

**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

Defendant  
(Respondent)

Proceeding under the *Class Proceedings Act, 1992*

**FACTUM OF THE RESPONDENT, BELL CANADA**

November 11, 2022

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## TABLE OF CONTENTS

<b>PART I - OVERVIEW – NATURE OF CASE AND ISSUES</b> .....	<b>1</b>
<b>PART II - SUMMARY OF FACTS</b> .....	<b>3</b>
A. BACKGROUND TO THE OTMS.....	3
B. THE MINISTRY SELECTS BELL TO PROVIDE OTMS SERVICES .....	4
C. THE MINISTRY REPLACES BELL AS THE OTMS SERVICE PROVIDER .....	6
D. THE CRTC’S REGULATORY FRAMEWORK .....	7
(i) <i>Overview of the role of the CRTC in general</i> .....	7
(ii) <i>CRTC decisions related to the rates charged for non-cash payphone calls</i> .....	10
(iii) <i>CRTC decisions related to inmate services</i> .....	11
E. DECISION UNDER APPEAL .....	12
<b>PART III - ISSUES</b> .....	<b>14</b>
<b>PART IV - LAW &amp; ARGUMENT</b> .....	<b>14</b>
A. A DEFERENTIAL STANDARD OF REVIEW APPLIES .....	14
B. JUSTICE PERELL DID NOT ERR BY NOT EXPRESSLY REFERRING TO THE <i>WEBER</i> TEST .....	15
C. JUSTICE PERELL DID NOT ERR IN HIS APPLICATION OF THE <i>WEBER</i> FACTORS.....	16
(i) <i>Justice Perell did not err in assessing the scope of the CRTC’s jurisdiction</i> .....	16
(ii) <i>Justice Perell did not err in determining that the CRTC was the preferred forum to resolve this dispute</i> .....	21
(iii) <i>Jurisprudence from Quebec is irrelevant to this analysis</i> .....	28
<b>PART V - ORDER REQUESTED</b> .....	<b>30</b>
<b>SCHEDULE “A” – LIST OF AUTHORITIES</b> .....	<b>31</b>
<b>SCHEDULE “B” – RELEVANT STATUTORY PROVISIONS</b> .....	<b>33</b>

## PART I - OVERVIEW – NATURE OF CASE AND ISSUES

1. The Respondent, Bell Canada (“**Bell**”), is a national telecommunications service provider established by an Act of Parliament.<sup>1</sup> In that Act, Parliament declared that the works of Bell are “for the general advantage of Canada”, reflecting the national importance of telecommunications.<sup>2</sup> Because of the national importance of telecommunications, Parliament established a federal regulatory regime and created a body, the Canadian Radio-television and Telecommunications Commission (the “**CRTC**”), to regulate telecommunications. Parliament mandated that the decisions of the CRTC are reviewable by the Federal Court of Appeal.<sup>3</sup>

2. The claim in this case, if allowed, would disrupt a fundamental aspect of the telecommunications regime: the reasonableness of call rates, specifically those charged by Bell for calls made by inmates at correctional facilities in Ontario. Bell provided a telephone service to inmates through its operation of the Offender Telephone Management System (“**OTMS**”) under an agreement with the Ontario Ministry of Community Safety and Correctional Services (the “**Ministry**”). The putative class asserted that the rates Bell charged inmates were “exorbitant”.<sup>4</sup> This allegation was at the core of each cause of action asserted against Bell. As such, the claim would require the Superior Court of one province to engage in telecommunications rate setting, something that the Supreme Court of Canada has held is at “the very heart of the CRTC’s specialized expertise”.<sup>5</sup>

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<sup>1</sup> *Bell Canada Act*, SC 1987, c 19, s. 2, definition of “company”.

<sup>2</sup> *Bell Canada Act*, SC 1987, c 19, s. 5.

<sup>3</sup> *Mahar v Rogers Cablesystems Ltd*, [1995] OJ no 3035, ¶35, Bell BOA, Tab 1; *Telecommunications Act*, SC 1993, c 38 (“**Telecommunications Act**”), s. 64.

<sup>4</sup> The Claim uses many other terms including “excessive” and “astronomical” to describe the rates charged.

<sup>5</sup> *Bell Canada v Bell Aliant Regional Communications*, [2009 SCC 40](#), ¶38, Bell BOA, Tab 2; see also *Penney v Bell Canada*, [2010 ONSC 2801](#), ¶140, Bell BOA, Tab 3.

3. Bell brought a motion seeking a declaration that the Ontario Superior Court lacked jurisdiction to hear the matter or, in the alternative, ought to exercise its discretion to decline jurisdiction, and defer to the CRTC's specialized expertise. The motion judge, Justice Perell, understood the potential ramifications of the Appellants' claim: the claim would require the Superior Court to encroach on a central responsibility of the CRTC (*i.e.*, assessing rates) and to weigh policy considerations. He recognized that the CRTC has the subject matter expertise to deal with these issues and that the Superior Court "does not".<sup>6</sup> Accordingly, he declined jurisdiction and held that the Superior Court ought to stay the action and defer to the jurisdiction and expertise of the CRTC.

4. The Appellants now seek to challenge Justice Perell's exercise of discretion in this appeal. They have failed to identify any error of principle or palpable and overriding factual error. Much of their factum is focused on re-arguing the issues in this Court. Further, the Appellants' submission that Justice Perell failed to properly consider that the CRTC forbore from regulating long-distance rates, which is central to their argument, portrays a fundamental misunderstanding of forbearance.

5. A decision by a judge to exercise discretion to decline jurisdiction is entitled to considerable deference on appeal.<sup>7</sup> There is no reason to interfere with the decision at issue here. Contrary to what the Appellants suggest, Justice Perell considered the correct factors and made no error in his application of those factors in his decision to decline jurisdiction. His conclusion to defer to the specialized expertise of the CRTC is well supported in the jurisprudence. This

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<sup>6</sup> Reasons for Decision, ¶¶ 96, 97, 99, Appeal Book and Compendium ("ABC"), Tab 3, p 100.

<sup>7</sup> *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, [2016 SCC 30](#), ¶54, Bell BOA, Tab 4.

Court and others have acknowledged the broad powers and specialized expertise of the CRTC and held that it is entitled to curial deference.

6. As such, Bell asks this Court to dismiss this appeal and to award it costs.

## **PART II - SUMMARY OF FACTS**

### **A. Background to the OTMS**

7. Telephone services available to inmates are subject to restrictions for security reasons. Historically, however, there were few restrictions on inmate telephone services at correctional and penal facilities in Ontario (“**Facilities**”). This led to certain abuses, such as inmates using phones to place calls to harass or intimidate victims, witnesses, lawyers and judges, and to participate in criminal conspiracies.<sup>8</sup> Correctional Services Canada wished to solve this problem. Bell worked with this agency to develop a new inmate telephone system with appropriate limits, such as restrictions on which numbers inmates could call, the duration of calls, and the number of times inmates could dial specific numbers. Bell sought approval from the CRTC for this system, indicating that the purpose of these restrictions was to protect the public “from harassing and intimidating calls”.<sup>9</sup>

8. Because of the unique restrictions placed on inmate telephone services, the regulations that typically governed public telephones (*i.e.*, payphones) could not apply. The CRTC approved a separate regulatory regime for inmate telephone services, Bell General Tariff 292 (“**GT 292**”).<sup>10</sup> GT 292 acknowledges that a correctional institution is able to place restrictions

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<sup>8</sup> Affidavit of Pierre-Luc Hebert, affirmed June 30, 2021 (“**Hebert Affidavit**”), Ex “V”, Respondent’s Compendium (“**RC**”), Tab 1, p 5, Exhibit Book (“**EB**”), Tab 19(v), p 1037-1038.

<sup>9</sup> Hebert Affidavit, Ex “V”, RC, Tab 1, p 8, EB, Tab 19(v), p 1037-1038.

<sup>10</sup> Hebert Affidavit, Ex “W”, RC, Tab 2, p 8, EB, Tab 19(w), p 1040. Tariffs set out the terms pursuant to which a telecommunications company will provide its services, including rates, charges and conditions. The provider

on inmates' uses of the telephones. GT 292 also set the rates for these calls, mandating that calls with inmates were to be "rated in the same manner as calls originating from other public telephones".<sup>11</sup>

**B. The Ministry selects Bell to provide OTMS services**

9. In September 2012, the Ministry needed a telecommunications provider to operate the telephone system for inmates at Facilities. The Ministry called this system the OTMS.

10. The Ministry released a request for proposals (the "RFP") for telecommunications companies to provide these OTMS services.<sup>12</sup> The RFP required the successful proponent to have the capability to place certain restrictions on the use of the telephones in the Facilities, consistent with GT 292.<sup>13</sup> This included limits on the length and destinations of calls (s. 2.3.4) as well as restrictions to ensure that inmates could not use calling cards or toll numbers to circumvent these limits (ss. 2.3.5 and 2.3.6).<sup>14</sup> The RFP also required that the successful proponent pay a commission to the Ministry that could not be less than 25% of gross revenues (not profit) from the OTMS.<sup>15</sup>

11. Several telecommunications companies responded to the RFP. Ultimately, the Ministry selected Bell.<sup>16</sup> Bell was required to enter into a form of agreement that was attached as an

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will prepare a tariff and submit it to the CRTC for review and approval before the tariff can be implemented. See *Telecommunications Act*, s. 25.

<sup>11</sup> Hebert Affidavit, Ex "W", RC, Tab 2, p 8, EB, Tab 19(w), p 1040.

<sup>12</sup> Affidavit of Paul Gortana, affirmed June 30, 2021 ("**Gortana Affidavit**"), ¶5, 8, ABC, Tab 19, p 504-505, EB, Tab 18, p 663-664.

<sup>13</sup> Gortana Affidavit, ¶6, ABC, Tab 19, p 505, EB, Tab 18, p 664.

<sup>14</sup> Affidavit of Paul Gortana, affirmed October 1, 2021 ("**2<sup>nd</sup> Gortana Affidavit**"), ¶14, RC, Tab 3, p 11, EB, Tab 21, p 1051-1052.

<sup>15</sup> Gortana Affidavit, Ex "A" (s. 2.3), ABC, Tab 20, p 519, EB, Tab 18(a), p 678.

<sup>16</sup> Gortana Affidavit, ¶8, ABC, Tab 19, p 505, EB, Tab 18, p 664.

appendix to the RFP (the “OTMS Agreement”).<sup>17</sup>

12. The OTMS that the Ministry required Bell to operate at its Facilities had the following features:

- (a) inmates could only use public payphones at Facilities to make collect calls;
- (b) a control centre applied multiple limits to the telephone lines at a Facility;
- (c) the Ministry determined the limits that the control centre applied, which included restrictions on the duration of calls, the number of times a destination could be called, or whether a destination was blocked all together;
- (d) when an inmate picked up a receiver, they inputted their language and the number they wished to reach; and
- (e) the control centre then determined whether the proposed call fell into one of the prohibited categories.<sup>18</sup>

13. With respect to rates, the OTMS Agreement required Bell to ensure that the local and long-distance rates for calls made on the OTMS were “no higher than the published residential rates established by the Incumbent Local Exchange Carrier (“ILEC”) applicable to a comparable call” made outside of the Facility.<sup>19</sup> This language mirrored Bell’s obligations under GT 292, which mandated that inmate calls be rated in the same manner as calls originating from “other public telephones”.<sup>20</sup> To comply with this provision (and GT 292), Bell charged persons paying for calls using the OTMS the same (or lower) rates as the ones Bell charged its residential

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<sup>17</sup> Gortana Affidavit, ¶7, ABC, Tab 19, p 505, EB, Tab 18, p 664.

<sup>18</sup> Hebert Affidavit, ¶5, 42, ABC, Tab 23, p 588, 604, EB, Tab 19, p 748, 764. There is one exception: the Ministry required Bell to enable a PIN-based system at the Central East Correctional Center. A PIN-based system is a prepaid system wherein an inmate has an account with funds loaded into it. The inmate can then use this account to pay for calls. See 2<sup>nd</sup> Gortana Affidavit, ¶6, RC, Tab 3, p 11, EB, Tab 21, p 1048.

<sup>19</sup> Gortana Affidavit, ¶9, ABC, Tab 19, p 505, EB, Tab 18, p 664.

<sup>20</sup> Hebert Affidavit, Ex “W”, RC, Tab 1, p 5, EB, Tab 19(w), p 1040.

customers who used their home telephone to make collect calls or individuals who used public payphones to make collect calls.<sup>21</sup>

**C. The Ministry replaces Bell as the OTMS service provider**

14. In 2020, the Ministry selected a different telecommunications company which replaced Bell in providing OTMS services, Synergy Inmate Phone Solutions Inc. (“**Synergy**”).

15. In their factum, the Appellants state that “Synergy calls are 16-32 times cheaper than Bell”.<sup>22</sup> There is no evidence to support this statement. The document on which the Appellants rely is Synergy’s agreement with the Ministry (the “**Synergy Agreement**”). However, s 5.01 of the Synergy Agreement states that the rates charged to inmates are the rates listed in the plaintiffs’ chart “*as increased by the amount of any percentage rate set by the Ministry*”.<sup>23</sup> There is no evidence in the record about the Ministry’s percentage rate and thus no evidence about what rates Synergy is actually charging inmates.

16. The evidence suggests some displeasure with Synergy’s operation of the OTMS. At a Niagara Facility, inmates launched a hunger strike in opposition to the new system Synergy implemented. Synergy uses a PIN-based system to provide OTMS services.<sup>24</sup> The inmates at the Niagara Facility were protesting the difficulties of maintaining a balance in a PIN account.<sup>25</sup> This hunger strike undermines the implied suggestion at paragraph 26 of the Appellants’ factum

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<sup>21</sup> Gortana Affidavit, ¶10, ABC, Tab 19, p 506, EB, Tab 18, p 665.

<sup>22</sup> Appellants Factum, ¶26.

<sup>23</sup> Affidavit of Nadine Blum, affirmed May 13, 2021 (“**Supp Blum Affidavit**”), Ex “A”, ABC, Tab 18, p 449, EB, Tab 24(a), p 1120. [emphasis added]

<sup>24</sup> As Justice Perell noted in his Reasons, Bell was also required to and did have the capability to provide OTMS services via a PIN-based system. However, with one insignificant exception, the Ministry only used a collect call service. See Reasons for Decision, ¶34, ABC, Tab 3, p 27.

<sup>25</sup> 2<sup>nd</sup> Gortana Affidavit, ¶8(b), Ex “A”, RC, Tab 4, p 17, EB, Tabs 21, 21(a), p 1049, 1054-55.

that prepaid plans necessarily offer a better solution for inmates. The reality is more complicated.

**D. The CRTC's regulatory framework**

**(i) Overview of the role of the CRTC in general**

17. The CRTC's regulatory regime for the telecommunications industry is critically important context in this case. The CRTC is Canada's national telecommunications regulator and oversees all aspects of the telephone services that telecommunications companies provide. Its governing statute for the regulation of telecommunications, the *Telecommunications Act*, affirms the essential role of telecommunications in "the maintenance of Canada's identity and sovereignty".<sup>26</sup> The *Telecommunications Act* mandates the CRTC to balance a number of competing objectives in its regulation of this industry.<sup>27</sup> The complexity of the CRTC's regulatory role is underscored in the Policy Directions set out for the regulator, which call on the CRTC to "encourage competition" and to "reduce barriers" to competition, while at the same time play a consumer protection role.<sup>28</sup>

18. The primary way in which the CRTC implements its policy objectives is through s. 25 of the *Telecommunications Act*, which requires all Canadian carriers to provide telecommunications 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". One court described tariffs as a "regulatory contract" between a telecommunications service provider and

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<sup>26</sup> *Telecommunications Act*, s. 7.

<sup>27</sup> *Telecommunications Act*, s. 7, which requires the CRTC to enhance the "efficiency and competitiveness" of Canadian telecommunications and foster "market forces", while still responding to "economic and social requirements" of Canadians.

<sup>28</sup> Hebert Affidavit, ¶11, ABC, Tab 23, p 591, EB, Tab 19, p 751. Hebert Affidavit, Ex "B", RC, Tab 5, p 17, EB, Tab 19(b), p 780-1.

its customers that cannot be modified without CRTC approval. As the court noted, “the rates charged by Bell to its customers must be approved by the CRTC”.<sup>29</sup> For the CRTC to approve a rate that a carrier proposes, that rate must be consistent with s. 27 of the *Telecommunications Act*, which, among other things, requires “[e]very rate charged by a Canadian carrier for a telecommunications service” to be “just and reasonable”. The Supreme Court described this tariff system as follows:

[29] The *Telecommunications Act* grants the CRTC the general power to set and regulate rates for telecommunications services in Canada. All tariffs imposed by carriers, including rates for services, must be submitted to it for approval, and it may decide any matter with respect to rates in the telecommunications services industry [...]<sup>30</sup>

19. There is an exception to s. 25 and the CRTC’s approval of specific rates. Under s. 34(1) of the *Telecommunications Act*, the CRTC has the statutory power to forbear exercising its regulatory powers over a specific issue.

20. The Appellants rely on the CRTC’s decision to forbear from regulating long-distance calling, including the decision to no longer require Commission approval of a tariff for such rates under s. 25, to argue that the CRTC had “washed its hands” of these rates.<sup>31</sup> This conveys a fundamental misunderstanding of the regulatory regime and of the decision to forbear.

21. Forbearance is itself an exercise of regulatory jurisdiction. The statute requires the CRTC to make a factual determination that forbearance would advance its policy objectives and

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<sup>29</sup> *Penney v Bell Canada*, [2010 ONSC 2801](#), ¶42, Bell BOA, Tab 3.

<sup>30</sup> *Bell Canada v Bell Aliant Regional Communications*, [2009 SCC 40](#), ¶29, Bell BOA, Tab 2.

<sup>31</sup> Appellants’ Factum, ¶45.

statutory mandate before it forbears.<sup>32</sup> Telecommunications regulation is, in short, a closed system: either a carrier must obtain approval from the CRTC of specific rates, or it must obtain an exception from the CRTC under s. 34 by satisfying the CRTC that forbearance will be consistent with Canadian telecommunications policy objectives.

22. Further, even where the CRTC exercises its discretion to forbear regulation of specific aspects of telecommunications services, it does not vacate the regulatory field (as the Appellants suggest). The CRTC generally retains the jurisdiction to exercise its powers under ss. 24 and 27 of the *Telecommunications Act* to impose specific conditions of services,<sup>33</sup> and to ensure that rates are not unjustly discriminatory.<sup>34</sup> It is also open to individuals or entities to bring applications asking the CRTC to reconsider its decision to forbear.<sup>35</sup>

23. The CRTC also acts as an adjudicative body, with broad powers to hear and decide issues related to the *Telecommunications Act* and obligations arising from rates approved by the CRTC.<sup>36</sup> On the application of any interested party (or on its own initiative), the CRTC can inquire and make determinations about whether a telecommunications service provider breached the *Telecommunications Act* or any of its regulations, including a breach of a tariff.<sup>37</sup> The CRTC may order a broad range of remedies, including remedies on “what is effectively a class-wide basis”:

The statute allows the CRTC to fashion a broad range of remedies, including the amendment or suspension of a tariff and the award of

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<sup>32</sup> *Telecommunications Act*, s. 34(1).

<sup>33</sup> For instance, relating to 9-1-1 services even where telephony rates are not commercially regulated.

<sup>34</sup> Affidavit of Pierre-Luc Hebert, affirmed November 22, 2021 (“**3<sup>rd</sup> Hebert Affidavit**”), ¶2(b), ABC, Tab 27, p 652, EB, Tab 30, p 3037.

<sup>35</sup> See, for example, [Telecom Decision CRTC 2002-37](#), ¶14, Bell BOA, Tab 5.

<sup>36</sup> *Telecommunications Act*, s. 48, 55.

<sup>37</sup> *Telecommunications Act*, s. 48.

costs. *In an appropriate case, the CRTC has exercised jurisdiction to order relief on what is effectively a class-wide basis ...*

The plaintiffs say that the CRTC does not afford a preferable procedure for the resolution of the dispute because it cannot award relief on a class-wide basis, cannot give relief on a retroactive basis and cannot award general damages. I do not accept these submissions. Where 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, *the CRTC can grant retroactive relief to all adversely affected customers*; [...] While the CRTC may not be able to provide compensation in precisely the same form as a court, *it has the capacity to order and implement compensatory relief in a manner that is fair and efficient*.<sup>38</sup> [emphasis added]

**(ii) CRTC decisions related to the rates charged for non-cash payphone calls**

24. The essence of the Appellants' claim relates to the allegedly "unconscionable" rates charged for calls made under the OTMS.<sup>39</sup> Although there are two different categories of rates charged under the OTMS, local rates and long-distance call rates, only the latter are at issue in this appeal. In Telecom Decision 97-19 (released in 1997), the CRTC decided that it would forbear from regulating the rates for long-distance calls.<sup>40</sup> However, the CRTC expressly reserved for itself the following powers:

- (a) to assess whether rates are just and reasonable in "non-equal access areas" under s. 27(1) of the *Telecommunications Act*. "Non-equal access areas" refer to areas

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<sup>38</sup> *Penney v Bell Canada*, [2010 ONSC 2801](#), ¶139, 188, Bell BOA, Tab 3.

<sup>39</sup> Amended Fresh as Amended Statement of Claim ("**Further Amended Claim**"), ¶3, Affidavit of Pierre-Luc Hebert, affirmed October 1, 2021 ("**2<sup>nd</sup> Hebert Affidavit**"), Ex "A", ABC, Tab 4, p 48, EB, Tab 22(a), p 1070.

<sup>40</sup> Hebert Affidavit, Ex "D", ABC, Tab 25, p 612ff, EB, Tab 19(d), p 787ff. In this decision, the CRTC decided to forbear regulation of rates of all toll calls, including long-distance calls.

where callers do not have access to the “competing long distance network of their choice”;<sup>41</sup> and

- (b) to review whether any rate “unjustly discriminate[s] or give[s] an undue or unreasonable preference toward any person” or subjects “any person to an undue or unreasonable disadvantage” under s. 27(2) of the *Telecommunications Act*.<sup>42</sup>

25. The consequences of Telecom Decision 97-19 in terms of the CRTC’s ongoing jurisdiction to review long-distance rates is discussed in further detail below.

**(iii) CRTC decisions related to inmate services**

26. When considering the regulatory structure that is meant to apply in Facilities, it is important to recall that, in GT 292, the CRTC determined that a distinct regulatory regime would govern all inmate telephone services across the country. As described above, GT 292 both allows correctional institutions to place restrictions on inmates’ uses of phones and sets the rates for calls.

27. The CRTC has never indicated how the regulatory framework that it approved for inmates under GT 292 interacts with the regulatory framework applicable to public payphones more generally. It is not clear whether regulatory requirements surrounding the operation of public payphones apply to the provision of services to inmates.<sup>43</sup> The CRTC has never explicitly decided that its decisions regarding notice of rates for calls made on public payphones should apply to inmate calling services.

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<sup>41</sup> [Telecom Decision CRTC 2018-84](#), ¶2, Bell BOA, Tab 6. Even though the CRTC modified the scope of its s. 24 power in regulating toll schedule constraints, it appears to have maintained its s.27(1) jurisdiction over “non-equal access” areas. See, [Telecom Decision CRTC 2007-56](#), ¶23-32, Bell BOA, Tab 7.

<sup>42</sup> Hebert Affidavit, Ex “D” (¶5, 95, 96), ABC, Tab 25, p 612, 625, EB, Tab 19(d), p 787, 800.

<sup>43</sup> Hebert Affidavit, ¶44, 45, ABC, Tab 23, p 605, EB, Tab 19, p 765.

**E. Decision under appeal**

28. The Appellants' certification motion as well as the Respondents' cross-motions regarding the jurisdiction of the Superior Court over the action were argued before Justice Perell over three days (March 8 to 10, 2022). *Vis-à-vis* Bell, only Justice Perell's decision allowing the cross-motion on jurisdiction is relevant for this appeal.

29. On that motion, Bell argued that the issues in the claim were within the exclusive jurisdiction of the CRTC or, in the alternative, that the Superior Court should use its discretion to choose not to exercise such jurisdiction given the complex nature of the regulation of telecommunications services and the role and expertise of the CRTC.<sup>44</sup> Ultimately, Justice Perell only addressed the issue of whether he ought to use his discretion to assume jurisdiction, and concluded that "it would not be an appropriate exercise of this court's jurisdiction" to do so.<sup>45</sup> He declined to exercise this discretion after considering the following factors:

- (a) He considered the CRTC's "expansive jurisdiction to regulate the telecommunications industry in Canada", including the setting of rates. His Honour noted that determining the reasonableness of rates is a "central responsibility of the CRTC" and that courts routinely recognized its "specialized expertise" to do so.<sup>46</sup> Contrary to the Appellants' assertion that Justice Perell "disregard[ed] the impact of forbearance" and interpreted the CRTC's scope of powers "as if the CRTC had never forborne its powers",<sup>47</sup> he in fact acknowledged that forbearance was itself an exercise of regulatory jurisdiction:

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<sup>44</sup> Notice of Cross-Motion, RC, Tab 6, p 29, EB, Tab 17, p 9.

<sup>45</sup> Reasons for Decision, ¶100, ABC, Tab 3, p 38.

<sup>46</sup> Reasons for Decision, ¶95, 96, ABC, Tab 3, p 99-100.

<sup>47</sup> Appellants' Factum, ¶37, 43.

The CRTC sets rates or it may exercise a discretion to forgo setting the rates when it is satisfied that there is a competitive marketplace adequate for the task.<sup>48</sup>

- (b) He also considered the “pith and substance” of the Appellants’ claim and found that it fell within the jurisdiction of the CRTC. Justice Perell noted that the “heart and soul, and letter and spirit” of the claim was about the rates charged on the OTMS, which the Appellants “variously described as ‘excessive’, ‘exorbitant’ and ‘astronomical’”.<sup>49</sup> Justice Perell noted that the subject matter of this claim is “at the heart of the telecommunications scheme administered by the CRTC”.<sup>50</sup>
- (c) Finally, Justice Perell concluded that the CRTC was the preferred forum to resolve the dispute. He referred to the several cases that have recognized that the Superior Court ought not exercise jurisdiction where the adjudication of a dispute “would require a consideration of the legislative scheme administered by the CRTC” (including many of the decisions Bell cited in its jurisdiction factum on this issue).<sup>51</sup> He then concluded that given the substance of the Appellants’ claim “the CRTC has the subject matter expertise to decide the dispute and the Superior Court of Justice does not” and that “a ruling by the Superior Court runs the risk of discombobulating the national policies and administration of telecommunications service providers”.<sup>52</sup>

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<sup>48</sup> Reasons for Decision, ¶95, ABC, Tab 3, p 99.

<sup>49</sup> Reasons for Decision, ¶92, ABC, Tab 3, p 99.

<sup>50</sup> Reasons for Decision, ¶99, ABC, Tab 3, p 100.

<sup>51</sup> Reasons for Decision, ¶97, ABC, Tab 3, p 100. Bell Jurisdiction Factum, ¶59-60, RC, Tab 7, p 47.

<sup>52</sup> Reasons for Decision, ¶99, ABC, Tab 3, p 100.

### PART III - ISSUES

30. Only one issue in this appeal is relevant to Bell: whether Justice Perell erred in exercising his discretion to decline jurisdiction over the Appellants' claim. He committed no error in doing so.

31. Bell takes the following positions:

- (a) the decision at issue is an exercise of discretion and, as such, it is entitled to deference on appellate review;
- (b) the reasons demonstrate that Justice Perell considered the correct factors in making his decision to defer to the CRTC; and
- (c) Justice Perell made no error in applying those factors.

### PART IV - LAW & ARGUMENT

#### A. A deferential standard of review applies

32. The Appellants frame the issue on appeal as one of jurisdiction and therefore argue that the standard of review is correctness. This mischaracterizes the nature of the decision in issue. Justice Perell did not assess the scope of his jurisdiction based on a constating document (which was the issue in *Fontaine*, the case on which the Appellants rely, where jurisdiction turned on the interpretation of a court order that implements the Indian Residential Schools Settlement Agreement<sup>53</sup>). In its factum in its jurisdiction motion, Bell had made the alternative argument that the CRTC had exclusive jurisdiction over this dispute.<sup>54</sup> Justice Perell chose not to address

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<sup>53</sup> See *Fontaine v Canada (Attorney General)*, [2020 ONCA 688](#), ¶28, 29, Appellants BOA, Tab 16.

<sup>54</sup> Bell is not advancing that argument on appeal and it is not a point which the Court need decide to determine this matter.

that issue in his reasons.

33. Rather, he addressed the matter as a question of whether he ought to accept or decline jurisdiction. That decision involved an exercise of discretion. Justice Perell understood the Superior Court to have jurisdiction over the dispute; however, he found that it would not be “an appropriate exercise of this court’s jurisdiction” to proceed with the case.<sup>55</sup> That required Justice Perell to consider multiple factors and to choose between two possible outcomes.<sup>56</sup> Such exercises of discretion are assessed on a deferential standard of review.<sup>57</sup> Appellate intervention is warranted only if Justice Perell clearly misdirected himself on the facts or the law, proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice.<sup>58</sup> In an analogous scenario, where a judge makes the discretionary decision to decline (or refuse to decline) jurisdiction on the basis of *forum non conveniens*, it is clear that such decisions are entitled to “considerable deference on appeal”.<sup>59</sup>

34. Here, there is no basis for this Court to interfere with Justice Perell’s decision to decline jurisdiction.

**B. Justice Perell did not err by not expressly referring to the *Weber* test**

35. Although he did not expressly set it out in his reasons, Justice Perell was aware of the *Weber* test<sup>60</sup> and his analysis shows that he applied it in substance. All of the parties referred to

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<sup>55</sup> Reasons for Decision, ¶100, ABC, Tab 3, p 100.

<sup>56</sup> Donald JM Brown, *Civil Appeals*, § 15:24-15:25, Bell BOA, Tab 26.

<sup>57</sup> Donald JM Brown, *Civil Appeals*, § 15:23, Bell BOA, Tab 26; *Murphy v. Sally Creek Environs Corporation*, [2010 ONCA 312](#), ¶70, Bell BOA, Tab 8.

<sup>58</sup> *Canada (Attorney General) v Fontaine*, [2017 SCC 47](#), ¶36, Bell BOA, Tab 9.

<sup>59</sup> *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, [2016 SCC 30](#), ¶54, Bell BOA, Tab 4.

<sup>60</sup> This test, applied to the CRTC context, is set out in *Penney v Bell Canada*, [2010 ONSC 2801](#), ¶149, Bell BOA, Tab 3.

this test in their facta on the motion.<sup>61</sup> Further, as demonstrated above in the summary of his reasons, Justice Perell considered each of the *Weber* factors. Specifically, he considered (i) the substance of the CRTC's jurisdiction,<sup>62</sup> (ii) the essential character of the dispute,<sup>63</sup> and (iii) factors making the CRTC the preferred forum for the resolution of this dispute.<sup>64</sup>

36. Further, the fact that the test is not expressly stated in the reasons does not matter in this case. There is a presumption of correct application unless an appellant can demonstrate that, in substance, the judge applied an incorrect standard.<sup>65</sup> As will be demonstrated below, there is no basis to argue that Justice Perell applied an incorrect standard. Given that the Appellants only take issue with Justice Perell's treatment of the first and third of the *Weber* factors, this factum will only focus on those issues.

### **C. Justice Perell did not err in his application of the *Weber* factors**

#### ***(i) Justice Perell did not err in assessing the scope of the CRTC's jurisdiction***

37. Justice Perell did not err in his assessment of the scope of the CRTC's jurisdiction. His holding that the CRTC has an "expansive jurisdiction"<sup>66</sup> is well supported by case law. Courts have consistently given a "broad and generous" interpretation to the powers and authority of the CRTC.<sup>67</sup> The Supreme Court has noted that the "broad powers" that the *Telecommunications Act* confers on the CRTC "demonstrate the comprehensive regulatory powers Parliament

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<sup>61</sup> Bell Jurisdiction Factum, ¶47, RC, Tab 7, p 41. Appellants Jurisdiction Factum, ¶8-9, RC, Tab 8, p 49. Ministry Factum, ¶68, RC, Tab 9, p 54.

<sup>62</sup> See Reasons for Decision, ¶95, 96, ABC, Tab 3, p 99-100.

<sup>63</sup> See Reasons for Decision, ¶92, 99, ABC, Tab 3, p 99, 100.

<sup>64</sup> See Reasons for Decision, ¶99, ABC, Tab 3, p 100.

<sup>65</sup> *FH v McDougall*, [2008 SCC 53](#), ¶54, Bell BOA, Tab 10.

<sup>66</sup> Reasons for Decision, ¶95, ABC, Tab 3, p 99.

<sup>67</sup> *Mahar v Rogers Cablesystems Ltd*, [1995] OJ no 3035, ¶22 (SCJ), Bell BOA, Tab 1.

intended to grant”.<sup>68</sup> Because of the complex regulatory regime that the CRTC oversees, courts have noted the deference owed to the CRTC when it is acting within its field of “expertise and specialized knowledge”.<sup>69</sup> In *Sprint Canada Inc*, Justice MacPherson held that the CRTC was entitled to “curial deference” because of its “considerable expertise”. Justice MacPherson went on to hold that it was “essential that the core jurisdiction of the CRTC—the regulation of the telecommunications industry—be respected and protected”.<sup>70</sup>

38. The essence of the Appellant’s claim is about the appropriateness of the rates charged under the OTMS. Justice Perell’s holding that this issue is at the “heart” of the CRTC’s regulatory scheme<sup>71</sup> is again well supported. In *Bell Canada v Bell Aliant*, the Supreme Court noted:

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.<sup>72</sup>

39. That the CRTC’s jurisdiction extends to the assessment of rates is even made clear in the plain language of the *Telecommunications Act*, which gives the CRTC a mandate to assess whether rates are “just and reasonable” under s. 27.

40. The crux of the Appellants’ argument before this Court is that Justice Perell erred by “disregarding the impact of forbearance” and that this undermined his assessment of the scope of

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<sup>68</sup> *Bell Canada v Bell Aliant Regional Communications*, [2009 SCC 40](#), ¶38, Bell BOA, Tab 2.

<sup>69</sup> *Allarco Entertainment 2008 Inc v Rogers Communications Inc*, [\[2009\] OJ no 5252](#), ¶30, 33 (SCJ), Bell BOA, Tab 11. Although this holding was made with respect to the CRTC’s regulation of broadcasting, it applies with equal force to its supervision of telecommunications.

<sup>70</sup> *Sprint Canada Inc v Bell Canada*, [\[1997\] OJ no 4772](#), ¶21 (SCJ), Bell BOA, Tab 12.

<sup>71</sup> Reasons for Decision, ¶95, 99, ABC, Tab 4, p 99, 100.

<sup>72</sup> *Bell Canada v Bell Aliant Regional Communications*, [2009 SCC 40](#), ¶36, Bell BOA, Tab 2.

the CRTC's jurisdiction. There is no basis to this argument for two reasons.

41. First, Justice Perell did not disregard forbearance. His reasons reflect that he considered forbearance in his assessment of the CRTC's jurisdiction. He expressly refers to this power twice in his reasons, and both references explain how forbearance works as part of the CRTC exercising its jurisdiction to regulate rates.<sup>73</sup> To the extent the Appellants are making a complaint, it is really about the sufficiency of the reasons. However, a judge need not detail every step of the reasoning process or refer to every piece of evidence or argument. In this case, it is clear that, "read in the context of the entire record, the [judge's] reasons demonstrate that he or she was alive to and resolved the central issues before the court".<sup>74</sup>

42. The reasons demonstrate that Justice Perell was alive to the forbearance issue and determined that it did not impact his jurisdictional analysis. In addition to it being apparent from the statutory regime (s. 34 of the *Telecommunications Act*), Bell adduced evidence demonstrating how: (i) the CRTC's decision to forbear from setting rates is an exercise of regulatory power; and, (ii) the CRTC retained residual jurisdiction to assess long distance rates under ss. 27(1) and 27(2) of the *Telecommunications Act* (to be discussed in further detail below).<sup>75</sup> The forbearance issue was argued at length.<sup>76</sup>

43. Second, the Appellants' argument misapprehends how the CRTC's regulatory regime functions. This misunderstanding is evidenced in their submission that, by forbearing, the CRTC has "washed its hands" of long-distance rates, suggesting that it has completely abdicated its

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<sup>73</sup> Reasons for Decision, ¶26, 95, ABC, Tab 3, p ●, 99.

<sup>74</sup> *R v HSB*, [2008 SCC 52](#), ¶8, Bell BOA, Tab 13.

<sup>75</sup> Hebert Affidavit, ¶18, Ex "D" (¶5, 95, 96), ABC, Tabs 23, 25, p 594, 612, 625, EB, Tabs 19, 19(d), p 754, 787, 800. 3<sup>rd</sup> Hebert Affidavit, ¶2(b), ABC, Tab 27, p 652, EB, Tab 30, p 3037.

<sup>76</sup> Bell Jurisdiction Factum, ¶18, 19, 54, RC, Tab 7, p 38, 44. Appellants Jurisdiction Factum, ¶25-31, RC, Tab 8, p 51.

jurisdiction over this issue. That is simply not the case.

44. The decision to forbear is itself an exercise of regulatory jurisdiction. The CRTC is statutorily required to determine “as a question of fact” that forbearance would be consistent with the nine “policy objectives” set out in its statutory mandate under s. 7 of the *Telecommunications Act* (which include rendering affordable telecommunication services).<sup>77</sup> If this Court were to assess the reasonableness of a forborne rate, it would be interfering with the CRTC’s policy decision that no regulation of specific long-distance rates best serves Canadian telecommunications. Case law is clear that courts ought not interfere with the CRTC’s determination of what best advances telecommunications policy objectives:

The analysis of the nine objectives of Canadian policy in this area, as set out in section 7 of the Act, raises questions of a truly polycentric nature in public policy, since they require a large number of intersecting and interrelated interests and considerations. The courts must exercise greater deference in this type of case.<sup>78</sup>

45. In the specific context of the present matter, it is incorrect to say (as the Appellants do) that the CRTC has no jurisdiction to assess long-distance rates.<sup>79</sup> It ignores the fact that, in its forbearance decision, 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” as well as under s. 27(2) to assess whether the rates or provision of services “unjustly discriminate” or give an “undue or unreasonable” preference or disadvantage.<sup>80</sup> Both powers are

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<sup>77</sup> *Telecommunications Act*, s. 34(1).

<sup>78</sup> *Allstream Corp v Bell Canada*, [2005 FCA 247](#), ¶29, Bell BOA, Tab 14.

<sup>79</sup> Appellants’ Factum, ¶43.

<sup>80</sup> Hebert Affidavit, Ex “D” (¶5, 95, 96), ABC, Tab 25, p 612, 625, EB, Tab 19(d), p 787, 800. As noted in footnote 41 above, the CRTC appears to have maintained its s. 27(1) jurisdiction to assess just and reasonable rates over “non-equal access” in Telecom Decision CRTC 2007-56, ¶23-32, Bell BOA, Tab 7.

in issue:

- (a) “Non-equal access areas” refer to areas where callers do not have access to the “competing long distance network of their choice”.<sup>81</sup> In their claim, the plaintiffs plead that Class Members had no choice with respect to long-distance providers.<sup>82</sup> As such, it would appear that the definition of “non-equal access areas” applies to the Class Members, meaning that s. 27(1) appears to still be engaged in these circumstances.<sup>83</sup> Before this Court, the Appellants contest this, pointing to general statements that Bell made in submissions to the CRTC that equal access was available throughout Ontario. This was not an argument that the Appellants advanced before Justice Perell, despite the Telecom Decision on which they rely having been included in Bell’s Book of Authorities that was before Justice Perell. In any event, these general statements do not go as far as the Appellants suggest. The Telecom Decision in which the statements were made did not deal with inmate calling. Also, the CRTC ultimately concluded that there remained some Bell subscribers who resided in non-equal access areas—thereby contradicting the Appellants’ implied argument that non-equal access areas no longer exist.<sup>84</sup> All of this, however, is collateral to the more fundamental point: if there is any issue about what the term “non-equal access area” means, and whether it includes inmates serviced at Facilities, this is an issue that should be left to the CRTC to determine.

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<sup>81</sup> See [Telecom Decision CRTC 2018-84](#), ¶2, Bell BOA, Tab 6.

<sup>82</sup> Further Amended Claim, ¶36, ABC, Tab 4, p 57.

<sup>83</sup> Even though the CRTC modified the scope of its s. 27(1) power in regulating toll schedule constraints, it appears to have maintained its jurisdiction over “non-equal access” areas. See, [Telecom Decision CRTC 2007-56](#), ¶23-32, Bell BOA, Tab 7.<sup>84</sup> [Telecom Decision CRTC 2007-56](#), ¶30, Bell BOA, Tab 7.

<sup>84</sup> [Telecom Decision CRTC 2007-56](#), ¶30, Bell BOA, Tab 7.

(b) The Appellants' amendment to their pleading, made on the eve of the motion, makes clear that the claim engages the CRTC's s. 27(2) power. The plaintiffs now plead that the OTMS rates were such that "no residential customer of rational mind" would choose a collect call at the rates "imposed on the Class" instead of paying "a fraction of a single Collect Call for unlimited long-distance calling or using a competitive calling card".<sup>85</sup> This is a pleading, in its essence, that the OTMS rates "unjustly discriminate" against users of the OTMS or otherwise subject them to "an undue or unreasonable disadvantage". It is a pleading that through the OTMS Bell effectively forced these rates to be used on inmate calls thereby treating inmates and their call recipients differently from all other customers because the other customers had access to other options. This pleading is an example of discrimination, and thus engages the CRTC's s. 27(2) power.

46. This is in addition to the fact that it is open to individuals to bring applications asking the CRTC to reconsider its decision to forbear, notably with a view to seeking a determination from the CRTC under s. 27(1) that a rate is unjust or unreasonable.<sup>86</sup> Thus, the fact that the CRTC forbore regulating *specific* long-distance rates does not detract from the conclusion that the assessment of these rates remains within the CRTC's jurisdiction.

**(ii) *Justice Perell did not err in determining that the CRTC was the preferred forum to resolve this dispute***

47. The Appellants' arguments that Justice Perell erred in exercising his discretion to determine that the CRTC was the preferred forum for this dispute are also flawed.

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<sup>85</sup> Further Amended Claim, ¶36, ABC, Tab 4, p 57.

<sup>86</sup> See, for example, [Telecom Decision CRTC 2002-37](#), ¶14, Bell BOA, Tab 5.

48. First, the Appellants are wrong that a full preferability analysis under s. 5(1)(d) of the *Class Proceedings Act* is required in order to determine the third *Weber* factor.<sup>87</sup> *Weber* does not say this. Nor do any of the decisions where Ontario courts have applied *Weber* to determine whether they should defer to the jurisdiction of the CRTC, even where those cases are class proceedings.<sup>88</sup> The Appellants approach, if accepted, would lead to the absurd result, even in non-*Class Proceeding Act* claims, that courts deciding whether to exercise their discretion to defer to regulatory tribunals would be required to consider s. 5(1)(d) factors.<sup>89</sup>

49. The Appellants rely on Justice Strathy's (as he then was) decision in *Penney* to argue that a s. 5(1)(d) analysis is required for the third *Weber* factor. There is no such holding in *Penney*. In *Penney*, the defendant to a class proceeding (Bell) brought a cross-motion to stay the action on jurisdictional grounds. Justice Strathy simply considered the preferability analysis at the same time that he assessed the jurisdiction motion, as both required an examination of the statutory jurisdiction of the CRTC.<sup>90</sup> Justice Strathy did not hold that a s. 5(1)(d)-type analysis is required to make the jurisdictional finding. Notably, in his analysis, Justice Strathy referred with approval to several of the above-referenced Ontario decisions where courts applied *Weber* without conducting a preferability analysis.<sup>91</sup>

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<sup>87</sup> Appellants' Factum, ¶64.

<sup>88</sup> See: *Mahar v Rogers Cablesystems Ltd*, [1995] OJ no 3035, Bell BOA, Tab 1; *B & W Entertainment Inc. v Telus Communications Inc*, [2004] OJ no 4564, Bell BOA, Tab 15; *Allarco Entertainment 2008 Inc v Rogers Communications Inc*, [2009] OJ no 5252, (SCJ), Bell BOA, Tab 11; *Penney v Bell Canada*, 2010 ONSC 2801, Bell BOA, Tab 3.

<sup>89</sup> This is in addition to the fact that the Appellants' argument is inconsistent with the numerous courts that have held that the *Class Proceedings Act, 1992*, is procedural only and does not "supplement or derogate" from the substantive rights of parties. See: *Kanitz v Rogers Cable Inc*, 2002 CanLII 49415, ¶50, Bell BOA, Tab 16.

<sup>90</sup> *Penney v Bell Canada*, 2010 ONSC 2801, ¶125, Bell BOA, Tab 3.

<sup>91</sup> *Penney v Bell Canada*, 2010 ONSC 2801, ¶141-158, Bell BOA, Tab 3

50. The factors that Justice Perell actually considered in determining the third *Weber* factor are well supported by case law. Justice Perell held that courts ought not exercise jurisdiction where the adjudication of a dispute would require consideration of the regulatory scheme that the CRTC administers.<sup>92</sup> Further, he found that the CRTC has subject matter expertise that the Superior Court does not and that a ruling by the Superior Court in this matter runs the risk of discombobulating the national policies and administration of telecommunication service providers.<sup>93</sup>

51. Numerous decisions have recognized that where the adjudication of a dispute would require a “detailed consideration and interpretation” of the legislative scheme that the CRTC administers, the Superior Court ought not to exercise jurisdiction to hear the matter, even where some of the relief being sought may not precisely be available from the CRTC.<sup>94</sup> This judicial restraint reflects courts’ deference to the CRTC’s expertise in fulfilling its statutory responsibilities.<sup>95</sup> In *Sprint*, this Court recognized that the CRTC’s status as a “highly specialized tribunal with particular expertise” entitles it to curial deference.<sup>96</sup> Dealing specifically with rates, in *Bell Canada v Bell Aliant*, the Supreme Court held that assessing rates goes “to the very heart of the CRTC’s specialized expertise and over which the CRTC is entitled to deference.”<sup>97</sup>

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<sup>92</sup> Reasons for Decision, ¶¶97, 98, ABC, Tab 3, p 100.

<sup>93</sup> Reasons for Decision, ¶¶99, ABC, Tab 3, p 100.

<sup>94</sup> *Nelson v Telus Communications Inc. (Part 2)*, [2021 ONSC 23](#), ¶56, Bell BOA, Tab 17; *Iris Technologies Inc., et al. v Telus Communications Company*, [2019 ONSC 2502](#), ¶31, Bell BOA, Tab 18; *Penney v Bell Canada*, [2010 ONSC 2801](#), ¶¶164, 167, Bell BOA, Tab 3; *Mahar v Rogers Cablesystems Ltd.*, [1995] OJ no 3035, ¶16 (SCJ), Bell BOA, Tab 1.

<sup>95</sup> *Nelson v Telus Communications Inc. (Part 2)*, [2021 ONSC 23](#), ¶56, Bell BOA, Tab 17.

<sup>96</sup> *Sprint Canada Inc. v. Bell Canada* (1999), [1999 CanLII 3296](#), ¶8 (Ont CA), Bell BOA, Tab 19.

<sup>97</sup> *Bell Canada v Bell Aliant Regional Communications*, [2009 SCC 40](#), ¶38, Bell BOA, Tab 2; see also *Penney v Bell Canada*, [2010 ONSC 2801](#), ¶140, Bell BOA, Tab 3.

52. The Appellants argue that Justice Perell erred by relying on the CRTC's expertise in setting rates given that the CRTC has forborne regulating long-distance rates for the past 25 years.<sup>98</sup> There are several problems with this argument. First, it is inconsistent with the Supreme Court's holding in *Bell Alliant* that the assessment of rates goes to the "very heart" of the CRTC's expertise. More significantly, it portrays a fundamental misunderstanding of forbearance and its role in the regulatory framework. The *Telecommunications Act* imposes, as a pre-condition for a forbearance decision, that the CRTC must find as a question of fact that such a step will be consistent with telecommunications policy objectives, which expressly include rendering affordable telecommunications to all Canadians as well as enhancing the competitiveness of Canadian telecommunications.<sup>99</sup> These are polycentric decisions that involve a large number of interrelated interests and considerations.<sup>100</sup> The Superior Court lacks the institutional knowledge to balance all of these considerations.

53. Further, Justice Perell's concern about the risk of "discombobulating" national telecommunications policies is also well supported by the case law. Courts have recognized Parliament's determination that the goals of Canadian telecommunications policy are best accomplished "under the supervision of the CRTC, a single independent agency".<sup>101</sup> Having a provincial superior court decide a telecommunications issue within the jurisdiction of the CRTC undermines this legislative intent. Justice Sharpe<sup>102</sup> explained the concerns inherent in inviting different provincial courts to weigh in on issues that have national implications as follows:

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<sup>98</sup> Appellants' Factum, ¶66(b).

<sup>99</sup> See *Telecommunications Act*, s. 7 and 34.

<sup>100</sup> *Allstream Corp v Bell Canada*, [2005 FCA 247](#), ¶29, Bell BOA, Tab 14.

<sup>101</sup> *Penney v Bell Canada*, [2010 ONSC 2801](#), ¶142, Bell BOA, Tab 3.

<sup>102</sup> Then sitting in the Ontario Court (General Division).

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 C.R.T.C. Because this is but one of ten provincial superior courts the spectre of various approaches from various provincial courts is raised. [...] The net result would be to disrupt the scheme envisaged by Parliament for the interpretation of the regulations*, a scheme which includes scrutiny by a court exercising jurisdiction akin to that of a superior court [*i.e.*, the Federal Court of Appeal, per s. 64 of the *Telecommunications Act*].<sup>103</sup> [emphasis added]

54. For these reasons, where a claim deals with issues that transcend the interests of the parties and have implications for the telecommunications industry more generally, courts are reluctant to exercise their jurisdiction.<sup>104</sup>

55. The Appellants' claim raised such issues. It invited one of the ten provincial superior courts to assess the reasonableness of rates charged under the OTMS, thereby encroaching on the regulatory terrain of the CRTC.<sup>105</sup> Setting rates is a "polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake".<sup>106</sup> Here, not only would the Court be making this assessment without any input from the CRTC, it would be doing so in a context where the CRTC has already expressed a view about the rates that are reasonable to charge inmates. GT 292 states that "[i]nmate service calls are rated *in the same manner* as calls originating from other public telephones".<sup>107</sup> If Justice Perell had assumed jurisdiction, this would have raised the spectre of inconsistent decisions between the CRTC and the Superior Court regarding long-distance rates.

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<sup>103</sup> *Mahar v Rogers Cablesystems Ltd*, [1995] OJ no 3035, ¶35, Bell BOA, Tab 1.

<sup>104</sup> *Penney v Bell Canada*, [2010 ONSC 2801](#), ¶167, Bell BOA, Tab 3.

<sup>105</sup> *Bell Canada v Bell Aliant Regional Communications*, [2009 SCC 40](#), ¶36, 38, Bell BOA, Tab 2.

<sup>106</sup> *Bell Canada v Bell Aliant Regional Communications*, [2009 SCC 40](#), ¶36, 38, Bell BOA, Tab 2.

<sup>107</sup> Hebert Affidavit, Ex "W", RC, Tab 2, p 8, EB, Tab 19(w), p 1040. [emphasis added]

56. The Appellants assert in their factum that their claim did not engage a national policy and would not have had a broader impact. They are wrong.<sup>108</sup> First, they ignore that the CRTC has already provided its view on inmate calling rates (via GT 292). Second, just because Bell no longer provides inmate services does not mean that the inmate services regulatory framework is no longer relevant. Another telecommunications company now provides these services in Ontario. Other companies provide these services to inmates in other provinces.<sup>109</sup> The regulatory regime continues to apply and remains relevant.

57. Importantly, the rates charged to inmates under the OTMS *were the same* rates that Bell charged to all individuals who used their home telephones or public payphones to make long-distance collect calls.<sup>110</sup> (Notably, this is a point that the Appellants themselves acknowledged in their most recent amendment to their pleading.<sup>111</sup>) As a result, the claim effectively asks the Superior Court to find either:

- (a) that Bell ought to have charged a different rate for OTMS callers than what it charged to all other individuals making similar calls, which would appear to contravene GT 292 (which mandates that the calls be rated in the same manner);
- or

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<sup>108</sup> Appellants' Factum, ¶66(c).

<sup>109</sup> Affidavit of Nadine Blum, affirmed December 21, 2020, Ex "C", ABC, Tab 17, p 376-381, EB, Tab 6(c), p 466-471.

<sup>110</sup> Gortana Affidavit, ¶10, ABC, Tab 19, p 506, EB, Tab 18, p 665.

<sup>111</sup> Their claim was initially based on the allegation that the misrepresentation that Bell had made was that the rates charged under the OTMS were the same as those "experienced by Bell residential customer"[sic]. In their most recent amendment (made after the Appellants reviewed Bell's evidence about the rates actually charged) the Appellants now concede that the rates charged under the OTMS were the same as those charged to residential customers making collect calls. What they now argue is that these rates, when charged to inmates, were unreasonable. See Further Amended Claim, ¶36, ABC, Tab 4, p 57.

- (b) that the rates charged to all individuals making long-distance collect calls in Ontario were unreasonable (despite that the CRTC has analyzed the reasonableness of long-distance rates on a national basis, as set out above).

58. Either way, Justice Perell was correct when he said that the subject matter of the claim is at the heart of the telecommunications scheme administered by the CRTC.<sup>112</sup> If the Superior Court assumed jurisdiction and in effect decided how GT 292 relates to the rest of the CRTC's framework or determined the reasonableness of long distance rates, there would be consequences beyond the proceeding. It would be contrary to Parliament's intention to have one decision maker for telecommunications policy, and would create confusion and undermine the work of the CRTC. This is precisely the concern that animated Justice Perell's decision to defer to the CRTC.

59. It is notable that the expert report that the Appellants filed on the motion supports the notion that the question of rates charged to inmates should be decided by the telecommunications regulator. The report shows that when the issue of the appropriateness of rates for inmate calling was considered in the United States, the Federal Communications Commission—the federal regulator responsible for telecommunications—decided the matter.<sup>113</sup>

60. The remaining issues raised with respect to Justice Perell's treatment of the third *Weber* factor can be dealt with briefly. The Appellants' argument that the CRTC cannot award remedies again reflects their misunderstanding about how forbearance functions, and in particular, that the CRTC maintains residual jurisdiction under s. 27(1) and 27(2) of the

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<sup>112</sup> Reasons for Decision, ¶99, ABC, Tab 3, p 100.

<sup>113</sup> Affidavit of Douglas Dawson, sworn January 5, 2021, Ex "A", ABC, Tab 13, p 118, EB, Tab 5(a), p 205.

*Telecommunications Act* (discussed above). With respect to the CRTC's remedial jurisdiction itself, case law is clear that the CRTC may order a broad range of remedies on what is effectively a class-wide basis, including retroactive relief.<sup>114</sup> This Court has also recognized the CRTC's broad powers to make remedial orders including financial remedies.<sup>115</sup> These holdings are supported by the several decisions where the CRTC did order such relief.<sup>116</sup>

61. Finally, whether or not the CRTC has jurisdiction to hear a fiduciary duty claim against the Ministry is an irrelevant consideration vis-à-vis Bell, and not a sufficient reason for the Superior Court to delve into the heart of a regulatory regime that requires a specialized expertise to administer.

***(iii) Jurisprudence from Quebec is irrelevant to this analysis***

62. The Appellants rely on two decisions from Quebec that dealt with preliminary motions brought pursuant to a specific provision of the Quebec Code of Civil Procedure known as 'declinatory exception'<sup>117</sup> to dismiss cases brought against Bell. A close review of these decisions reveals that neither supports the Appellants' position.

63. The two Quebec decisions at issue, *Aka-Trudel* and *Morin*, deal with facts that are different than what was before Justice Perell. *Aka-Trudel* and *Morin* dealt with provisions in the *Civil Code of Québec* that relate to interest on late fees and termination/cancellation fees,

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<sup>114</sup> *Penney v Bell Canada*, [2010 ONSC 2801](#), ¶139, 188, Bell BOA, Tab 3. 205.

<sup>115</sup> *Sprint Canada Inc. v. Bell Canada* (1999), [1999 CanLII 3296](#), ¶8 (Ont CA), Bell BOA, Tab 19.

<sup>116</sup> For example, in [Telecom Decision CRTC 2017-9](#), Bell BOA, Tab 20, the CRTC directed the respondent to refund, with interest, improperly charged payments for a monthly rental fee. Furthermore, the CRTC required the respondent to ensure that refunds were issued to other individuals in the same position as the applicant but that were not before the CRTC (*i.e.* the CRTC granted a remedy on a "class basis" to non-parties to the Application) (see ¶48-50). Similarly, the CRTC ordered refunds on a "class basis" in [Telecom Decision CRTC 2007-10](#), Bell BOA, Tab 21, and on an individual basis in [Telecom Decision CRTC 2011-87](#), ¶17-18, Bell BOA, Tab 22 and [Telecom Decision 2014-235](#), ¶34, Bell BOA, Tab 23.

<sup>117</sup> *Code of Civil Procedure*, CQLR c C-25.01, Art. 167. See *Bell Canada v Aka-Trudel*, 2018 QCCA 829, ¶4, Appellants BOA, Tab 24.

respectively.<sup>118</sup> On the face of the reasons of these decisions, the appropriateness of these *fees* (pursuant to the relevant provisions of the *Civil Code of Québec*) is a distinct question from the issue that was before Justice Perell. As discussed above, Justice Perell found that the essence of the Appellants' claim dealt with the reasonableness of *rates* charged for telecommunications services, something that he found was at the heart of the heart of the scheme administered by the CRTC.<sup>119</sup> In making its determination, the Quebec Court of Appeal in *Aka-Trudel* distinguishes certain Ontario cases<sup>120</sup>—cases that Justice Perell relied upon in his analysis—on the basis that the essence of those cases dealt with a legislative provision, decision or regulation relating to the CRTC.<sup>121</sup> This lends support to the proposition that Justice Perell was entitled to rely upon these cases in the way he did in exercising his discretion, given the essence of the case that was before him.

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<sup>118</sup> *Bell Canada v Aka-Trudel*, 2018 QCCA 829, ¶18, Appellants BOA, Tab 23; *Morin v Bell Canada*, 2012 QCCS 4191, ¶1, Appellants BOA, Tab 24.

<sup>119</sup> Reasons for Decision, ¶92, 99, ABC, Tab 3, pp 99, 100.

<sup>120</sup> *Mahar v Rogers Cablesystems Ltd*, [1995] OJ no 3035, Bell BOA, Tab 1; *B & W Entertainment Inc. v Telus Communications Inc*, [\[2004\] OJ no 4564](#), Bell BOA, Tab 15; *Penney v Bell Canada*, [2010 ONSC 2801](#), Bell BOA, Tab 3; *Shaw Cablesystems (SMB) Ltd. et al. v. MTS Communications Inc. et al.*, [2006 MBCA 29](#), Bell BOA, Tab 24; *MTS Allstream Inc. v. Telus Communication Co.*, [2009 ABCA 372](#); Bell BOA, Tab 25.

<sup>121</sup> *Bell Canada v Aka-Trudel*, 2018 QCCA 829, ¶27, Appellants BOA, Tab 23.

**PART V - ORDER REQUESTED**

64. Bell respectfully requests that this Honourable Court:
- (a) dismiss this appeal; and
  - (b) order the Appellants to pay Bell its costs of this appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 11<sup>th</sup> day of November, 2022.



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Paul Le Vay / Carlo Di Carlo

**STOCKWOODS LLP**  
Barristers  
Lawyers for the Defendants

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

1.	<i>Mahar v Rogers Cablesystems Ltd</i> , <a href="#">[1995] OJ no 3035</a>
2.	<i>Bell Canada v Bell Aliant Regional Communications</i> , <a href="#">2009 SCC 40</a>
3.	<i>Penney v Bell Canada</i> , <a href="#">2010 ONSC 2801</a>
4.	<i>Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock &amp; Blackwell LLP</i> , <a href="#">2016 SCC 30</a>
5.	<a href="#">Telecom Decision CRTC 2002-37</a>
6.	<a href="#">Telecom Decision CRTC 2018-84</a>
7.	<a href="#">Telecom Decision CRTC 2007-56</a>
8.	<i>Murphy v. Sally Creek Environs Corporation</i> , <a href="#">2010 ONCA 312</a>
9.	<i>Canada (Attorney General) v Fontaine</i> , <a href="#">2017 SCC 47</a>
10.	<i>FH v McDougall</i> , <a href="#">2008 SCC 53</a>
11.	<i>Allarco Entertainment 2008 Inc v Rogers Communications Inc</i> , <a href="#">[2009] OJ no 5252</a>
12.	<i>Sprint Canada Inc v Bell Canada</i> , <a href="#">[1997] OJ no 4772</a>
13.	<i>R v HSB</i> , <a href="#">2008 SCC 52</a>
14.	<i>Allstream Corp v Bell Canada</i> , <a href="#">2005 FCA 247</a>
15.	<i>B &amp; W Entertainment Inc. v. Telus Communications Inc</i> , <a href="#">[2004] OJ no 4564</a>
16.	<i>Kanitz v Rogers Cable Inc</i> , <a href="#">2002 CanLII 49415</a>
17.	<i>Nelson v Telus Communications Inc. (Part 2)</i> , <a href="#">2021 ONSC 23</a>
18.	<i>Iris Technologies Inc., et al. v Telus Communications Company</i> , <a href="#">2019 ONSC 2502</a>
19.	<i>Sprint Canada Inc. v. Bell Canada (1999)</i> , <a href="#">1999 CanLII 3296</a>
20.	<a href="#">Telecom Decision CRTC 2017-9</a>
21.	<a href="#">Telecom Decision CRTC 2007-10</a>
22.	<a href="#">Telecom Decision CRTC 2011-87</a>
23.	<a href="#">Telecom Decision 2014-235</a>

24.	<i>Bell Canada v Aka-Trudel</i> , 2018 QCCA 829
25.	<i>Morin v Bell Canada</i> , 2012 QCCS 4191
26.	<i>Shaw Cablesystems (SMB) Ltd. et al. v. MTS Communications Inc. et al.</i> <a href="#">2006 MBCA 29</a>
27.	<i>MTS Allstream Inc. v. Telus Communication Co.</i> <a href="#">2009 ABCA 372</a>

Secondary Sources

28.	Donald JM Brown, <i>Civil Appeals</i> , 15:23; § 15:24-15:25
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## SCHEDULE “B” – RELEVANT STATUTORY PROVISIONS

### *Bell Canada Act, SC 1987, c 19*

#### **Definitions**

2 In this Act,

***affiliate***, in respect of the Company, means any person that controls or is controlled by the Company or that is controlled by the same person that controls the Company;  
(*personne du même groupe*)

***Commission*** means the Canadian Radio-television and Telecommunications Commission; (*Conseil*)

***Company*** means The Bell Telephone Company of Canada, established by an Act of Parliament and continued as a corporation under the names “The Bell Telephone Company of Canada”, “La Compagnie de Téléphone Bell du Canada” and “Bell Canada” under the [Canada Business Corporations Act](#) on April 21, 1982, whether or not the name of the Company is subsequently changed; (*Compagnie*)

***control*** includes control in fact, whether or not through one or more persons. (*contrôle*)

#### **Declaration re works**

5 The works of the Company are hereby declared to be works for the general advantage of Canada.

***Telecommunications Act, SC 1993, c 38***

**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.

**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.

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.

### **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.

### **Inquiries and determinations**

- **48 (1)** The Commission may, on application by any interested person or on its own motion, inquire into and make a determination in respect of anything prohibited, required or permitted to be done under Part II, except in relation to international submarine cables, Part III or this Part or under any special Act, and the Commission shall inquire into any matter on which it is required to report or take action under section 14.

### **Accessibility inquiries**

**(1.1)** The Commission may, on application by any interested person or on its own motion, inquire into and make a determination in respect of anything prohibited, required or permitted to be done under sections 51 to 53 of the *Accessible Canada Act*.

### **Interested persons**

**(2)** The decision of the Commission that a person is or is not an interested person is binding and conclusive.

### **Judicial powers**

**55** The Commission has the powers of a superior court with respect to

- **(a)** the attendance and examination of witnesses;
- **(b)** the production and examination of any document, information or thing;
- **(c)** the enforcement of its decisions;
- **(d)** the entry on and inspection of property; and
- **(e)** the doing of anything else necessary for the exercise of its powers and the performance of its duties.

### **Appeals**

#### **Appeal to Federal Court of Appeal**

**64 (1)** An appeal from a decision of the Commission on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with the leave of that Court.

#### **Application for leave**

**(2)** Leave to appeal shall be applied for within thirty days after the date of the decision appealed from or within such further time as a judge of the Court grants in exceptional circumstances, and the costs of the application are in the discretion of the Court.

### **Notice**

(3) Notice of an application for leave to appeal shall be served on the Commission and on each party to the proceedings appealed from.

**Time limit for appeal**

(4) An appeal shall be brought within sixty days after the day on which leave to appeal is granted.

**Findings of fact**

(5) On an appeal, the Court may draw any inference that is not inconsistent with the findings of fact made by the Commission and that is necessary for determining a question of law or jurisdiction.

**Argument by Commission**

(6) The Commission is entitled to be heard on an application for leave to appeal and at any stage of an appeal, but costs may not be awarded against it or any of its members.

*Code of Civil Procedure, CQLR c C-25.01*

**§ 2. — Declinatory exception**

167. If an application is brought before a court other than the court of competent jurisdiction, a party may ask that it be referred to the competent court or, failing that, that it be dismissed.

Lack of subject-matter jurisdiction may be raised at any stage of the proceeding, and may even be declared by the court on its own initiative, in which case the court adjudicates as to legal costs according to the circumstances.

VANESSA FAREAU et al.

and BELL CANADA et al.

Court of Appeal File No. C70691  
Court File No. CV-20-00635778-00CP

Plaintiffs (Appellants)

Defendant (Respondent)

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at TORONTO

**FACTUM OF THE RESPONDENT,  
BELL CANADA**

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