fact that to refrain would be consistent with the Canadian telecommunications policy objectives.

**Idem**

(2) Where the Commission 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, the Commission shall make a determination to refrain, to the extent that it considers appropriate, 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 the service or class of services.

**Exception**

(3) The Commission shall not make a determination to refrain under this section in relation to a telecommunications service or class of services if the Commission 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.

**Effect of forbearance**

(4) The Commission shall declare that sections 24, 25, 27, 29 and 31 do not apply to a Canadian carrier to the extent that those sections are inconsistent with a determination of the Commission under this section.

...

## **Civil Liability Damages**

**72** (1) Subject to any limitation of liability imposed in accordance with this or any other Act, a person who has sustained loss or damage as a result of any act or omission that is contrary to this Act or any special Act or a decision or regulation made under either of them may, in a court of competent jurisdiction, sue for and recover an amount equal to the loss or damage from any person who engaged in, directed, authorized, consented to or participated in the act or omission.

### **Limitation**

(2) An action may not be brought in respect of any loss or damage referred to in subsection (1) more than two years after the day on which the act or omission occurred.

### **Exception**

(3) Nothing in subsection (1) or (2) applies to any action for breach of a contract to provide telecommunications services or any action for damages in relation to a rate charged by a Canadian carrier.

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### *Ministry of Correctional Services Act, R.S.O. 1990, c. M.22*

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**5** It is the function of the Ministry to supervise the detention and release of inmates, parolees and probationers and to create for them an environment in which they may achieve changes in attitude by providing training, treatment and services designed to afford them opportunities for successful personal and social adjustment in the community, and, without limiting the generality of the foregoing, the objects of the Ministry are to,

...

(c) provide programs and facilities designed to assist in the rehabilitation of inmates;

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### *Constitution Act, 1867*

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## **VI. Distribution of Legislative Powers Powers of the Parliament Legislative Authority of Parliament of Canada**

**91** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
- 1A. The Public Debt and Property
2. The Regulation of Trade and Commerce.
- 2A. Unemployment insurance.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.

21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

**Exclusive Powers of Provincial Legislatures**  
**Subjects of exclusive Provincial Legislation**

**92** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:
  - (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
  - (b) Lines of Steam Ships between the Province and any British or Foreign Country:
  - (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

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*Courts of Justice Act, R.S.O. 1990, c. C.43*

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**Court of Appeal jurisdiction**

**6** (1) An appeal lies to the Court of Appeal from,

...

(b) a final order of a judge of the Superior Court of Justice, except,

(i) an order referred to in clause 19 (1) (a) or (a.1), or

(ii) an order from which an appeal lies to the Divisional Court under another Act;

**VANESSA FAREAU, et al.**  
**Plaintiffs (Appellants on Appeal)**

**-and-**

**BELL CANADA, et al.**  
**Defendants (Respondents on Appeal)**

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**Court File No. C70691**

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**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT TORONTO  
Proceeding under the *Class Proceedings Act, 1992*

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**FACTUM OF THE APPELLANTS**

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