

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

VANESSA FAREAU and RANSOME CAPAY

Plaintiffs (Appellants)

and

BELL CANADA and HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Defendants/(Respondents)

Proceeding under the *Class Proceedings Act, 1992*

**FACTUM OF THE RESPONDENT (DEFENDANT)
HIS MAJESTY THE KING IN RIGHT OF ONTARIO**

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PART I: OVERVIEW

1. The Appellants appeal the decision of the motion judge dismissing their unconstitutional tax claim and staying the remainder of the action deferring the dispute to the Canadian Radio-television and Telecommunications Commission (“CRTC”).
2. The Appellants claim that Bell Canada (“Bell”) and His Majesty the King in right of Ontario (“Ontario”) imposed unconscionable telephone rates on collect calls from persons in custody through the Offender Telephone Management System (“OTMS”), and that Ontario took a commission on the rates. The Appellants claim against Ontario in breach of fiduciary duty, unjust enrichment, and unconstitutional taxation.¹ The Appellants seek damages based on the difference between reasonable telephone rates, as determined by the court, and the rates charged.
3. In staying the action, the motion judge found that it was “painfully plainly obvious” that the Appellants’ causes of action against Ontario of fiduciary duty and unjust enrichment are in relation to telephone rates.² The Appellants do not challenge that the essential character of the dispute is about rates.
4. The Appellants’ principal argument which underlies almost all its arguments is that the motion judge erred because the CRTC in Telecom Decision CRTC 1997-19 forbore from regulating long distance rates in correctional facilities, so the court should not have deferred to the CRTC.
5. However, the CRTC has regulated rates in correctional facilities in approving Bell’s General Tariff (“GT”), including GT Item 292 specific to “Inmate Service”. That Item requires that “inmate service calls are rated in the same manner as calls originating from other public

¹ The Appellants have abandoned their claim under s. 72 of the *Telecommunications Act*.

² Reasons for Decision of Perell J. dated April 26, 2022 (“Reasons for Decision”) at paras 92, 99, Appeal Book and Compendium (“ABC”) Tab 3, pp. 47-48.

telephones”, which was done. If the Appellants wish to challenge the CRTC’s approved tariff for Inmate Services, because in their view it permits rates that are unconscionable, it should proceed to the CRTC, and not collaterally attack it in court.

6. Furthermore, contrary to the Appellants’ assertion, the CRTC did not forbear its regulatory authority under s. 27(1) of the *Telecommunications Act* (the “Act”) to determine “just and reasonable rates” for long distance calls for customers in “non-equal access areas”, such as correctional facilities. A non-equal access area is an area where customers cannot switch to a competing long distance service provider, like persons in custody using the OTMS. Nor did the CRTC forbear from its s. 27(2) authority in equal and non-equal access areas to address alleged “unjust discrimination” or “undue or unreasonable disadvantages” in the charging of a rate.

7. The motion judge did not ultimately decide this disputed forbearance issue. Indeed, such a decision would involve the interpretation of Telecom Decision CRTC 1997-19, and related CRTC decisions and policies. The motion judge made no error in deferring this interpretive aspect of the Appellants’ rate dispute to the CRTC, and overall, he made no error in deferring the broader telephone rate dispute to the CRTC for it to apply its expertise, policy considerations, and broad remedial authority if warranted.

8. The Appellants’ reliance on the Quebec jurisprudence is misplaced. This jurisprudence is distinguishable because in those cases there was no dispute about forbearance. There clearly was forbearance, and there was also no approved CRTC tariff item addressing the issue before the court. Furthermore, the Northwest Territories Court of Appeal has held that a forbearance decision is itself a regulatory decision and has deferred to the CRTC even where there has been complete forbearance.

9. With respect to the unconstitutional tax claim, the motion judge correctly concluded that

the law does not support characterizing the commission paid by Bell to Ontario in respect of Bell's telephone rates as a tax, even if all the facts pleaded by the Appellants are assumed to be true. Payments made pursuant to private law obligations, whether pursuant to contract, in respect of property, or both, cannot be taxes because they are made in the absence of any legislative compulsion by the government. Nor are the telephone rate amounts paid to Bell taxes, because they are paid to a private company, not a public authority.

10. Finally, in the alternative, Ontario states that this Court should stay the unconstitutional tax claim and dismiss the fiduciary duty and unjust enrichment claims.

PART II: FACTS

1. Alleged Facts from the Amended Fresh As Amended Statement of Claim

11. Following a Request for Proposals, considering numerous qualification and evaluation criteria³, Ontario entered into a contract with Bell to operate an OTMS in Ontario correctional facilities.⁴ Under Bell's operation of the OTMS, persons in custody were able to make collect calls through payphones to landlines.

12. The Appellants plead that through various contractual provisions Ontario had extensive authority over the telephone rates to be charged.⁵

13. Pursuant to the contract, Bell was required to pay Ontario a percentage commission on all

³ See Request for Proposals at Part 3 – Evaluation of Proposals, Affidavit of Paul Gortana (“Gortana Affidavit”) at Exhibit “A”, ABC Tab 20, pp. 535-541.

⁴ Amended Fresh as Amended Statement of Claim (“Claim”) at para 4, ABC Tab 4, p. 48; OTMS Agreement, Affidavit of Nadine Blum (“Blum Affidavit”) at Exhibit “A”, ABC Tab 15, p. 299.

⁵ Claim at para 29, ABC Tab 4, p. 54; Bell OTMS Agreement at ss. 3.02, 3.03, 3.05, 3.08, 3.13, 3.19, 3.20, 4.08, 8.01, 8.02, Blum Affidavit at Exhibit “A”, ABC Tab 15, pp. 313-321, 328-329.

calls charged, whether Bell collected payment of those charges, or not.⁶ Bell's payment to Ontario was made to the Minister of Finance, as are all payments made to Ontario, per the *Financial Administration Act*.⁷

14. Under the header "Nature of the Action", the Appellants describe the nature of their action as follows: "This action arises from unconscionable telephone services rates imposed on the Plaintiffs and the Class Members."⁸

15. The Appellants' central complaint is that the "Defendants" imposed unconscionable rates for making collect calls through the OTMS. They plead that while in a correctional facility, a person in custody's only option for telephone contact with persons outside was "Collect Calls to landlines at exorbitant and unconscionable prices".⁹

16. From the foregoing basic facts, the Appellants claim against Ontario in breach of fiduciary duty, unjust enrichment, and imposition of an unconstitutional tax.¹⁰

2. Relevant Evidence for the Jurisdiction Motion

a) The CRTC's Regulation of Rates in Correctional Facilities

17. The CRTC has already exercised its regulatory authority over payphones and rates in correctional facilities. GT Item 292 in Bell's approved General Tariff is specific to "inmate services" and addresses the rates that can be charged and additional controls on inmate calls:

Item 292. INMATE SERVICE

...(c) Inmate service calls are rated in the same manner as calls originating from other public telephones except that payment options may be limited based on the requirements

⁶ Claim at para 61 ABC Tab 4, p. 64 ; Bell OTMS Agreement at s. 4.01, Blum Affidavit at Exhibit "A", ABC Tab 15, pp. 319-320.

⁷ *Financial Administration Act*, RSO 1990 c F12 at ss. 1(3) and 2.

⁸ Claim at para 3, ABC Tab 4, p. 48.

⁹ Claim at paras 5, 43, 47, 69, ABC Tab 4, pp. 48, 60, 65.

¹⁰ Claim at para 9, 71-75, ABC Tab 4, pp. 49, 66-67.

of the institution, technological limitations and Company collection policies.¹¹

b) Rates Charged Comply with CRTC Approved GT – Item 292

18. The contract between Bell and Ontario does not specify the rates to be charged, but commensurate with GT Item 292, requires rates to be charged for the collect calls to be no higher than in the local community.¹²

19. The motion judge set out the specific rates that the Appellants pleaded were charged, finding that the same rates are charged to residential customers outside the correctional facility:

Under the OTMS Agreement: (a) Bell charged a flat rate of \$1.00 for a local call up to 20-minutes in duration; and (b) long-distance collect calls were charged a connection fee of \$2.50 plus long-distance rates that ranged from \$0.16 to \$1.33 per minute depending on the distance between the place of the prisoner-caller's phone and the phone of the person being called. These were the conventional rates for long-distance calls outside the prison as are experienced by Bell's residential customers.¹³ [Emphasis added]

c) The CRTC's Regulation of Rates Generally

20. The \$1 per call rate for local calls is in accordance with Telecom Decision CRTC 2007-27, wherein the CRTC set the price cap for local non-cash calls, which includes local collect calls.¹⁴

21. For long-distance collect calls, in Telecom Decision CRTC 1997-19, the CRTC decided to partially forbear from regulating rates pursuant to s. 34 of the Act, instead relying on the market to determine rates. The degree of forbearance depends on whether one is in a non-equal access area or an equal access area.

¹¹ Affidavit of Pierre-Luc Hebert ("Hebert Affidavit") at para 43 and Exhibit "W", ABC Tab 23, p. 604, EXB Tab 19(w), p. 1039.

¹² Claim at para 27 and 29, ABC Tab 4, pp. 53-56; Bell OTMS Agreement at s. 4.08, Bell OTMS Agreement at s. 4.01, Blum Affidavit at Exhibit "A", ABC Tab 15, p. 321.

¹³ Reasons for Decision at para 35, ABC Tab 3, p. 27.

¹⁴ Hebert Affidavit at para 22, ABC Tab 23, p. 596; [Telecom Decision 2007-27](#).

22. In Telecom Decision CRTC 2007-56, the CRTC explained that “subscribers in non-equal access areas would not have the ability to switch to comparable services provided by competitive long distance telecommunications service providers, and thus required regulatory protection.” This definition captures persons in custody in Ontario since they could not switch to another service provider.¹⁵ For long distance collect calls in non-equal access areas, the CRTC retained the entirety of its jurisdiction under ss. 27(1) and 27(2) of the Act.¹⁶

23. Section 27(1) of the Act provides that all rates charged by a Canadian carrier for a telecommunications service “shall be just and reasonable”. “Just and reasonable” is a term of art in rate regulation schemes requiring that rates “be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested”.¹⁷

24. Section 27(2) separately provides that no Canadian carrier shall “unjustly discriminate” in 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.”

25. Among other things, s. 27(3) of the Act empowers the CRTC to make determinations, as a question of fact, as to whether a Canadian carrier has complied with the requirements of s. 27. In determining whether a rate is “just and reasonable”, under s. 27(5) the CRTC may “adopt any method or technique that it considers appropriate, whether based on a carrier’s return on its rate base or otherwise”. Under s. 32 of the Act, the CRTC is empowered to “determine any matter and make any order relating to the rates, tariffs or telecommunications services of Canadian carriers.” Under s. 47, the CRTC is required to administer the Act in accordance with policy

¹⁵ [Telecom Decision CRTC 2007-56](#) at para 24.

¹⁶ [Telecom Decision CRTC 1997-19](#) at paras 1-5, 23-25, 64-67, 95-96.

¹⁷ [Ontario \(Energy Board\) v. Ontario Power Generation Inc.](#), 2015 SCC 44 at [para 15](#), quoting [Northwestern Utilities Ltd. v. City of Edmonton](#), [1929] S.C.R. 186 at 192-193.

objectives and ensure that rates are charged in accordance with s. 27.

26. Furthermore, under s. 35(1), where there is not a sufficient degree of competition to ensure just and reasonable rates and prevent unjust discrimination, and undue or unreasonable preference or disadvantage, the CRTC can require the provision of the service in any manner subject to any conditions determined by the CRTC.

27. Even for “equal access areas”, which Telecom Decision CRTC 2018-84 explains “refers to the ability of a customer to directly access the competing long distance network of their choice”,¹⁸ the CRTC retained its jurisdiction to intervene under s. 27(2) in some circumstances to address concerns over unjust discrimination in the charging of a rate, or the giving of an undue or unreasonable preference or disadvantage.¹⁹

d) The Appellants’ Request that the Court Set Telephone Rates

28. Despite the CRTC’s legislative mandate to determine reasonable calling rates, to conclude that rates are unconscionable, and to award damages, the Appellants ask the court, not the CRTC, to determine reasonable calling rates. Specifically, for damages the Appellants seek “the difference between the actual Collect Call rates and Commissions charged by the Defendants and what the reasonable rates for Collect Calls should have been as established by expert evidence.”²⁰

29. The Appellants tendered an expert affidavit from Douglas A. Dawson. Mr. Dawson provided expert testimony in a case before the United States Federal Communications

¹⁸ [Telecom Decision CRTC 2018-84](#) at para 2.

¹⁹ We further refer to and rely upon the motion judge’s decision reviewing the statutory jurisdiction and powers of the CRTC as set out in the *Telecommunications Act*, at paras 18- 29 of the Reasons for Decision, ABC Tab 3, pp. 24-26.

²⁰ Litigation Plan at para 29(d), Blum Affidavit at Exhibit “G”, EXB Tab 6(g), p. 549.

Commission (“FCC”), concerning the costs of calling by persons in custody, for the FCC to determine the reasonable rates for such calls. He was retained for the present proceeding “... to provide an expert opinion as to the reasonableness of the long-distance and local calling rates charged by Bell Canada for calls originated from Ontario prisons.”²¹

PART III: ISSUES AND ARGUMENT

30. The three issues raised by the Appellants are: 1) the standard of review; 2) whether the motion judge erred in deferring jurisdiction to the CRTC and permanently staying the Appellants’ claim against Ontario; 3) whether the motion judge erred in dismissing the Appellants’ claim for an unconstitutional tax against Ontario.

1. Standard of Review

31. Extricable legal questions are reviewable on a standard of correctness, including the decision dismissing the unconstitutional tax claim under s. 5(1)(a) of the *Class Proceedings Act, 1992* (“CPA”).²²

32. The motion judge’s decision to defer the remainder of the dispute to the CRTC in consideration of a variety of factors is a discretionary decision wherein a court will “only intervene if the exercise of the motion judge’s discretion was based on a wrong principle, a failure to consider a relevant principle or a misapprehension of the evidence”.²³

²¹ Dawson Methodology Report at para 6, 10, 12(i), 14, and Schedule “A”, Affidavit of Douglas Dawson (“Dawson Affidavit”) at Exhibit “A”, ABC Tab 13, p. 115-117. See also the Litigation Plan at para 29(d), Blum Affidavit at Exhibit “G”, EXB Tab 6(g), p. 549.

²² *Housen v Nikolaisen*, 2002 SCC 33 at [para 8](#).

²³ *Brown v Hanley*, 2019 ONCA 395 at [para 24](#).

2. No Error in Deferring to the CRTC and Staying the Action

a) No Error in the Analytical Framework for the Jurisdiction Motion

33. In *Penney v Bell Canada* (“*Penney*”), Justice Strathy (as he then was), considered a similar motion regarding whether to stay or dismiss a proposed class action and defer jurisdiction to the CRTC. Justice Strathy set out the following three-part test derived from the Supreme Court of Canada’s decision in *Weber v Ontario Hydro*:

The first step of the *Weber* analysis requires the Court to consider the scope of the tribunal’s jurisdiction...

The second step is to examine the essential character of the dispute...[and]

The third step in the *Weber* analysis is to ask whether the matter falls within the CRTC’s exclusive jurisdiction or whether, if not, the tribunal is a preferable forum for its resolution.²⁴

34. The motion judge followed this analytical framework. He thoroughly reviewed the CRTC’s jurisdiction under the Act²⁵, and considered numerous decisions concerning the scope of the CRTC’s jurisdiction and whether to defer to it.²⁶ He found it plainly obvious that the “pith and substance” or essential character of the dispute concerned rates, and exercised his discretion to defer to the CRTC considering a variety of factors.²⁷

35. Contrary to what the Appellants contend, there is no requirement at law for the motion judge to decide the certification criteria of preferable procedure, before ruling on the threshold jurisdiction motion. While Justice Strathy conducted a jurisdiction analysis within a preferable

²⁴ *Penney v Bell Canada*, 2010 ONSC 2801 at [para 161-165](#); *Iris Technologies Inc. v Telus Communications Co.*, 2019 ONSC 2502 at [para 34](#); *Weber v Ontario Hydro*, [1995] 2 SCR 929.

²⁵ Reasons for Decision at paras 18-31, ABC Tab 3, pp. 24-26.

²⁶ Reasons for Decision at paras 18, 22, 30, 97, 98, ABC Tab 3, pp. 24, 25, 26, 38.

²⁷ Reasons for Decision at paras 99, 100, ABC Tab 3, p. 38.

procedure analysis in *Penney*²⁸, there is no one way to approach concurrent certification and jurisdiction motions. Indeed, judges in other cases considering both certification and jurisdiction motions have not structured their decisions in this way.²⁹

b) No Error in Determining the Scope of the CRTC's Jurisdiction

(i) Motion Judge's Decision

36. The motion judge thoroughly reviewed the CRTC's jurisdiction as referenced in the Act³⁰, and jurisprudence³¹, and held:

...the CRTC has an expansive jurisdiction to regulate the telecommunications industry in Canada. Included within its jurisdiction is the setting of rates for telephone calls of various sorts including collect calls. 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. The CRTC has the jurisdiction to impose terms and conditions on the delivery of telecommunications services.³²

37. The motion judge recognized the "...CRTC's broad jurisdiction to resolve disputes and its broad remedial authority", and further held that:

Determining the reasonableness of rates is a central responsibility of the CRTC and courts routinely recognize that the CRTC has a specialized expertise to assess rates and the reasonableness and fairness or [sic] rates.³³

38. The motion judge's decision is supported by ample authority.

²⁸ *Penney v Bell Canada*, 2010 ONSC 2801 at [para 9](#).

²⁹ See *Nelson v Telus (Part 2)*, 2021 ONSC 23 and *Nelson v Telus (Part 3)*, 2021 ONSC 24, in which the Superior Court determined a defendant's cross-motion for as a discrete issue and in separate reasons (i.e., Part 2) from the plaintiffs' motion for certification (i.e., Part 3). This Court affirmed these decisions in [2021 ONCA 751](#). See also *Mahar v Rogers Cablesystems Ltd.*, [1995] OJ No 3035 (Gen Div).

³⁰ Reasons for Decision at paras 18-31, ABC Tab 3, pp. 24-26.

³¹ Reasons for Decision at paras 18, 22, 30, 97, 98, ABC Tab 3, pp. 24, 25, 26, 38.

³² Reasons for Decision at para 95, ABC Tab 3, p. 37.

³³ Reasons for Decision at para 96, ABC Tab 3, p. 37-38.

(ii) *The CRTC's Broad Jurisdiction Over Rates*

39. Disputes regarding rates and conditions of service fall squarely within the CRTC's jurisdiction.³⁴ As the Supreme Court of Canada has 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...with a view to implementing the Canadian telecommunications policy objectives set out in s. 7³⁵

40. Similarly, the Court in *Penney* held that it is the CRTC that is responsible for establishing just and reasonable rates and terms of service:

[T]he CRTC has been charged with the responsibility of establishing just and reasonable rates for the provision of wireline telephone services in Canada and the terms on which those services are to be provided.³⁶

41. Parliament's intention to entrust the CRTC with exclusive authority to determine rate disputes is made clear through s. 72 of the Act. Section 72(1) permits a civil action for breaches of the Act, but s. 72(3) expressly prohibits any such action in relation to the charging of a rate. Disputes in relation to a rate are reserved exclusively to the CRTC.

(iii) *The CRTC Has Regulated Rates in Correctional Facilities*

42. The CRTC did not forbear from regulating rates in correctional facilities. There is no dispute that the CRTC regulated rates through GT Item 292 in requiring inmate service calls to be "rated in the same manner as calls originating from other public telephones", thereby capping the rates for such calls. If the Appellants disagree with the CRTC's approval of GT Item 292 because in its view it permits unconscionable rates, the Appellants should make that challenge to

³⁴ For a discussion of the CRTC's broad authority in general see: *Bell Canada v Bell Aliant Regional Communications*, [2009] 2 SCR 7674 at [para 32](#); *Bell Canada v Canada*, 2019 SCC 66 at [para 83](#); and *Penney v Bell Canada*, 2010 ONSC 2801 at [para 161](#).

³⁵ *Bell Canada v Bell Aliant Regional Communications*, [2009] 2 SCR 7674 at [para 36](#).

³⁶ *Penney v Bell Canada*, 2010 ONSC 2801 at [para 136](#).

the CRTC and not collaterally attack it in court.³⁷

(iv) The CRTC Did Not Forbear the Power to Regulate Just and Reasonable Rates

43. The Appellants baldly proclaim that in Telecom Decision CRTC 1997-19, the CRTC forbore its powers to determine just and reasonable rates under s. 27(1). However, the CRTC did not forbear its authority under s. 27(1) for persons in non-equal access areas (i.e. areas where persons cannot switch to the service provider of their choice).³⁸

44. The Appellants make no argument that they had access to the long distance service provider of their choice when in custody and so were in an “equal access area”. Rather, their argument is to the opposite, that they had no choice of long distance service provider (i.e. a non equal access area), and were thereby subject to the allegedly unconscionable rates. On the facts pled by the Appellants, they are in a non-equal access area, and per Telecom Decision CRTC 1997-19, the CRTC retained its jurisdiction over determining just and reasonable rates.

45. Furthermore, there is no dispute that the CRTC retained its jurisdiction under s. 27(2) of the Act in equal and non equal access areas to remedy “unjust discrimination” or “undue or unreasonable disadvantage” in the charging of a rate. While the Appellants necessarily frame their action in causes of action, their claim is essentially that due to their unique situation they were disadvantaged in the rates charged.³⁹

(v) No Error in Not Deciding the Forbearance Issue

46. Ultimately, the motion judge did not expressly decide whether the CRTC forbore its s. 27(1) powers to determine just and reasonable rates for calls from persons in custody.

³⁷ [Toronto v CUPE Local 79](#), 2003 SCC 63 at [para 33](#); [Garland v Consumers' Gas Co.](#), 2004 SCC 25 at [para 71](#).

³⁸ [Telecom Decision CRTC 1997-19](#) at para 95-96.

³⁹ Claim at para 36, ABC Tab 4, p. 57.

Answering that question involves interpreting Telecom Decision CRTC 1997-19, with reference to other CRTC decisions as above.

47. The CRTC should interpret and rule on the meaning of its own decisions. Otherwise, an Ontario court could decide that there was no forbearance, a court of another province could decide that there was forbearance, and the CRTC itself could ultimately rule on the issue. The risk of adjudicative inconsistency is clear.

48. Indeed, courts have consistently cautioned against taking jurisdiction over interpretation issues involving the statutory and regulatory scheme administered by the CRTC.⁴⁰

49. The motion judge was correct to recognize that he need not determine the forbearance issue and decide this aspect of the Appellants' rate dispute. It is for the CRTC to determine any forbearance issue and adjudicate this rate dispute and any remedies flowing from it.

(vi) The Scope of CRTC Remedial Authority is Broad

50. In *Penney*, the Court described the broad remedial authority of the CRTC noting its ability to order remedies, including retroactive remedies, on a class-wide basis.⁴¹ In *Sprint Canada Inc. v Bell Canada*, the Ontario Court of Appeal similarly held:

The CRTC is a highly specialized tribunal with particular expertise. It enjoys a broad discretion over telecommunication matters and has broad powers to make remedial orders including financial remedies. The CRTC is entitled to curial deference.⁴²

51. The CRTC has expressly concluded that it has the authority to order refunds for over or improper billing. For example, in Telecom Decision CRTC 2017-9, the CRTC directed the

⁴⁰ Reasons for Decision at para 98, ABC Tab 3, p. 38. See also: [Mahar v Rogers Cablesystems Ltd.](#), [1995] OJ No 3035 at para 16, 35 (Gen Div), [Nelson v Telus \(Part 2\)](#), 2021 ONSC 23 at [para 56-67](#), [Iris Technologies v Telus](#), 2019 ONSC 2502 at [para 29-30](#).

⁴¹ [Penney v Bell Canada](#), 2010 ONSC 2801 at [para 139](#), [188-189](#), [193](#).

⁴² [Sprint Canada Inc. v Bell Canada](#), [1999] OJ No 63 at [para 8](#) (CA).

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).⁴³ Similarly, the CRTC ordered refunds on a “class basis” in Telecom Decision CRTC 2007-10⁴⁴, and on an individual basis in Telecom Decisions CRTC 2011-87 and 2014-235.⁴⁵

52. The Appellants allege that in Telecom Decision CRTC 93-12, the CRTC decided that it could not “review or regulate rates retroactively”. In that 1993 decision, Bell sought approval from the CRTC to charge a higher rate going forward in part to permit it to recover shortfalls from charging its consumers too low a rate in the past. Omitted from the Appellants’ factum⁴⁶ is the latter half of the quote from Telecom Decision CRTC 93-12 which explains what the CRTC means by retrospective rate making:

The rule against retrospective rate-making that has been established in the case law precludes the Commission from setting rates to take into account the past losses or obligations or the past gains of a regulated company. In other words, current customers cannot be required to pay rates intended to make up for the fact that past customers may have paid either more or less than was necessary for the company to earn a reasonable rate of return...⁴⁷

53. This rule is a consumer protection measure designed to protect consumers from effectively paying more for services already rendered and paid. This rule and this CRTC decision do not prevent the Appellants from seeking a remedy based on the allegation that the rates they were charged were not just and reasonable (as required under s. 27(1) of the Act), or that the

⁴³ [Telecom Decision CRTC 2017-9](#) at para 28.

⁴⁴ [Telecom Decision CRTC 2007-10](#) at para 48-50, see also Hebert Affidavit at para 15, ABC Tab 23, p. 593.

⁴⁵ [Telecom Decision CRTC 2011-87](#) at para 17-18; [Telecom Decision CRTC 2014-235](#) at para 34.

⁴⁶ Appellants’ Factum at para 61.

⁴⁷ [Telecom Decision CRTC 93-12](#) at p. 40.

rates they were charged unjustly discriminated against them or subjected them to an undue or unreasonable disadvantage (prohibited under s. 27(2) of the Act). Whether the CRTC would grant a remedy in a given case is for the CRTC to decide.

c) No Error in Determining the Essential Character of the Dispute

54. The Appellants do not dispute that the essential character or “pith and substance” of their dispute concerns telephone rates. Indeed, throughout the Claim, the Appellants characterize the rates charged through the OTMS as “exorbitant and unconscionable”, “excessive”, “unnecessary and unjustifiably high”, and “astronomical”.⁴⁸

55. To prove liability and damages, the Appellants intend to seek judicial findings as to reasonable calling rates, and request damages that are: “the difference between the actual Collect Call rates and Commissions charged by the Defendants and what the reasonable rates for Collect Calls should have been as established by expert evidence”.⁴⁹

56. As against Ontario, while framed in legal causes of action, the Appellants allege that Ontario breached a fiduciary duty because it imposed, or failed to prevent Bell from charging, an unconscionable rate⁵⁰, and that Ontario was unjustly enriched by the unconscionable rates.⁵¹ Absent an unconscionable rate there is no claim in fiduciary duty or unjust enrichment.

57. Indeed, the Appellants note that the class period ends, and they make no claim against Ontario following the change of phone service provider in 2021, that charges lower rates.⁵²

58. As the motion judge found, “it is painfully plainly obvious that all of the Plaintiffs’

⁴⁸ Claim at para 3, 5, 6, 14, 16, 22, 36, 45, ABC Tab 4, pp. 48, 50-52, 57, 60.

⁴⁹ Dawson Methodology Report at para 10, Dawson Affidavit at Exhibit “A”, ABC Tab 13, p.

115. See the Litigation Plan at para 29(d), Blum Affidavit at Exhibit “G”, EXB Tab 6(g), p. 549.

⁵⁰ Claim at para 65-70, ABC Tab 4, pp. 65-66.

⁵¹ Claim at para 9, 71-75, ABC Tab 4, pp. 49, 66-67.

⁵² Appellants’ Factum at para 2 and 26

causes of action are in relation to rates.”⁵³ While framed in legal causes of action, based on the facts pled and the evidence proposed to establish those facts, the essential character of the dispute is a complaint that the Defendants imposed unconscionable rates on the class.

d) No Error in the Exercise of Discretion to Defer to the CRTC as the Preferable Forum: Fiduciary Duty and Unjust Enrichment

59. The motion judge made no error, in exercising his discretion, to defer to the CRTC to decide this telephone rate dispute.

60. Ontario acknowledges that the CRTC cannot decide a fiduciary duty claim. But it is not the Appellants’ characterization of their dispute that governs, it is the essential character of the dispute. Motion judges on jurisdiction motions do not defer causes of action to the CRTC. Rather, they defer the essential character of the dispute to the CRTC.

61. Indeed, courts have frequently stayed civil actions pleading causes of action where the essential character of the dispute is within the CRTC’s jurisdiction. This has included actions seeking declaratory relief⁵⁴, claims in contract⁵⁵, claims in tort such as unlawful interference with contractual relations⁵⁶, and unjust enrichment⁵⁷, among others.⁵⁸

⁵³ Reasons for Decision at para 92, ABC Tab 3, p. 37.

⁵⁴ *Mahar v Rogers Cablesystems Ltd.*, [1995] OJ No 3035 at para 2 (Gen Div).

⁵⁵ *Allarco Entertainment v Rogers*, [2009] OJ No 5252 at [para 15, 22](#) (Sup Ct J); *Iris Technologies Inc. v Telus Communications Co.*, 2019 ONSC 2502 at [para 3, 26-29](#).

⁵⁶ *Sprint Canada Inc. v Bell Canada*, [1997] OJ No 4772 at [para 4](#) (Gen Div); *Iris Technologies Inc. v Telus Communications Co.*, 2019 ONSC 2502 at [para 3](#).

⁵⁷ *Sprint Canada Inc. v Bell Canada*, [1997] OJ No 4772 at [para 4](#) (Gen Div).

⁵⁸ See generally: *Mahar v Rogers Cablesystems Ltd.*, [1995] OJ No 3035 at para 15 (Gen Div), *Sprint Canada Inc. v Bell Canada*, [1997] OJ No 4772 at [para 4](#) (Gen Div), *B&W Entertainment Inc. v Telus Communications Inc.*, [2004] OJ No 4564 at [para 18](#) (Sup Ct J), *Shaw Cablesystems Ltd. v MTS Communications Inc.*, [2004] MJ No 505 at [para 4](#) (QB), aff’d [2006] MJ No 80 at [para 2](#) (CA), *Allarco Entertainment v Rogers*, [2009] OJ No 5252 at [para 15-22](#) (Sup Ct J), *Penney v Bell Canada*, 2010 ONSC 2801 at [para 5](#), *Iris Technologies Inc. v Telus*

62. By way of a specific example, the Court in *Iris Technologies v Telus Communications Inc.* held that the claim should be stayed notwithstanding that the CRTC could not adjudicate the torts advanced within:

While it is true that Iris Technologies' and ICE Wireless' claims for damages for breach of contract or for the tort of intentional interference with economic relations could not be determined by the CRTC, it is also true that what is before the CRTC is: (a) the alleged predicate misconduct for Iris Technologies' breach of contract claim; (b) the alleged predicate misconduct for ICE Wireless' wrongful intentionally interference with economic relations claim; and (c) the alleged predicate misconduct by Iris Technologies that TELUS would rely on in defence of the Plaintiffs' claims.

The predicate misconduct of all the claims and defences in the civil action before this court concerns matters that are within the exclusive jurisdiction of the CRTC.⁵⁹

63. In the present case, the motion judge gave reasons for staying the fiduciary duty and unjust enrichment claims against Ontario. He properly assessed that the essential character or pith and substance of these disputes concerned a dispute over telephone rates, and then exercised his discretion to defer this telephone rate dispute to the CRTC. The motion judge considered numerous factors guiding his discretion and reasoned as follows:

Once again, a conclusion is painfully obvious. The pith and substance of the Plaintiffs' remaining causes of action are: (a) within the jurisdiction of the CRTC to resolve; (b) meaningful remedies are available from the CRTC; (c) the subject matter of the dispute is at the heart of the telecommunications scheme administered by the CRTC; (d) the CRTC has the subject matter expertise to decide the dispute and the Superior Court of Justice does not; and (e) a ruling by the Superior Court runs the risk of discombobulating the national policies and administration of telecommunications service providers. In these circumstances, a superior court ought to stay its jurisdiction and defer to the jurisdiction and expertise of the CRTC.⁶⁰

64. Indeed, the Supreme Court of Canada has held that rate disputes engage the CRTC's

Communications Co., 2019 ONSC 2502 at [para 3](#); *Nelson v Telus (Part 2)*, 2021 ONSC 23 at [para 27-29, 44-51, 56](#).

⁵⁹ *Iris Technologies Inc. v Telus Communications Co.*, 2019 ONSC 2502 at [para 29-30](#).

⁶⁰ Reasons for Decision at para 99, ABC Tab 3, p. 38.

policy making expertise:

In my view, therefore, the issues raised in these appeals go to the very heart of the CRTC's specialized expertise. In the appeals before us, the core of the quarrel in effect is with the methodology for setting rates and the allocation of certain proceeds derived from those rates, a polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake...

This leads inevitably, it seems to me, to the conclusion that the CRTC may set rates that are just and reasonable for the purposes of the *Telecommunications Act* through a diverse range of methods...taking into account a variety of different constituencies and interests referred to in s. 7 [i.e. list of Canadian telecommunications policy objectives]...

Pursuing policy objectives through the exercise of its rate-setting power is precisely what s. 47 requires the CRTC to do in setting just and reasonable rates.⁶¹[emphasis added]

65. Notably, in the American context, it was the FCC, not a court, that ultimately determined the appropriate rates that should be paid for interstate long-distance calling in prisons.⁶²

66. In coming to its 158-page decision, the FCC received commentary from over 100 parties, who brought diverse perspectives to the questions of telecommunications policy raised in this area.⁶³ In doing so, the FCC was able to ensure that its decision would balance the interests of just and reasonable rates with the unique circumstances that exist in the correctional context.⁶⁴

67. Similarly, it is the CRTC, and not this Court, that is better suited to and is entrusted by Parliament to consider the various policy objectives of telecommunications regulation and apply its expertise and policy making authority to this case. Having various provincial courts decide on rates instead, can give rise to inconsistencies within those courts and potentially the CRTC itself.

⁶¹ *Bell Canada v Bell Aliant Regional Communications*, [2009] 2 SCR 7674 at paras, 38, 48, 74.

⁶² Dawson Methodology Report at para 6, Dawson Affidavit at Exhibit "A", ABC Tab 13, p. 113.

⁶³ *In the Matter of Rates for Interstate Inmate Calling Services*, FCC-13-113 ("FCC Report") at Appendix "B", Dawson Affidavit at Exhibit "A", ABC Tab 13, p. 225.

⁶⁴ FCC Report at para 29-31, 39-41, Dawson Affidavit at Exhibit "A", ABC Tab 13, pp. 136-138, 143-145.

68. Overall, the motion judge made no error in deferring this rate dispute to the specialized expert tribunal empowered to determine rate disputes.

e) The Quebec Jurisprudence is Distinguishable

69. The Quebec jurisprudence is distinguishable because: 1) there was no dispute regarding forbearance and the interpretation of CRTC decisions; 2) the CRTC clearly forbore its regulatory powers in respect of the conduct at issue; and 3) there was no CRTC approved regulatory tariff item already addressing the circumstances at issue.

70. In the present case: 1) there is a dispute regarding forbearance and the interpretation of Telecom Decision CRTC 1997-19; 2) even if the court were to go further and decide this aspect of the rate dispute instead of the CRTC, the CRTC did not forbear its powers under s. 27(1) or (2) of the Act in the present circumstances; and 3) the CRTC has already exercised its regulatory authority regarding rates in correctional facilities through the approved Tariff Item 292.

71. The Quebec jurisprudence also takes a different approach from Ontario in that it generally focuses entirely on whether the CRTC has exclusive jurisdiction, and where it does not, the court takes jurisdiction giving little to no consideration for whether it should exercise its discretion to defer jurisdiction to the CRTC.⁶⁵ The Ontario jurisprudence rightly considers whether to exercise discretion to defer to the CRTC, which the motion judge followed.

72. The Quebec jurisprudence is also at odds with jurisprudence from the Northwest Territories Court of Appeal. In *Bell Mobility Inc. v Anderson*, the Court disallowed an amendment to plead unjust enrichment as failing to disclose a reasonable cause of action. The plaintiff in *Anderson* sought an amendment to allege that the fees charged for a 911 service were

⁶⁵ [*Bell Canada v Aka-Trudel*, 2018 QCCA 829 at para 30.](#)

excessive and vastly exceeded expenses, and that the defendant earned too large of a profit. While there was complete forbearance over the rate of 911 calls by the CRTC, the Court held that forbearance decisions are themselves regulatory decisions, and that attacking them in court is a collateral attack.⁶⁶

3. No Error in Dismissing the Unconstitutional Tax Claim

a) No Error in the Application of the s. 5(1)(a) CPA Test

73. Over 11 paragraphs, the motion judge exhaustively reviewed the law of whether a claim discloses a reasonable cause of action.⁶⁷ He accepted all the facts pled as true (there is no claim otherwise), and he applied the test explicitly finding that it was “plain and obvious” that the unconstitutional tax claim was not a viable cause of action.⁶⁸ The motion judge made no error and did not overstep the boundaries of a determination under s. 5(1)(a) of the *CPA*.

74. This Court’s decision in *Bowman v Ontario*⁶⁹ does not assist the Appellants. In that decision, this Court upheld the certification motion judge’s decision striking three causes of action (i.e. negligence, alleged unjustified infringement of s. 7 the *Charter*, and breach of undertaking). However, this Court held that the certification judge overstepped the boundaries of s. 5(1)(a) by essentially deciding factual issues about whether a contract existed, and if so, its interpretation. This Court held that to be inappropriate since contractual issues are “generally infused with a strong factual component”, and that “courts must treat [contractual issues] as a question of mixed fact and law”.⁷⁰ Unlike in *Bowman*, there is no factual dispute here about whether a contract exists or its interpretation.

⁶⁶ *Bell Mobility Inc. v Anderson*, 2012 NWTCA 4 at [paras 3, 8, 22, 23, 25](#)

⁶⁷ Reasons for Decision at paras 57-67, ABC Tab 3, pp. 30-32.

⁶⁸ Reasons for Decision at paras 68-85, ABC Tab 3, pp. 32-36.

⁶⁹ [2022 ONCA 477](#).

⁷⁰ *Bowman v Ontario*, 2022 ONCA 477 at [paras 32, 40-44](#).

75. Nor is this case like *National Steel Car*, where this Court found that a motion judge erred by dismissing an unconstitutional tax application on a Rule 21 motion to strike. There, this Court held that the motion judge erred because she failed to accept the applicant’s affidavit evidence as true for the purposes of the motion, did not answer critical questions, misstated the Appellant’s position, and did not address key arguments.⁷¹

76. The deficiencies in the *National Steel Car* decision do not arise in this case. There is no colourability challenge attacking the Legislature’s intent in passing a statute, there are no facts pled that were not accepted as true, and there are no necessary questions or determinative arguments left unanswered. Rather, the motion judge applied the facts pled to settled tax law. The Appellants simply disagree with the result.

77. As above, *Bowman* is distinguishable, but in the alternative, its reframing of the s. 5(1)(a) test discouraging any consideration of the merits should not be followed.⁷² The *Bowman* decision rejected the phraseology of “no reasonable prospect of success” to be used to determine if a claim meets the s. 5(1)(a) CPA test. The court rejected it because it is “seemingly tinged with merits-based phraseology”. The Court noted that a preliminary evidentiary merits test was rejected for class actions stating “...the analysis under CPA s. 5(1)(a) must remain faithful to the governing policy that certification does not involve a decision on the merits”. Instead, the Court distinguished and preferred the different phrase “supportable at law”, holding that the s. 5(1)(a) test is whether the cause of action is “supportable at law”.⁷³

78. *Bowman*’s caution and reframing of the s. 5(1)(a) test conflicts with a five-judge panel

⁷¹ [National Steel Car Limited v. Independent Electricity System Operator](#), 2019 ONCA 929 at [paras 10, 25, 54, 57-58, 61-64, 67, 71, 75](#).

⁷² While Ontario has not sought leave to appeal the *Bowman* decision, this should not be interpreted as agreement with the decision.

⁷³ [Bowman v Ontario](#), 2022 ONCA 477 at [paras 38, 40](#).

decision of this Court, and Supreme Court of Canada authorities:

- a) In *Green v Canadian Imperial Bank of Commerce*, a five-judge panel of this Court in a class action endorsed the no reasonable prospect of success formulation of the test (rejected in *Bowman*) and found that it was the same test (albeit with deemed facts) as the securities class action leave test, which it described as a preliminary low level merits test.⁷⁴ Indeed, s. 5(1)(a) and Rule 21 are low level merits tests, just with deemed facts. The test assesses the legal merit of the claim.
- b) The Supreme Court of Canada in its July 2020 decision of *Atlantic Lottery* similarly applied the no reasonable prospect of success test to the class action in that case.⁷⁵ The Supreme Court of Canada in *Imperial Tobacco* also previously held that the no reasonable prospect of success phrasing is simply “another way of putting the [plain and obvious] test”.⁷⁶

79. Furthermore, this Court’s grounding of its rejection of the no reasonable prospect of success test in class actions policy goals is misplaced. First, class action policy supports rejecting an evidentiary merits test, not a legal merits test accepting the facts pled as true.

80. Second, regardless of class action policy, this Court and the Supreme Court of Canada have held that the test under s. 5(1)(a) and Rule 21 (for non-class actions) is the same.⁷⁷

81. Finally, academic commentary has also advocated for a more robust and modern application of the test noting that “[d]ispensing with the antiquated call for a “full evidentiary record” to resolve what is fundamentally a legal question would free up scarce judicial

⁷⁴ *Green v CIBC*, 2014 ONCA 90 (5 judge panel) at [paras 85-91](#), var’d on other grounds [2015 SCC 60](#); See also *Arora v Whirlpool Canada LP*, 2013 ONCA 657 at [paras 14, 15, 87, 89-90, 94](#); leave to appeal denied, [\[2013\] SCCA No 498](#).

⁷⁵ *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 at [paras 14, 18-19](#); Note: the “supportable at law” phrase comes from *Alberta v Elders Advocates of Alberta Society*, 2011 SCC 24 at [para 4](#), a Supreme Court of Canada authority pre-dating *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 and *R v Imperial Tobacco*, 2011 SCC 42.

⁷⁶ *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 at [paras 14](#); *R v Imperial Tobacco*, 2011 SCC 42 at [para 17](#).

⁷⁷ *Cirillo v Ontario*, 2021 ONCA 353 at [para 32](#); *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 at [paras 14, 18-19](#).

resources”.⁷⁸ Where a court can come to the conclusion that accepting the facts pled as true there is no reasonable prospect of success of the action, then it is plain and obvious that there is no “reasonable” cause of action.

b) Court below correctly found that the Unconstitutional Tax Claim did not raise a Reasonable Cause of Action

82. The motion judge concluded that it was plain and obvious that the commission paid by Bell to Ontario, in relation to the amounts that Bell charged the Appellants, is not an unconstitutional tax. He described the commission as both a “proprietary charge” and as “contractual payments made to a government authority”.⁷⁹ This holding is consistent with the outcome in *Toronto Distillery*, as affirmed by this Court, where a percentage-based payment from a vendor to the government in respect of sales made to consumers was found to be *either* a proprietary charge *or* a contractual payment.⁸⁰

c) No Constitutional Distinction Between a Proprietary Charge and a Contractual Payment

83. In the context of the constitutional limitations on taxation, nothing turns on whether a given payment is best characterized as a proprietary charge or a contractual payment. It is clear neither is a tax, as can be seen from the application of the threshold requirements for characterizing a payment as a tax set out in *Lawson v Interior Tree Fruit and Vegetable Committee of Direction*. For a payment to be characterized as a tax it must be: (1) compulsory

⁷⁸ See Stephen Pitel & Matthew Lerner, “Resolving Questions of Law: A Modern Approach to Rule 21” (2014) 43 Advocates’ Q. 344, pp. 351-352 (Cited with approval in: [Atlantic Lottery Corp. Inc. v Babstock](#), 2020 SCC 19 at [para 18](#)); Gerard Kennedy & Mary Angela Rowe, “Tanudjala v Canada (Attorney General): Distinguishing Injusticiability and Deference on Motions to Strike”, (2015) 44 Advocates’ Q. 391, pp. 397-402 (Articles attached); See also: [Rayner v McManus](#), 2017 ONSC 3044 at [paras 16, 25-26](#) (Div Ct).

⁷⁹ Reasons for Decision at para 81 and 84, ABC Tab 3, p. 35.

⁸⁰ [Toronto Distillery Company Ltd. v Ontario \(Alcohol and Gaming Commission\)](#), 2016 ONCA 960 at [paras 4, 8](#).

and enforceable by law; (2) imposed under the authority of Parliament or a provincial legislature; (3) levied by a public official; and (4) intended for a public purpose.⁸¹

84. Proprietary charges and contractual payments alike do not involve the element of compulsion under the first requirement. Similarly, contractual payments and most proprietary charges, including the commission at issue in this appeal, do not meet the second requirement either, because the obligation to pay them arises from the common law and not legislation.⁸² As the motion judge noted, in both cases the government is acting in a private law capacity and not its public, legislative capacity, which engages constitutional constraints such as s. 53 of the *Constitution Act, 1867*.

85. There are also many transactions which may accurately be characterized as falling into both categories of contractual payment and proprietary charge. A payment pursuant to a contract in consideration for the transfer of property has a contractual element as well as a proprietary element. In the constitutional context, there is no need to determine which element is dominant since the answer does not make it more or less likely that the payment in question is a tax.

d) No Procedural Unfairness

86. Nor was there any procedural unfairness to the Appellants, who were aware of the core argument advanced by Ontario in its factum and oral argument that Bell pays the commission to Ontario subject to voluntary private law obligations and not under legislative compulsion.

⁸¹ *620 Connaught v Canada (Attorney General)*, 2008 SCC 7 at [para 22](#), citing *Lawson v Interior Tree Fruit and Vegetable Committee of Direction*, [1931] SCR 357 at 362-63.

⁸² An exception is whether the Legislature chooses to set the price for the purchase of Crown property, as in *Boniferro Mill Works ULC v Ontario*, 2009 ONCA 75. Even where that is the case, a legislatively structured proprietary charge is still not a tax because the element of compulsion is missing (see [para 34](#)).

e) No Error in Characterizing the Commissions as a Proprietary Charge

87. The motion judge did not err in substance by describing the commission as proprietary charges in one part of his reasons. The commission paid by Bell to Ontario has both proprietary and contractual elements. In exchange for entering into a contract with Ontario, Bell gained physical access to Ontario's real property, which was necessary for it to engage in the business in question. Rents, which are payments made to a real property owner in exchange for certain uses of that property, are a recognized form of proprietary charges.⁸³

f) No Error in Characterizing the Commissions as a Voluntary Contractual Payment

88. Even if the motion judge did err in characterizing the payments as proprietary charges, this Court should affirm his parallel conclusion that the commissions are a voluntary contractual payment. No party has suggested that the contract was not voluntarily and validly executed by Bell and Ontario. The Appellants do not suggest there is any legislative requirement that Bell pay the commission to Ontario, only that Bell is bound to follow the contract it agreed to. These pleaded facts are fatal to the unconstitutional tax claim.

89. Indeed, this contractual arrangement is analogous to the facts in *Toronto Distillery*, in which this Court concluded that there was no unconstitutional tax. In that case, in order to sell its wares at an on-site store, the appellant distillery was required to enter into a contract with a Crown corporation which required it to pay a mark-up based on a percentage of its sales. Given the government monopoly on alcohol sales in Ontario, entering into the contract was the only way the distillery "can sell its products directly to the public".⁸⁴ There was no direct payment

⁸³ [620 Connaught v Canada \(Attorney General\)](#), 2008 SCC 7 at [para 49](#).

⁸⁴ [Toronto Distillery Company Ltd. v Ontario \(Alcohol and Gaming Commission\)](#), 2016 ONCA 960 at [para 9](#).

from consumer to the Crown corporation.⁸⁵

90. The distillery argued that the payments were an unconstitutional tax since it was under a practical compulsion to make the payments to legally operate. In rejecting that argument, this Court's analysis focused exclusively on the relationship between the business making the payment and the government. The crucial fact that led to the determination that the payment was not a tax was that the distillery entered into a voluntary contract for a commercial advantage.⁸⁶

91. The fact that the funds used to pay the commission originated with the business's customers, and that the obligation to pay the commission was triggered by a sale from the business to a customer, was irrelevant. The fact that consumers have no option to buy alcohol in Ontario other than through the government monopoly was similarly no bar to this conclusion.⁸⁷

92. The authorities relied on by the Superior Court in *Toronto Distillery*, and by the motion judge,⁸⁸ also involved scenarios where a contractual payment was paid by a business which can be assumed to pass the cost of the payment onto other parties. They provide a complete answer to the Appellants' argument that the motion judge did not consider the context that the Appellants make payments to Bell and Bell subsequently pays the commission to Ontario.

93. In *Abernethy-Lougheed Logging*, timber dues were paid to British Columbia, and presumably recouped from purchasers of timber.⁸⁹ In *QCTV*, a cable television provider was required to make a monthly payment to a municipality based on a percentage of its revenue from

⁸⁵ [*Toronto Distillery Company Ltd. v Ontario \(Alcohol and Gaming Commission\)*](#), 2016 ONSC 2202 at [para 7](#).

⁸⁶ [*Toronto Distillery Company Ltd. v Ontario \(Alcohol and Gaming Commission\)*](#), 2016 ONCA 960 at [para 9](#).

⁸⁷ [*Toronto Distillery Company Ltd. v Ontario \(Alcohol and Gaming Commission\)*](#), 2016 ONSC 2202 at [para 15](#).

⁸⁸ Reasons for Decision at footnote 46, ABC Tab 3, p. 35.

⁸⁹ [*Abernethy-Lougheed Logging Co. \(Trustee of\) v British Columbia*](#), 1937 CanLII 261 (BC Sup Ct J), affd on this point [1938 CanLII 210](#) at 526 (BC CA).

cable subscribers under a contract in which it gained the use of the municipality's property: its roads, easements and telephone system facilities.⁹⁰ In both cases, courts concluded that such contractual payments are not taxes.

94. Further, payments made to a private party cannot be taxes since they do not meet the third element of the *Lawson* test, that the payments be made to a public authority. The same analysis applies to the commission paid from Bell to Ontario. It is paid pursuant to a voluntary agreement between Bell and Ontario, which Bell entered to pursue a commercial advantage. The commission is based on a percentage of the amounts charged by Bell, just as in *Toronto Distillery* and *QCTV*. Ontario operates correctional facilities due to its unique governmental role, but the same was true of the government monopoly over liquor sales in *Toronto Distillery*. There is simply no constitutional issue when a business makes payments to the government as part of an arrangement it has willingly entered into, even where the payment may originate with the business's customers or other third parties.

95. Finally, under the contract, Bell has an obligation to pay Ontario based on the monthly amount it charges to customers, regardless of whether Bell successfully collects those charges.⁹¹ That is, Bell could owe Ontario a commission on a call for which Bell has itself received no revenue. This is a further indication that the true characterization of the commission is a voluntary contractual payment from Bell to Ontario and not Bell simply acting as a collector of a payment owed to the government from customers.⁹² It is not accurate to refer to Ontario itself as collecting the commission from Bell's customers, as the payment is only required from Bell and is required regardless of whether Bell actually collects any revenue on the transaction.

⁹⁰ *QCTV Ltd. v Edmonton (City)*, 1983 CanLII 1088 at [para 8](#) (AB QB), aff'd [1984 ABCA 311](#).

⁹¹ OTMS Agreement at s. 4.01; ABC Tab 15, pp. 310-320.

⁹² The OTMS Agreement also specifies that Bell is not acting as Ontario's agent at s. 2.03, ABC Tab 15, p. 307.

96. Accordingly, the commission paid by Bell does not meet the *Lawson* criteria and cannot be characterized as a tax. This ground of appeal should be dismissed.

PART IV: ADDITIONAL ISSUES

97. Alternatively, pursuant to s. 134(1)(a) of the *Courts of Justice Act*, this Court should stay the unconstitutional tax claim, and dismiss the claims for fiduciary duty and unjust enrichment for failing to disclose a reasonable cause of action.⁹³

1. Alternative: Stay of Unconstitutional Tax Claim

98. In the alternative to a dismissal of the unconstitutional tax claim, this claim should be stayed because a determination of the rate dispute by the CRTC would be relevant and potentially determinative of this claim.⁹⁴ Specifically, if the CRTC determined that the rates are just and that there is a nexus between the rates and the regulatory purposes of the Act, then the rates (inclusive of the commission) would be a valid regulatory charge, and not a tax.⁹⁵ Indeed, the Supreme Court of Canada has recently confirmed that a valid regulatory charge may be established not only where it recovers the government's costs in administering a regulatory scheme, but also if the charge itself serves a regulatory purpose.⁹⁶

2. Alternative: Dismiss the Fiduciary Duty and Unjust Enrichment Claims

99. Government defendants such as Ontario will rarely be found to owe a fiduciary duty. This is because the requirement to place the beneficiary's interests above all else is inconsistent

⁹³ [Schaeffer v Wood](#), 2011 ONCA 716 at [paras 48-53](#); [LM v Peel CAS](#), 2019 ONCA 841 at [paras 53-55](#).

⁹⁴ [Dioguardi Tax Law v Law Society of Upper Canada](#), 2016 ONCA 531 at [para 2](#). see also [Nova Scotia \(Workers' Compensation Board\) v Martin](#), 2003 SCC 54 at [para 30](#).

⁹⁵ [Reference re Agricultural Products Marketing Act](#), [1978] 2 S.C.R. 1198 at p. 1234 (Laskin C.J.) and pp. 1291-1292 (Pigeon J.); [National Steel Car Limited v Independent Electricity System Operator](#), 2018 ONSC 3845 at [para 70](#), rev'd on other grounds [2019 ONCA 929](#).

⁹⁶ [References re Greenhouse Gas Pollution Pricing Act](#), 2021 SCC 11 at [para 216](#).

with a government's responsibility to act in the best interests of society as a whole, which often requires the balancing of competing interests as opposed to the paramountcy of one interest.⁹⁷

100. Indeed, management of correctional facilities requires the balancing of a variety of different, and at times competing, interests. For example, in providing telephone services, Ontario did not undertake to place the Appellants' interests before all other interests, but expressly stated in the RFP that it sought to balance a person in custody's access to telephones with the need to protect justice participants and prevent criminal activity.⁹⁸

101. Accordingly, in *Johnson v Ontario*, wherein it was alleged that Ontario breached a fiduciary duty to persons in custody by not preventing substandard living conditions, overcrowding, threats and assaults, the Superior Court held that Ontario did not owe a fiduciary duty and struck the cause of action.⁹⁹ This Court in *R v Phaneuf* also rejected a fiduciary duty on Ontario to persons ordered assessed under the *Criminal Code* and detained in jail pending the availability of a bed in the hospital where the assessment was to be conducted. The Court recognized that, in the correctional context, Ontario acts for the benefit of the general public and not any individual detainee.¹⁰⁰ This Court in *Cirillo* further rejected a fiduciary duty on Ontario to persons in bail court.¹⁰¹ The fiduciary duty claim does not raise a reasonable cause of action.

102. The claim for unjust enrichment fails for three reasons.¹⁰² First, any enrichment to Ontario was through a valid and unchallenged contract between Ontario and Bell. A contract is a

⁹⁷ *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at [para 30-34, 44](#).

⁹⁸ Request for Proposals No.: COS-0009 at s 1.4, Affidavit of Paul Gortana at Exhibit "A", ABC Tab 20, p. 512-513.

⁹⁹ *Johnson v Ontario*, 2016 ONSC 5314 at [paras 40-42](#).

¹⁰⁰ *Ontario v Phaneuf*, [2009] OJ No 5618 at para 5, 22 and 57 (Sup Ct J).

¹⁰¹ See also *Cirillo v Ontario*, 2019 ONSC 3066, at [paras 12-16, 30](#) (fiduciary duty claim abandoned on appeal, [2021 ONCA 353](#) at [para 27](#)); *Leroux v Ontario*, 2018 ONSC 6452 at [para 41](#) (no cross-appeal on fiduciary duty, [2021 ONSC 2269](#) at [para 5](#))

¹⁰² *Kerr v Baranow*, 2011 SCC 10 at [para 32](#).

recognized juristic reason for an enrichment.¹⁰³

103. Second, the Appellants do not plead a “direct” relationship between their alleged deprivation and Ontario’s alleged enrichment. Rather, the Appellants plead that they made payments to Bell.¹⁰⁴ To prevent recovery from both the immediate beneficiary of a payment, and a party that obtained a secondary or collateral benefit, claims for unjust enrichment may only be made against the direct beneficiary as noted by this Court in *Catalyst Capital Group Inc.* in upholding a decision striking a claim of unjust enrichment.¹⁰⁵

104. Third, insofar as this claim is a derivative claim of the unconstitutional tax claim, an unconstitutional/*ultra vires* tax claim cannot support an unjust enrichment claim.¹⁰⁶

PART V: ORDER SOUGHT

105. Ontario requests the following relief:

- a. an order dismissing the appeal; and
- b. costs of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

And. J.

¹⁰³ [*Tega Homes Inc. v Spencedale Properties Ltd.*, 2018 ONSC 6048 at paras 62-71; *Inglis v TD Securities Inc.*, \[2006\] OJ No 2545 at para 28 \(Sup Ct J\); *Pacific National Investments v Victoria*, 2004 SCC 75 at paras 23, 28.](#)

¹⁰⁴ Claim at para 36, 39-40, ABC Tab 4, pp. 57-59.

¹⁰⁵ [*Catalyst Capital Group Inc. v Dundee Kilmer Developments Ltd.*, 2020 ONCA 272 at para 86-87; *Peel v Canada*, \[1992\] SCJ No 101 at para 58; *Kerr v Baranow*, 2011 SCC 10 at para 39.](#)

¹⁰⁶ [*Kingstreet Investments Ltd. v New Brunswick*, 2007 SCC 1 at paras 12-13, 34, 40.](#)

CERTIFICATE

I estimate that 1.5 hours will be needed for the respondent Ontario's 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 16th day of November, 2022.



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Schedule “A” – Authorities Relied Upon

Judicial Authorities

1. [*Ontario \(Energy Board\) v Ontario Power Generation Inc.*](#), 2015 SCC 44.
2. [*Northwestern Utilities Ltd. v City of Edmonton*](#), [1929] S.C.R. 186.
3. [*Housen v Nikolaisen*](#), 2002 SCC 33.
4. [*Brown v Hanley*](#), 2019 ONCA 395.
5. [*Penney v Bell Canada*](#), 2010 ONSC 2801.
6. [*Iris Technologies Inc. v Telus Communications Co.*](#), 2019 ONSC 2502.
7. [*Weber v Ontario Hydro*](#), [1995] 2 SCR 929.
8. [*Nelson v Telus \(Part 2\)*](#), 2021 ONSC 23.
9. [*Nelson v Telus \(Part 3\)*](#), 2021 ONSC 24.
10. [*Nelson v Telus*](#), 2021 ONCA 751.
11. [*Mahar v Rogers Cablesystems Ltd.*](#), [1995] OJ No 3035 (Gen Div).
12. [*Bell Canada v Bell Aliant Regional Communications*](#), [2009] 2 SCR 7674.
13. [*Bell Canada v Canada*](#), 2019 SCC 66.
14. [*Toronto v CUPE Local 79*](#), 2003 SCC 63.
15. [*Garland v Consumers' Gas Co.*](#), 2004 SCC 25.
16. [*Sprint Canada Inc. v Bell Canada*](#), [1999] OJ No 63 (CA).
17. [*Allarco Entertainment v Rogers*](#), [2009] OJ No 5252 (Sup Ct J).
18. [*Sprint Canada Inc. v Bell Canada*](#), [1997] OJ No 4772 (Gen Div).
19. [*B&W Entertainment Inc. v Telus Communications Inc.*](#), [2004] OJ No 4564 (Sup Ct J).
20. [*Shaw Cablesystems Ltd. v MTS Communications Inc.*](#), [2004] MJ No 505 (QB), aff'd [2006] MJ No 80 (CA).
21. [*Bell Canada v Aka-Trudel*](#), 2018 QCCA 829.
22. [*Bell Mobility Inc. v Anderson*](#), 2012 NWTCA 4.
23. [*Bowman v Ontario*](#), 2022 ONCA 477.
24. [*National Steel Car Limited v. Independent Electricity System Operator*](#), 2019 ONCA 929.
25. [*Green v CIBC*](#), 2014 ONCA 90, var'd on other grounds [2015 SCC 60](#).

26. [*Arora v Whirlpool Canada LP*](#), 2013 ONCA 657, leave to appeal ref'd [\[2013\] SCCA No 498](#).
27. [*Atlantic Lottery Corp. Inc. v Babstock*](#), 2020 SCC 19.
28. [*Alberta v Elders Advocates of Alberta Society*](#), 2011 SCC 24.
29. [*R v Imperial Tobacco*](#), 2011 SCC 42.
30. [*Cirillo v Ontario*](#), 2021 ONCA 353.
31. [*Rayner v McManus*](#), 2017 ONSC 3044 (Div Ct).
32. [*Toronto Distillery Company Ltd. v Ontario \(Alcohol and Gaming Commission\)*](#), 2016 ONCA 960.
33. [*620 Connaught v Canada \(Attorney General\)*](#), 2008 SCC 7.
34. [*Lawson v Interior Tree Fruit and Vegetable Committee of Direction*](#), [1931] SCR 357.
35. [*Boniferro Mill Works ULC v Ontario*](#), 2009 ONCA 75.
36. [*Toronto Distillery Company Ltd. v Ontario \(Alcohol and Gaming Commission\)*](#), 2016 ONSC 2202.
37. [*Abernethy-Lougheed Logging Co. \(Trustee of\) v British Columbia*](#), 1937 CanLII 261 (BC Sup Ct J), aff'd [1938 CanLII 210](#) (BC CA).
38. [*QCTV Ltd. v Edmonton \(City\)*](#), 1983 CanLII 1088 (AB QB), aff'd [1984 ABCA 311](#).
39. [*Schaeffer v Wood*](#), 2011 ONCA 716.
40. [*LM v Peel CAS*](#), 2019 ONCA 841.
41. [*Reference re Agricultural Products Marketing Act*](#), [1978] 2 S.C.R. 1198.
42. [*National Steel Car Limited v Independent Electricity System Operator*](#), 2018 ONSC 3845, rev'd on other grounds [2019 ONCA 929](#).
43. [*References re Greenhouse Gas Pollution Pricing Act*](#), 2021 SCC 11.
44. [*Dioguardi Tax Law v Law Society of Upper Canada*](#), 2016 ONCA 531.
45. [*Nova Scotia \(Workers' Compensation Board\) v Martin*](#), 2003 SCC 54.
46. [*Johnson v Ontario*](#), 2016 ONSC 5314.
47. [*Ontario v Phaneuf*](#), [2009] OJ No 5618 (Sup Ct J).
48. [*Cirillo v Ontario*](#), 2019 ONSC 3066.
49. [*Leroux v Ontario*](#), 2018 ONSC 6452.
50. [*Kerr v Baranow*](#), 2011 SCC 10.
51. [*Tega Homes Inc. v Spencedale Properties Ltd.*](#), 2018 ONSC 6048.

52. [*Inglis v TD Securities Inc.*](#), [2006] OJ No 2545 (Sup Ct J).
53. [*Pacific National Investments v Victoria*](#), 2004 SCC 75.
54. [*Catalyst Capital Group Inc. v Dundee Kilmer Developments Ltd.*](#), 2020 ONCA 272.
55. [*Peel v Canada*](#), [1992] SCJ No 101.
56. [*Kingstreet Investments Ltd. v New Brunswick*](#), 2007 SCC 1.

CRTC Authorities

57. [Telecom Decision CRTC 2007-56](#).
58. [Telecom Decision CRTC 1997-19](#).
59. [Telecom Decision CRTC 2018-84](#).
60. [Telecom Decision CRTC 2017-9](#).
61. [Telecom Decision CRTC 2007-10](#).
62. [Telecom Decision CRTC 2011-87](#).
63. [Telecom Decision CRTC 93-12](#).
64. [Telecom Decision CRTC 2014-235](#).

Secondary Sources

65. Stephen Pitel & Matthew Lerner, “Resolving Questions of Law: A Modern Approach to Rule 21” (2014) 43 *Advocates’ Q.* 344
66. Gerard Kennedy & Mary Angela Rowe, “Tanudjala v Canada (Attorney General): Distinguishing Injusticiability and Deference on Motions to Strike”, (2015) 44 *Advocates’ Q.* 391.

Schedule “B” – Legislation Relied Upon

1. *Financial Administration Act, RSO 1990 c F12*

Public money

1(3) Money is public money if it belongs to Ontario and is received or collected by the Minister of Finance or by any other public officer or by any person authorized to receive and collect such money. 2010, c. 1, Sched. 7, s. 1 (7).

[...]

Public money to be credited to Minister of Finance

2 (1) Subject to this Part, all public money shall be deposited to the credit of the Minister of Finance. R.S.O. 1990, c. F.12, s. 2 (1); 1994, c. 17, s. 62 (2).

2. *Courts of Justice Act, RSO 1990 c C43*

Powers on appeal

134 (1) Unless otherwise provided, a court to which an appeal is taken may,

- (a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
- (b) order a new trial;
- (c) make any other order or decision that is considered just. R.S.O. 1990, c. C.43, s. 134 (1).

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

Ontario relies on numerous parts and sections of the *Telecommunications Act* and for the purposes of brevity will not be reproducing them in this Schedule. The full text of the Act is produced within Ontario’s book of Authorities and may also be accessed at <https://canlii.ca/t/5552w>.

The parts and sections relied upon are: Part III, Part IV, sections 7, 24, 25, 27, 32, 35, 37, 47, 48, 52, 55, 60, 63, 64, 62, and 72.

FAREAU et al

and

BELL CANADA et al

Court File No: C70691

Plaintiffs (Appellants)

Defendants (Respondents)

COURT OF APPEAL FOR ONTARIO

**FACTUM OF THE RESPONDENT (DEFENDANT) HIS
MAJESTY THE KING IN RIGHT OF ONTARIO**

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