Federal Court of Appeal

Cour d'appel fédérale

**Date: 20240209**

**Docket: 23-A-52**

**Citation: 2024 FCA 28**

2024 FCA 28 (CanLII)

**PRESENT: GLEASON J.A.**

**BETWEEN:**

**BELL CANADA**

**Moving Party**

**and**

**BEANFIELD TECHNOLOGIES INC., BRAGG COMMUNICATIONS INCORPORATED c.o.b. EASTLINK, CAMPBELL PATTERSON COMMUNICATIONS, CANADIAN ANTI-MONOPOLY PROJECT, COGECO COMMUNICATIONS INC., COMMUNITY FIBRE COMPANY, COMPETITIVE NETWORK OPERATORS OF CANADA, DEVTEL COMMUNICATIONS INC., IGS HAWKESBURY INC., NATIONAL CAPITAL FREENET, OPENMEDIA, PUBLIC INTEREST ADVOCACY CENTRE, QUEBECOR MEDIA INC. ON BEHALF OF VIDEOTRON LTD., ROGERS COMMUNICATIONS CANADA INC., SASKATCHEWAN TELECOMMUNICATIONS, SKYCHOICE COMMUNICATIONS INC., TEKSAVVY SOLUTIONS INC., TELUS COMMUNICATIONS INC., TRUESPEED INTERNET SERVICES INC., VAXINATION INFORMATIQUE, VAXXINE COMPUTER SYSTEMS INC., and WAVEDIRECT TELECOMMUNICATIONS**

**Responding Parties**

Dealt with in writing without appearance of the parties.

Order delivered at Ottawa, Ontario, on February 9, 2024.

REASONS FOR ORDER BY: GLEASON J.A.

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## REASONS FOR ORDER

**GLEASON J.A.**

[1] Bell Canada (Bell) has moved for a stay of Decision CRTC 2023-358 of the Canadian Radio-television and Telecommunications Commission (CRTC), issued on November 6, 2023 (the Decision). In the Decision, the CRTC directed Bell and Telus Communications Inc. (TCI) to provide reseller competitors access to Bell and TCI's fibre-to-the-premises (FTTP) facilities "over aggregated wholesale HSA", within Ontario and Quebec, by no later than May 7, 2024. Such access was mandated by the CRTC on a temporary basis, pending the outcome of a broader review that the CRTC is undertaking, following a Notice of Consultation the CRTC issued on March 8, 2023.

[2] A little background is helpful to put this motion and the Decision into context.

[3] FTTP facilities enable access to high-speed internet. In ordering the temporary provision of access to Bell and TCI's FTTP facilities over aggregated wholesale HSA, the Decision requires Bell and TCI (the latter, for only a relatively small number of customers) to allow reseller competitors to temporarily access, on an aggregated basis, Bell and TCI's fibre network facilities in Ontario and Quebec that deliver to customers wireline access to high-speed internet. The CRTC was of the view that this would open the door to competitors to sell high-speed internet services in Ontario and Quebec that are competitive to those offered by Bell and TCI. In the Decision, the CRTC also mandated the wholesale rates that Bell and TCI can charge resellers on an interim basis for such aggregated access to their FTTP facilities.

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[4] In 2015, the CRTC mandated that facilities based carriers, including Bell and TCI, were required to provide disaggregated FTTP services to resellers and set the wholesale rates that could be charged to resellers for such services.

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[5] The difference between aggregated and disaggregated access is usefully summarized by Bell, at paragraphs 18 and 19 of its Written Representations filed in connection with this motion, as follows:

> 18. Facilities Based Carriers invest in two types of facilities, among others: transport facilities and access facilities. Transport facilities allow large amounts of data traffic to be sent and received across a fibre network. They are analogous to highways or transmission power lines. Access facilities, by contrast, connect individual customer locations (i.e., premises) to the fibre network. These access facilities are analogous to local roads or distribution power lines.
>
> 19. The CRTC has historically regulated two types of wholesale Internet services using these facilities:
>
> (a) Aggregated wholesale Internet service: permits Resellers to lease a combination of both: (i) the access facilities needed to connect to customer locations; and (ii) the transport facilities through which large amounts of traffic can be sent and received. Prior to the Decision, aggregated wholesale service was available for Bell's fibre-to-the-node Internet service (a good Internet service, but not as fast as FTTP service), but was not available for FTTP service, which is an emerging technology that Facilities Based Carriers use to provide the highest speed Internet services available to them; and
>
> (b) Disaggregated wholesale Internet service: permits Resellers to lease only the access facilities needed to connect to customer locations, but not the transport facilities. Instead, competitors must obtain transport facilities primarily by either investing in their own networks … or by leasing facilities from other carriers on a commercial basis. Disaggregated wholesale services have been available on FTTP facilities for some time, but, in practice, none of Bell's competitors made use of them.

[6] According to some of the respondents to this motion, the disaggregated access option for FTTP was unfeasible because it was too expensive for them on the terms that the CRTC mandated in 2015.

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[7] On February 9, 2023, the Governor in Council issued an order under section 8 of the *Telecommunications Act*, S.C. 1993, c 38, entitled the *Order Issuing a Direction to the CRTC on a Renewed Approach to Telecommunications Policy*, SOR/2023-23, registered February 10, 2023 (P.C. 2023-110 February 9, 2023) (the Policy Direction).

[8] Section 10 of the Policy Direction provided as follows:

| **Aggregated wholesale high-speed access service** | **Service d’accès haute vitesse de gros groupé** |
| --- | --- |
| **10** The Commission must mandate the provision of an aggregated wholesale high-speed access service — that is additional to any other types of wholesale high-speed access services that are mandated — until it determines that broad, sustainable and meaningful competition will persist even if the provision of an aggregated service is no longer mandated. | **10** Le Conseil doit rendre obligatoire la fourniture de services d’accès haute vitesse de gros groupé — qui s’ajoutent à tout autre type de service d’accès de gros à haut débit dont la fourniture est obligatoire — jusqu’à ce qu’il détermine qu’une concurrence vaste, durable et significative perdurera même si la fourniture d’un service groupé n’est plus obligatoire. |

[9] On March 7, 2023, the CRTC issued Telecom Notice of Consultation CRTC 2023-56. In it, the CRTC stated that it was going to review the existing framework for wholesale high-speed access (HSA) “… in light of changing market conditions, the significant challenges in

implementing the framework, and the importance to Canadians of having access to greater choice and more affordable services”. The CRTC also set out its preliminary views that:

> (i) the provision of aggregated wholesale HSA services should be mandated; (ii) access to fibre-to-the-premises (FTTP) facilities should be provided over these services; and (iii) the provision of FTTP facilities over aggregated wholesale HSA services should be mandated on a temporary and expedited basis, until the Commission reaches a decision as to whether such access is to be provided indefinitely.

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[10] In its Notice of Consultation, the CRTC invited comments from interested parties. Over 300 companies and individuals intervened before the CRTC to provide their views. Among them were Bell and the respondents who have filed submissions on this motion, namely TekSavvy Solutions Inc. (TekSavvy), Québecor Media Inc., on behalf of Vidéotron Ltd. (QMI), and Competitive Network Operators of Canada (CNOC).

[11] In the Decision, the CRTC confirmed, in part, its preliminary views on the temporary relief it was considering to impose. As a result, the CRTC mandated that Bell and TCI were to provide reseller competitors access to Bell and TCI’s FTTP facilities over aggregated wholesale HSA, within Ontario and Quebec, by no later than May, 7, 2024, on a temporary basis pending the outcome of the CRTC’s overall review of the framework for HSA services.

[12] In reaching this conclusion, the CRTC noted that, in recent years, many additional subscribers have subscribed to Bell’s FTTP service and that the competitive intensity in the sector has declined. The CRTC determined that the temporary aggregated FTTP access that it mandated would help stabilize competition. The CRTC also noted that it was its view that

"… competitors' inability to practically provide services over FTTP networks has severely affected their ability to effectively compete". The CRTC continued by stating that it was "… concerned that this negative impact on wholesale-based competition will become even more severe over time [and that absent] regulatory intervention, meaningful wholesale-based competition will continue to decline" (Decision at para. 57).

[13] The CRTC limited the scope of the temporary mandated FTTP access to Ontario and Quebec, finding that these were the two areas "where wholesale based competition [was] most clearly declining" (Decision at paras. 59 and 68).

[14] In the Decision, the CRTC addressed Bell's concerns that it might not be able to recover the implementation costs associated with providing temporary access to its FTTP facilities over aggregated wholesale HSA, if such access were not permanently mandated. The CRTC considered that such issues, should they arise, were "... not insurmountable from a regulatory perspective". The CRTC continued by stating that it was "... prepared to deal with these matters at a later date should this be required" (Decision at para. 67).

[15] With this background in mind, I turn to now assess the merits of this motion.

[16] As noted, Bell seeks to stay the Decision until the disposition of its application for leave to appeal the Decision, and if, leave is granted, until the appeal is decided. If Bell's motion is granted, Bell would not be required to provide its competitors with temporary access to its FTTP facilities over aggregated wholesale HSA within Ontario and Quebec until this Court rules on

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Bell's motion for leave to appeal the Decision, and if, leave is granted, until the appeal is decided.

[17] TekSavvy, QMI, and CNOC oppose the motion.

[18] The test for the granting a stay in a case like this is well-known and requires the moving party to establish that: (1) their appeal raises a serious issue; (2) they would suffer irreparable harm if the stay were not granted; and (3) the balance of convenience favours granting the stay: *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 at 334 (*RJR-MacDonald*); *Canada v. Canadian Council for Refugees*, 2008 FCA 40, 2008 CarswellNat 150 at para. 18 (*Canadian Council for Refugees*). All three of the foregoing criteria must be met for a stay to be issued by a court.

[19] The threshold for establishing the first criterion of a serious issue is generally a low one. It will be met in a case, like the present, if the issues raised in the Notice of Appeal are not frivolous or vexatious: *RJR-MacDonald* at 348; *Canadian Council for Refugees* at paras. 18, 22. Here, I am prepared to accept, for purposes of this motion, that Bell's Notice of Appeal raises at least one such issue.

[20] However, I find that it has not established that it will suffer irreparable harm if the stay is not granted. Thus, the second criterion for the issuance of the requested stay is not met.

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[21] Irreparable harm refers to the nature, as opposed to the extent, of the harm that a party will suffer if a stay is not granted. There must be "a real probability that unavoidable irreparable harm will result unless a stay is granted": see *Arctic Cat, Inc. v. Bombardier Recreational Products Inc.*, 2020 FCA 116, 176 C.P.R. (4th) 323 at para. 20, citing *Glooscap Heritage Society v. Canada (National Revenue)*, 2012 FCA 255, [2012] F.C.J. No. 1661 (QL) at para. 31 (*Glooscap*); see also *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd.*, 2010 FCA 232, 406 N.R. 304 at para. 14 (*Dywidag*); *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328, leave to appeal to SCC refused, 28584 (13 September 2001) at para. 12 (*Canada (Information Commissioner)*); *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84, 402 N.R. 341 at para. 17 (*Laperrière*); *Janssen Inc. v. AbbVie Corporation*, 2014 FCA 176, 242 A.C.W.S. (3d) 11 at para. 46.

[22] Irreparable harm is harm that either cannot be quantified in monetary terms or that cannot be compensated: *RJR-MacDonald* at 341. Irreparable harm is also harm that is unavoidable: *Janssen Inc. v. AbbVie Corporation*, 2014 FCA 112, 2014 CarswellNat 1434 at para. 24 (*Janssen*). As this Court explained at paragraph 24 of *Janssen*, "it would be strange if a litigant complaining of harm it caused itself, harm it could have avoided or repaired, or harm it can still avoid or repair could get such serious relief [as a stay would afford]".

[23] In *RJR-MacDonald*, the Supreme Court of Canada gave examples of the types of harm that may be irreparable because it cannot be quantified. These include instances where the party seeking the stay will be put out of business or will suffer permanent market loss or irreversible damage to its business reputation: see *RJR-MacDonald* at 341, citing *R.L. Crain Inc. v. Hendry*,

(1988) 48 D.L.R. (4th) 228 (Sask. Q.B.); *American Cyanamid Co. v. Ethicon Ltd*., [1975] A.C. 396 (UKHL).

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[24] This Court has held that the probability of such irreparable harm occurring must be established by the party seeking the stay through "… evidence at a convincing level of particularity …. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight": *Glooscap* at para. 31, citing to *Dywidag* at para. 14; *Stoney First Nation v. Shotclose*, 2011 FCA 232, 2011 CarswellNat 3639 at para. 48 (*Shotclose*); *Canada (Information Commissioner)* at para. 12; *Laperrière* at para. 17; see also, to similar effect, *Gateway City Church v. Canada (National Revenue)*, 2013 FCA 126, 2013 CarswellNat 1314 at paras. 14-16 (*Gateway City Church*).

[25] As my colleague Stratas J.A. aptly put it in *Gateway City Church*, "[g]eneral assertions cannot establish irreparable harm. They essentially prove nothing" (see para. 15). This is because, as Stratas J.A. found in *Shotclose* at paragraph 48:

> It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable.

[26] Bell notes that the Court has recognized irreparable harm in the context of orders that it has granted to stay certain CRTC decisions pending an appeal. More specifically, in *Aboriginal Voices Radio Inc. v. Canada (Attorney General)*, 2015 FCA 172, 2015 CarswellNat 12195, this Court stayed a CRTC decision when the decision mandated the closure of a radio station.

Further, in *North American Gateway Inc. v. Canadian Radio-Television & Telecommunications Commission*, [1997] F.C.J. No. 628, 1997 CarswellNat 1268, this Court stayed a CRTC decision when the evidence established that the effect of the CRTC decision was to put those seeking the stay "out of business within days" at para. 13. Finally, in *CKLN Radio Incorporated v. Canada (Attorney General)*, 2011 FCA 56, 2011 CarswellNat 316, this Court stayed a CRTC decision that would have resulted in the loss of a sought-after radio frequency in a hotly contested market, with the consequence that a campus radio station was likely to be imperilled.

[27] As will soon become apparent, the foregoing cases are very different from the present one.

[28] Bell also points to two unreported speaking orders, issued in 2019 by this Court in 19-A-59. However, due to their brevity, neither order provides any indication of the relevant circumstances that led to its issuance beyond the notation that the Court was satisfied that the stay orders were required to prevent market distortion: see Bell's Motion Record, Tab 4, Exhibits H and I of the Sonia Atwell Affidavit. On the other hand, in the present case, the CRTC made the Decision with a view to correcting such distortion and preserving competition in the high speed internet market in Ontario and Quebec.

[29] In the present case, Bell puts forward only general assertions of the harm that it says it will suffer if the stay is not granted, as opposed to evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted.

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[30] Bell says that it will suffer three types of harm that it submits are irreparable if it complies with the Decision, including: (1) it will lose customers and revenue; (2) it will incur unrecoverable implementation costs; and (3) it will have to delay or cancel other projects. However, Bell has failed to substantiate that these harms are irreparable with the necessary degree of convincing particularity.

[31] In support of its allegations of irreparable harm, Bell relies on an affidavit from its Senior Vice President of Technology Services, Ms. Anuja Sheth (Sheth affidavit), that is speculative and lacks supporting evidence for the harm that Bell alleges it will suffer if a stay is refused. Bell also relies on an affidavit from a law clerk that attaches, among other things, certain filings made in the present case before the CRTC, as well as a decision and other filings made in the case before the Competition Tribunal involving the Rogers-Shaw merger, namely *Canada (Commissioner of Competition) v. Rogers Communications Inc. and Shaw Communications Inc.*, 2023 Comp Trib 1, aff'd 2023 FCA 16, 477 D.L.R. (4th) 553 (*Rogers Shaw Merger*).

[32] Most of the harms alleged in the Sheth affidavit are premised on the assumption that the CRTC will not permanently order similar access to Bell's FTTP facilities over aggregated wholesale HSA at the end of its broad policy review. At this point, this is pure speculation.

[33] Dealing more specifically with each of the alleged harms, Bell provides no evidence, documentary or otherwise, detailing how or why it is likely to permanently lose customers or revenue. Although the Sheth affidavit refers in passing to estimated and hypothetical losses, the affiant provides little, if any, basis to support the amounts or effects alleged.

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[34] Bell's estimates also lack necessary nuance. For example, as TekSavvy points out, Bell's figures fail to distinguish between different types of customers. There is no distinction between customers who may migrate from a wholesale-based competitor using Bell's dedicated-subscriber line services to a wholesale-based competitor using Bell's FTTP services; customers who may migrate to a wholesale-based competitor that also uses Bell's FTTP service; or non-customers who might still subscribe to a wholesale-based competitor that accesses Bell's FTTP services. In all of these examples, Bell would still gain wholesale revenue in relation to these customers, yet the generalizations in the Sheth affidavit would not account for them.

[35] In my view, the evidence on alleged market loss tendered by Bell in the Sheth affidavit is comparable to the evidence in *Gateway City Church*. It is not "evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted": *Gateway City Church* at para. 16. It includes several assumptions, speculations, and hypotheticals that are unsupported by evidence and "carry no weight": see *Glooscap* at para. 31.

[36] Bell also premises its arguments relating to loss of market share and revenue on certain filings made in this case before the CRTC by TekSavvy and CNOC, the Decision, and on the Competition Tribunal's decision in *Rogers Shaw Merger* and related filings. Yet, none of the foregoing establishes a real probability that Bell will irreparably lose market share or revenues. While the CRTC intends, via the Decision, to increase competition in the sector, and TekSavvy and CNOC indicated in their submissions to the CRTC that they believed that the temporary access the CRTC contemplated was required, this does not establish a real probability that Bell

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will permanently lose market share or revenues. As the respondents convincingly point out in their responding materials, the fact that competition might increase does not necessarily translate into a loss of market share for Bell. Further, Bell has offered no details that substantiate how the interim wholesale rates the CRTC has mandated compare to the discounted prices Bell is already offering certain customers.

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[37] As for the Competition Tribunal's decision in *Rogers Shaw Merger* and related filings, namely the Responding Witness Statement from Mr. Jean-François Lescadres, I fail to see how they prove much, if anything, of relevance when that case dealt with at least somewhat different services, markets, and issues. While the Competition Tribunal did recognize that Videotron's acquisition of VMedia, a reseller, was indicative of Videotron's plans to expand into Ontario, Bell has not offered any evidence linking such an expansion to any permanent loss of its market share or revenues.

[38] Turning to the alleged unrecoverable implementation costs, the CTRC's assurance that it can address these concerns, if necessary, is a complete answer to this argument, given that Bell has provided no evidence that shows how or why the CRTC cannot do so. The Sheth affidavit does not convincingly establish that the CRTC could not mandate new rates that would allow Bell to recapture costs expended to institute temporary access in the event the CRTC were to decide not to permanently order similar access to Bell's FTTP facilities over aggregated wholesale HSA at the end of its broad policy review.

[39] Finally, Bell's own choices to redirect or cut its investment dollars do not constitute irreparable harm, but rather a business choice that it appears that it has chosen to make in light of the Decision. In the absence of evidence showing how implementing the temporary mandated access would imperil Bell's continued existence, I fail to see how making the investments required to implement the Decision instead of others could constitute irreparable harm.

[40] For all of these reasons, Bell has not demonstrated, to the Court's satisfaction, "the actual existence or real probability of harm that can not be repaired later": *Shotclose* at para. 48. Its assertions lack the necessary particularity to succeed on part two of the *RJR-MacDonald* test.

[41] Given that the *RJR-MacDonald* test is conjunctive, Bell's inability to establish that it will suffer irreparable harm means that its motion for stay must be dismissed. It is therefore unnecessary for me to comment on the third factor in the *RJR-MacDonald* test, being that of the balance of convenience.

[42] I will accordingly dismiss this motion with a single set of costs, payable by Bell in equal parts to each of the respondents, TekSavvy, QMI, and CNOC.

"Mary J.L. Gleason"
J.A.

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**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | 23-A-52 |
| **STYLE OF CAUSE:** | BELL CANADA v. BEANFIELD TECHNOLOGIES INC., BRAGG COMMUNICATIONS INCORPORATED c.o.b. EASTLINK, CAMPBELL PATTERSON COMMUNICATIONS, CANADIAN ANTI-MONOPOLY PROJECT, COGECO, COMMUNICATIONS INC., COMMUNITY FIBRE COMPANY, COMPETITIVE NETWORK OPERATORS OF CANADA, DEVTEL COMMUNICATIONS INC., IGS HAWKESBURY INC., NATIONAL CAPITAL FREENET, OPENMEDIA, PUBLIC INTEREST ADVOCACY CENTRE, QUEBECOR MEDIA INC. ON BEHALF OF VIDEOTRON LTD., ROGERS COMMUNICATIONS CANADA INC., SASKATCHEWAN TELECOMMUNICATIONS, SKYCHOICE COMMUNICATIONS INC., TEKSAVVY SOLUTIONS INC., TELUS COMMUNICATIONS INC., TRUESPEED INTERNET SERVICES INC., VAXINATION INFORMATIQUE, VAXXINE COMPUTER SYSTEMS INC., and WAVEDIRECT TELECOMMUNICATIONS |

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**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

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|---|---|
| **REASONS FOR ORDER BY:** | GLEASON J.A. |
| **DATED:** | FEBRUARY 9, 2024 |

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**WRITTEN REPRESENTATIONS BY:**

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| Cara Cameron<br>Laurence Ste-Marie<br>Joshua Bouzaglou | FOR THE RESPONDING PARTY QUEBECOR MEDIA INC. ON BEHALF OF VIDEOTRON LTD. |
| Colin Baxter<br>Julie Mouris<br>Siobhan Morris<br>Logan Stack | FOR THE RESPONDING PARTY TEKSAVVY SOLUTIONS INC. |
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