Federal Court  Cour fédérale

Date: 20110929

Docket: T-514-11

Citation: 2011 FC 1120

Ottawa, Ontario, September 29, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

BELL CANADA

Applicant

and

ATTORNEY GENERAL OF CANADA, MINISTER OF INDUSTRY AND ROGERS COMMUNICATIONS INC.

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under the *Federal Courts Act*, RSC 1985, c. F-7 for judicial review to: (a) quash and set aside the publication in the *Canada Gazette* on 19 March 2011 as Gazette Notice No. DGTP-002-11 (Notice) by the Minister of Industry (Minister) of the 26 January 2011 petition (Petition) by Rogers Communications Inc. (Rogers) pursuant to subsections 12(1) and 12(4) of the

Telecommunications Act, S.C. 1993, c. 38 (Act); and (b) prohibit the Governor in Council (Cabinet) from considering the Petition.

BACKGROUND

[2] In 2002, the Canadian Radio-television and Telecommunications Commission (CRTC) issued Decision 2002-34, which permitted Incumbent Local Exchange Carriers (ILECs), including Bell Canada (Bell), to charge more than a permitted maximum tariff. Though these ILECs were permitted to charge above the tariff, the excess amount was to be tracked in a separate account (Deferral Account) and segregated from other funds. The CRTC retained the authority to determine the use of these funds at a later date.

[3] On 14 December 2006, by Order in Council P.C. 2006-1534 SOR/2006-355, the Cabinet gave the *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunication Policy Objectives* (Policy Direction) under section 8 of the Act. Among other things, the Policy Direction directed the CRTC to "rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives, and when relying on regulation, use measures that […] interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives."

[4] Beginning in 2006, the CRTC issued a series of decisions which established principles for the distribution of the Deferral Account monies. The CRTC decided in Decision 2006-9 that the Deferral Account funds would be used for two purposes: (1) improving access for people with disabilities; and (2) extending broadband internet services into rural and remote locations. Any excess funds would be returned to customers as rebates. Several parties appealed that decision to the

Federal Court of Appeal: Bell appealed the portion of the decision requiring it to return a portion of the funds as rebates to customers, while other parties appealed the requirement that the funds be used for broadband expansion. Ultimately, the Supreme Court of Canada, in *Bell Canada v Bell Aliant Regional Communications* 2009 SCC 40, held that the CRTC's allocation of funds for broadband expansion, increasing access for people with disabilities, and rebates to customers was valid, as the allocation of Deferral Account funds is within the CRTC's rate-setting authority.

[5] In Decisions 2006-9 and 2007-15 the CRTC had rejected the proposal that the Deferral Account funds should be available to all telecommunications companies and awarded on the basis of a competitive bidding process. This competitive bidding process, Rogers had submitted, would fulfill the principle of competitive neutrality which the Telecommunications Policy Review Panel had recommended the CRTC adopt in its 2006 Final Report. Rather than use a competitive bidding process which it felt would "add a significant layer of complexity, delay the implementation of broadband expansion, and result in substantial administrative and regulatory burden," the CRTC opted for the use of a proposal system. In the proposal system, the CRTC would examine proposals submitted by the ILECs for the use of the Deferral Account funds and approve or disapprove of them based on their compliance with the conditions established in Decision 2006-9. In Decision 2007-15, the CRTC approved the use of Deferral Account funds for Broadband expansion into 112 communities in Ontario. In Decision 2008-1, the CRTC approved several proposals to expand accessibility to telecommunications with Deferral Account funds and also set additional principles for how additional communities would be selected for expansion, the implementation of least-cost technology, and the recovery of uneconomic costs.

[6] In 2009, Bell filed a proposal with the CRTC to use $303.6 million in Deferral Account funds to expand broadband access to 112 communities in Ontario. Bell proposed expanding broadband coverage using wireless high-speed packet access (HSPA+) technology. Among others, Rogers opposed this proposal, in part because Rogers had already implemented HSPA broadband technology in a number of these communities. Rogers argued that, for the CRTC to permit Bell to expand its network using HSPA+ technology would not in fact expand broadband access, and so was contrary to the principles established by the CRTC in Decisions 2006-9, 2007-15 and 2008-1 (the Deferral Account Decisions).

[7] In CRTC Decision 2010-637, the Commission rejected Bell's proposal. In that decision, the CRTC approved the use of $306.3 million of Deferral Account funds for expanding broadband internet services to 112 communities. However, rather than using the wireless HSPA+ technology, the CRTC required Bell to complete the expansion using wireline Digital Subscriber Line (DSL) technology. The remaining balance in the Deferral Account fund of $277 million would be returned to consumers as a rebate. Bell proposed to roll out this technology over a four-year period, beginning with 15 communities in 2011 and completing the expansion by 2015.

[8] In 2010, given advances in technology, Bell filed an application with the CRTC to vary Decision 2010-637, and to allow Bell to complete the expansion into the approved communities using improved wireless technology (HSPA+). Rogers opposed this application to vary, saying Bell's proposal did not comply with the Guidelines established in the Deferral Account Decisions and violated the Policy Direction. The CRTC in Decision 2010-805 approved Bell's proposal to complete the expansion using wireless HSPA+ technology and noted that

> it had rejected this idea in both Telecom Decisions 2006-9 and 2007-50 (*sic*), since it would add a significant layer of complexity, delay

> the implementation of broadband expansion, and result in substantial administrative and regulatory burden. The Commission considers that these reasons continue to be valid.

[9] In response, on 26 January 2011, Rogers filed the Petition with the Clerk of the Privy Council under subsection 12(1) of the Act. In the Petition, Rogers asks the Cabinet to vary Decision 2010-805 to reduce the amount of deferral account funds approved to only the amount necessary to cover the uneconomic portion of Bell's expansion into the first 15 communities in its proposal. Rogers also asks the Cabinet to vary Decision 2010-805 to permit a competitive bidding process for expansion into the remaining 97 approved communities.

[10] Having received the Petition from Rogers, the Minister published the Notice in the 19 March 2011 issue of the *Canada Gazette*. The Notice informs the public that the Minister has received the Petition, that the Petition and the supporting documents can be obtained electronically on Industry Canada's Spectrum Management and Telecommunications website, and that submissions regarding the Petition must be made within thirty days of the publication of the Notice in the *Gazette*. The publication of this Notice is what Bell seeks to quash in this application for judicial review. Bell also seeks to prohibit Cabinet from considering the Petition.

DECISION UNDER REVIEW

[11] Bell seeks judicial review to quash the Notice published by the Minister in the *Canada Gazette*. The Notice provides in relevant part as follows:

> Notice is hereby given that a petition from Rogers Communications Partnership (hereinafter referred to as Rogers), has been received by the Governor in Council (GIC) under section 12 of the *Telecommunications Act* with respect to a decision issued by the Canadian Radio-television and Telecommunications Commission (CRTC), concerning the use of wireless technology and deferral

> account funds for extending broadband service to approved communities.
>
> Subsection 12(1) of the *Telecommunications Act* provides that, within one year after a decision by the CRTC, the GIC may, on petition in writing presented to the GIC within 90 days after the decision, or on the GIC's own motion, by order, vary or rescind the decision or refer it back to the CRTC for reconsideration of all or a portion of it.
>
> In its petition, dated January 26, 2011, Rogers requests that the GIC vary Telecom Decision CRTC 2010-805, *Bell Canada – Applications to review and vary certain determinations in Telecom Decision 2010-637 concerning the use of high-speed packet access wireless technology and the deferral account balance*. The reasons for this request are included in Rogers' petition.
>
> Submissions regarding this petition should be filed within 30 days of the publication of this notice in the *Canada Gazette.* All comments received will be posed on Industry Canada's Spectrum Management and Telecommunications Web site at www.ic.gc.ca/spectrum.

[12] Bell also seeks an order of prohibition preventing the Cabinet from considering and determining Rogers's Petition.

ISSUES

[13] Bell raises two basic issues in this application:

1. Whether the Minister had jurisdiction to publish the Notice in the *Canada Gazette*;
2. Whether the Cabinet has jurisdiction to hear Rogers's Petition.

STATUTORY PROVISIONS

[14] The following statutory provisions of the Act are relevant to these proceedings:

2. (1) In this Act,

“decision” includes a determination made by the Commission in any form;

…

2. (1) Les définitions qui suivent s’appliquent à la présente loi.

« décision » Toute mesure prise par le Conseil, quelle qu’en soit la forme.

…

CANADIAN TELECOMMUNICATIONS POLICY

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

…

(*c*) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications

…

(*f*) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;

…

POLITIQUE CANADIENNE DE TÉLÉCOMMUNICATION

7. La présente loi affirme le caractère essentiel des télécommunications pour l’identité et la souveraineté canadiennes; la politique canadienne de télécommunication vise à

…

c) accroître l’efficacité et la compétitivité, sur les plans national et international, des télécommunications canadiennes;

…

f) favoriser le libre jeu du marché en ce qui concerne la fourniture de services de télécommunication et assurer l’efficacité de la réglementation, dans le cas où celle-ci est nécessaire;

…

Variation, rescission or referral

Modification, annulation ou réexamen

12. (1) Within one year after a decision by the Commission, the Cabinet may, on Petition in writing presented to the Cabinet within ninety days after the decision, or on the Cabinet's own motion, by order, vary or rescind the decision or refer it back to the Commission for reconsideration of all or a portion of it.

...

(4) On receipt of a Petition, the Minister shall publish in the *Canada Gazette* a notice of its receipt indicating where the Petition and any Petition or submission made in response to it may be inspected and copies of them obtained.

…

Partial or additional relief

60. The Commission may grant the whole or any portion of the relief applied for in any case, and may grant any other relief in addition to or in substitution for the relief applied for as if the application had been for that other relief.

…

Review of decisions

12. (1) Dans l'année qui suit la prise d'une décision par le Conseil, le gouverneur en conseil peut, par décret, soit de sa propre initiative, soit sur demande écrite présentée dans les quatre-vingt-dix jours de cette prise, modifier ou annuler la décision ou la renvoyer au Conseil pour réexamen de tout ou partie de celle-ci et nouvelle audience.

…

(4) Dès réception de la demande, le ministre publie un avis dans la *Gazette du Canada* faisant état de la réception et indiquant où la demande, ou toute autre demande ou observation présentées en réponse à celle-ci peuvent être consultées et où il peut en être obtenu copie.

…

Réparation

60. Le Conseil peut soit faire droit à une demande de réparation, en tout ou en partie, soit accorder, en plus ou à la place de celle qui est demandée, la réparation qui lui semble justifiée, l'effet étant alors le même que si celle-ci avait fait l'objet de la demande.

…

Révision et annulation

62. The Commission may, on application or on its own motion, review and rescind or vary any decision made by it or re-hear a matter before rendering a decision.	**62.** Le Conseil peut, sur demande ou de sa propre initiative, réviser, annuler ou modifier ses décisions, ou entendre à nouveau une demande avant d'en décider.

STANDARD OF REVIEW

[15] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[16] Both of the issues raised involve true questions of *vires*. As the Supreme Court of Canada held in *Dunsmuir*, true questions of *vires* attract review on the standard of Correctness. Also in *Dunsmuir*, at paragraph 50, the Supreme Court of Canada held that

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

ARGUMENTS

The Applicant

[17] Bell argues that the Cabinet should be prohibited from hearing the Petition because the Cabinet lacks jurisdiction as the Petition does not relate to the subject matter of Decision 2010-805, the decision it purports to vary, and so is outside subsection 12(1) of the Act. Bell also argues that because the true subject matter of the Petition is the variance of Decisions 2006-9 and 2007-15, the Petition is out of time and so beyond the jurisdiction of the Cabinet to hear.

[18] With respect to the Notice, Bell argues that it should be quashed by the Court as it relates to a proceeding over which the Cabinet does not have jurisdiction. Since Parliament intended the Minister to act in accordance with the Cabinet's jurisdiction, Parliament could not have intended subsection 12(4) of the Act to require the Minister to publish notices over which the Cabinet had no jurisdiction.

The Cabinet Should be Prohibited From Hearing The Petition Because it Lacks Jurisdiction

[19] Bell says that when the Cabinet is exercising an authority delegated to it by statute, it must do so within the bounds of the powers granted to it. Any exercise of the power is reviewable by the Court and, where the Cabinet purports to exercise its power outside of the bounds established for that power, the Court can intervene to quash or, where necessary, prohibit the exercise of that power.

[20] Bell also argues that, as with the exercise of a delegated power by any body, the Cabinet only has jurisdiction to act where the necessary conditions precedent have been fulfilled. Where the Cabinet does not meet the statutory conditions precedent, any exercise of that power is *ultra vires*. In this case, if the exercise of the subsection 12(1) power to review Decision 2010-805 requires the Cabinet to ignore a mandatory condition precedent, the Court ought to intervene. In support of the use of prohibition to prevent the unlawful exercise of delegated power, Bell refers to the Federal Court of Appeal decision in *Canadian Red Cross Society v Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] 2 FC 36, [1997] FCJ No 17 (CA) at paragraph 28:

> In the instant case, if the Commissioner did not have jurisdiction to make the findings in his report that he set out in the notices, then this is a case in which want of jurisdiction is apparent, or at least one in which the Commissioner "is undoubtedly about to step outside his jurisdiction". It would be intolerable to compel the appellants to wait until the report was made before allowing them to object to it: the harm would then be greater, and probably irreparable.

Since, by hearing the Petition, the Cabinet will step outside its jurisdiction, Bell argues that prohibition is an appropriate remedy in this case.

The Cabinet Lacks Jurisdiction Because it Has Not Fulfilled the Mandatory Conditions Precedent

[21] Bell also argues that there are two mandatory (though not statutory) conditions precedent for the exercise of the review power under subsection 12(1): (1) the existence of a decision by the CRTC on the same subject matter as the Petition; and (2) variance of the CRTC decision within one year of its making. Since neither of these conditions has been fulfilled in this case, hearing the Petition under subsection 12(1) is outside the jurisdiction of the Cabinet and should be prohibited.

Existence of a Decision on the Same Subject Matter

[22] Bell relies on *British Colombia (Attorney General) v Canada (Attorney General)*, [1994] SCJ No 35; [1994] 2 SCR 41 for the proposition that a petition to the Cabinet under subsection 12(1) must concern the same subject matter as the decision which is sought to be varied. As the Supreme Court of Canada said in that case at paragraph 139,

> While the Cabinet can vary an order "at any time" pursuant to s. 64 of the *National Transportation Act, 1987*, and while the s. 64 jurisdiction has been recognized as vast in *Inuit Tapirisat*[,] the s. 64 power can only be exercised if a CTC or NTA "order" exists.

[23] Bell also relies on the following from *Jasper Park Chamber of Commerce v Canada (Attorney General)*, [1983] 2 FC 98; [1982] FCJ No 193, at paragraph 9:

> I agree with counsel for the appellants that the Governor in Council under the authority given to it by subsection 64(1) is not entitled, under the guise of "variation" to do something of an entirely different nature. I agree that the Cabinet is constrained under subsection 64(1), when varying a Commission order, to deal with the same type or kind of order as the Commission was dealing with. I do not agree that subsection 64(1) authorizes the Governor in Council to vary any and all Commission orders no matter when they are issued or regardless of their subject-matter. In my view, Order R-22346 is not a relevant Order for the purposes of the discontinuance Order contained in section 2 of Schedule XV because as detailed supra, the passenger-train service which was the subject-matter of Order R-22346 was not the same passenger-train service as that ordered to be discontinued in section 2 of Schedule XV.

[24] Taken together, Bell says that these cases demonstrate that in order for the Cabinet to review a decision under subsection 12(1), the Petition must concern the same subject matter as the decision to be varied.

[25] In this case, Bell argues that the subject matter of the Petition is sufficiently different from that of the decision in question to remove it from the Cabinet's jurisdiction. Bell argues that Decision 2010-805 was solely about what kind of technology should be used in the implementation of the broadband expansion. Since the issue of competitive bidding, which Rogers seeks to have included by its Petition was not before the CRTC in its deliberations for Decision 2010-805, the subject matter of the Petition and the decision it purports to vary are different. Bell notes that competitive bidding had been considered and rejected by the CRTC in Decisions 2006-9 and 2007-15 and, as such, was not before the CRTC in the hearings related to Decision 2010-805.

Improperly Raised at Hearings

[26] Bell also argues that competitive bidding was improperly raised by Rogers at the hearings related to Decision 2010-805. As a mere intervener in the hearings on Bell's application to vary Decision 2010-637, which resulted in Decision 2010-805, Rogers could not raise new issues for the CRTC to consider that were not in Bell's original application. Bell relies on the Supreme Court of Canada's statement in *Reference re: Goods and Services Tax*, [1992] 2 SCR 445; [1992] SCJ No 62 at paragraph 76:

> Intervener status is granted when this Court feels that the intervener may be of assistance to the Court in resolving the principal issues before us. Intervener status is not granted to allow the intervener to raise an entirely new set of issues which are not addressed by other principal parties.

Bell says this means that an intervener in an administrative proceeding cannot raise new issues before the decision-maker.

[27] Bell also asserts that there is nothing in Decision 2010-805 to suggest that the CRTC intended to deal with competitive bidding. Bell points to paragraph 23 of that decision, which reads

> With respect to the proposals to allow for competitive bidding in order to ensure the use of least-cost technology, the Commission notes that it rejected this idea both in Telecom Decisions 2006-9 and 2007-50 (*sic*), since it would add a significant layer of complexity, delay the implementation of broadband expansion, and result in substantial administrative and regulatory burden. The Commission considers that these reasons continue to be valid.

Bell says this statement is merely a reiteration of an earlier decision and is akin to a courtesy letter advising a party of a decision previously taken. This demonstrates that the issue of competitive bidding was not before the CRTC in Decision 2010-805. Since the issue of competitive bidding was not before the CRTC in Decision 2010-805, then the Petition which purports to vary that decision to include competitive bidding does not concern the same subject matter. As they do not concern the same subject matter, the Petition does not fulfil a mandatory condition precedent for the exercise of Cabinet's power under subsection 12(1).

Variance of the Decision Within Year

[28] Bell further argues that the Petition is in substance about Decisions 2006-9 and 2007-15 because the subject matter of the Petition is competitive bidding which was also the subject matter of those decisions. This means that the Petition should be subject to the same limitation periods as those decisions. The limitation period for a petition to the Cabinet to vary Decision 2007-15 expired 12 June 2007, and for Decision 2006-9, it expired on 17 May 2006, so the Petition in the current case is well out of time. The expiry of a limitation period results in a loss of jurisdiction.

[29] Bell also argues that there is no discretion for Cabinet to extend the limitation period. This is shown by the legislative history of subsection 12(1). Where the predecessor section, subsection 64(1) of the *National Transportation Act*, RSC 1985, c. N-20, allowed Cabinet to vary a decision of the CRTC at any time, the current subsection 12(1) limits the application period to ninety days from the decision date, with an ultimate limitation period of one year. As there is a presumption that Parliament intends legislative changes to be meaningful, the change from an unlimited time to vary to a one year period to vary must have been intended to limit Cabinet's jurisdiction to vary CRTC decisions.

[30] Bell also argues that *Ontario Hydro v Cuddy International Corp.*, [1990] OJ No 676, establishes the principle that, where a later decision of a board clarifies an earlier decision with the same subject matter, while not being an entirely new decision, the limitation period for appeal runs from the date of the earlier decision. Since the true focus of the Petition is Decisions 2006-9 and 2007-15, the limitation period must run from the earlier dates.

[31] Because the Petition to vary the CRTC decision is out of time, the Cabinet lacks jurisdiction to consider it and must be prohibited from doing so by the Court.

The *Gazette* Notice Should be Quashed

[32] In addition to prohibiting the Cabinet from hearing and deciding the Petition, Bell also argues that the Court should quash the Notice published in the *Canada Gazette*. Since the Cabinet does not have the jurisdiction to hear the Petition, the Notice should be quashed. Bell notes that courts have regularly and properly quashed notices of hearings which are held to be *ultra vires* the

entity making the decision. Further, though subsection 12(4) of the Act, under which the Minister published the Notice in the *Gazette*, is mandatory, Bell argues that Parliament intended the Minister to act in accord with the Cabinet's jurisdiction as the Minister is part of the Cabinet. It cannot be, Bell argues, that Parliament intended the Minister to publish notices for hearings that are *ultra vires* the Cabinet. As such, the Notice should be quashed.

The Respondent – Rogers

[33] Rogers says that the Court should reject Bell's argument that the Petition is really seeking a Cabinet review of subject matter that was dealt with in Decisions 2006-9 and 2007-15. Relying on subsection 12(1) of the Act, Rogers argues that the only statutory conditions precedent for the Cabinet to have jurisdiction are that there be a decision by the CRTC and that relief be sought within the ninety-day limitation period established by the statute.

[34] Rogers asserts that its Petition seeks to vary Decision 2010-805 as it relates to the determination of the availability of wireless broadband, the effect of HSPA+ technology on competition, the impact of competitive bidding in the use of deferral account funds, and the CRTC's refusal to institute a competitive bidding process for the allocation of those funds. All of these issues, Rogers argues, were raised by the interested parties in the hearings leading up to Decision 2010-805 and the CRTC made determinations on each of them. As such, the Petition to vary is proper and within the jurisdiction of the Cabinet.

[35] Rogers argues that simply because parties other than Bell raised the issue of competitive bidding at the hearings, does not mean that this was not part of the subject matter of Decision 2010-

805. Further, although the CRTC considered and rejected the implementation of a competitive bidding arrangement in Decisions 2006-9 and 2007-15, those decisions do not prevent the consideration of competitive bidding in Decision 2010-805. The fact that the CRTC could have instituted competitive bidding in Decision 2010-805, but did not is within the Cabinet's jurisdiction to review. Rogers further argues that the CRTC is not bound by its own precedents and cannot fetter its discretion to decide each matter before it based on a full assessment of the facts and the law in each case. Though the CRTC decided not to implement a competitive bidding process in Decisions 2006-9 and 2007-15, this does not mean that the CRTC could not have implemented competitive bidding in Decision 2010-805.

[36] Rogers also notes that Bell characterised its own application in Decision 2010-805 as a new application or, in the alternative, an application to review and vary Decision 2010-637. Further, in the hearings, several companies, including Rogers, opposed the Decision 2010-805 application on several grounds, including that Bell's proposal was inconsistent with the 2006 Policy Direction made by Cabinet. As the question before the CRTC in Decision 2010-805 was whether Bell's application met the guidelines set for the allocation of the Deferral Account funds in accordance with telecommunications policy objectives, it is within the Cabinet's jurisdiction to hear and determine a Petition on those grounds. This is what Rogers's Petition is truly about and the Cabinet has the jurisdiction to hear and determine the matter.

The CRTC Did Not Fully Consider Competitive Bidding

[37] Rogers takes issue with Bell's argument that the CRTC fully considered competitive bidding in Decisions 2006-9 and 2007-15. Rogers quotes from Macauley and Sprague's *Practice and Procedure Before Administrative Tribunals*:

> …the notion of *stare decisis* is not applicable in the administrative sphere. Agencies are not only at liberty not to treat their earlier decisions as precedent, they are positively obligated not to do so.

Rogers argues that, although the CRTC had considered and rejected a competitive bidding process in earlier contexts and decisions, it was not bound to follow those decisions in Decision 2010-805. The CRTC was empowered to, and did, consider whether competitive bidding should be implemented in Decision 2010-805.

[38] Rogers notes that, following *Hopedale Developments v Oakville (Town)* (1965), 47 DLR (2d) 482 (ONCA), it is permissible for administrative tribunals to consider the principles established in their previous decisions in subsequent matters that come before them. They must, however, give each new matter full consideration. Thus, although the CRTC had previously considered and rejected competitive bidding, it was not foreclosed from considering this in Decision 2010-805.

[39] Rogers further argues that administrative tribunals such as the CRTC must have the flexibility to consider each decision in light of new developments. In Decision 2010-637, the CRTC did not have all the facts before it that were relevant to the determination of whether HSPA+ wireless technology would satisfy the established criteria, including its affect on competition. Even had the CRTC intended to determine for all time in Decision 2010-637 that competitive bidding would not be employed, it could not have done so as it could not possibly have had all the facts before it necessary to make such a determination.

Competitive Bidding Was Properly Before the CRTC

[40] Although Bell has argued that it is not proper for interveners to raise new issues in proceedings, Rogers says that the jurisprudence cited by Bell in support of this proposition is not applicable to administrative proceedings. Rogers further argues that, even if it were applicable, it and the other telecommunications companies were interested parties in the proceedings related to Decision 2010-805 and could properly raise issues for the CRTC to consider.

[41] Rogers asserts that there is nothing in the CRTC rules, past or present, that would prevent Rogers or any other intervener from raising issues in be considered by the CRTC. Contrary to Bell's argument that Rules 13 and 27 of the former CRTC Telecommunications Rules of Practice would require an amendment to the pleadings to raise a new issue, Rogers argues that these Rules simply give the CRTC the discretion to require an amendment to the pleadings where it is necessary for an issue to be fully determined. Since these Rules are discretionary, it cannot be said that the CRTC did not intend to consider competitive bidding simply because it did not require pleadings to be amended. Further, the parties other than Bell raised the issues of competitive neutrality and competitive bidding in their submissions.

[42] Rogers also notes that, under section 60 of the Act, the powers of the CRTC to vary an order are broad. Because the CRTC could have ordered competitive bidding as a variance to Decision 2010-637, yet did not do so, this is a decision that is properly reviewable on petition to the Cabinet.

The CRTC Intended to Render a New Decision on Competitive Bidding

[43] Rogers argues that the phrase in paragraph 23 of Decision 2010-805 that "these reasons continue to be valid" constitutes a fresh determination on the issue of competitive bidding which is reviewable by the Cabinet. Rogers relies on the decision of Justice Simon Noël in *Dumbrava v*

Canada (Minister of Citizenship and Immigration) [1995] FCJ No 1238; (1995) 101 FTR 230, in which he wrote at paragraph 15 that

> Whenever a decision-maker who is empowered to do so agrees to reconsider a decision on the basis of new facts, a fresh decision will result whether or not the original decision is changed, varied or maintained. What is relevant is that there be a fresh exercise of discretion, and such will always be the case when a decision-maker agrees to reconsider his or her decision by reference to facts and submissions which were not on the record when the original decision was reached.

Since in this case the CRTC was considering whether to vary Decision 2010-637 based on the availability of the new HSPA+ technology and its impact on competition, Decision 2010-805 was a fresh exercise of discretion which is reviewable by the Cabinet.

[44] Rogers also argues that the words “reasons” and “continue” in paragraph 23 of Decision 2010-805 demonstrate that this is a fresh exercise of discretion. “Continue” refers to the fact that the CRTC is making a new decision in the present. “Reasons” shows that the CRTC is not simply re-stating its earlier decisions, but is adopting the rationale of previous decision in its current Decision 2010-805.

The Respondents – The Minister and the Attorney General of Canada (AGC)

[45] The Minister and the AGC (Canada) have made joint submissions which support and complement those of Rogers. In brief, Canada says first that the publication of a notice of petition under subsection 12(4) of the Act is mandatory and does not impact rights or deal with substantive issues. Second, the proper course is for the court to decline to exercise its prerogative to prohibit the Cabinet from considering the Petition because the Cabinet has authority to determine questions of

jurisdiction and it would be premature for the Court to intervene at this stage. Also, because prohibition is an exceptional remedy which should only be exercised where a want of jurisdiction is apparent, and since it is not apparent in this case, prohibition should not be granted.

[46] Canada says that there are three routes of review available from decisions of the CRTC: (i) the CRTC has the authority, within the scheme of the Act, to reconsider any of it is decisions, either by application of a party or on its own motion; (ii) a decision of the CRTC may also be appealed directly to the Federal Court of Appeal; or (iii) a Petition may be filed asking the Cabinet to vary, rescind, or remit for re-determination the decision. Further, the Minister may, on consultation with the Provinces, make a recommendation to the CRTC on how it ought to exercise its discretion.

Publication of a *Gazette* Notice is Mandatory

[47] Based on the plain language of subsection 12(4), the Minister has no discretion whether or not to publish a notice of petition once the statutory conditions have been met. Since the decision to publish is mandatory and involves no exercise of discretion, *certiorari* is not available to quash this decision.

[48] Canada notes that *certiorari* is available to quash decisions where a public decision-maker has acted in excess of its authority. In *Martineau v Matsqui Institution* [1980] 1 SCR 602 at page 628, Justice Dickson wrote that

> *Certiorari* is available as a general remedy for supervision of the machinery of government decision-making. The order may go to any public body with power to decide any matter affecting the rights, interests, property, privileges, or liberty of any person. The basis for

> the broad reach of this remedy is the general duty of fairness resting on all public decision-makers.

Since, in this case, the decision to publish the notice has no effect on the rights of Bell or any other person, *certiorari* is not available to quash the Notice. The publishing of the Notice does not bind the Minister or the Cabinet to make a recommendation or to consider and decide the Petition; the only functions of the Notice are to give notice that the Minister has received the Petition and to provide an opportunity for interested parties to make submissions on the Petition. As there is no determination made at this stage, it is inappropriate to quash the Notice.

The Notice Does Not Bind the Minister or the Cabinet

[49] Canada argues that, because simply publishing the Notice in the *Gazette* does not bind either the Minister or the Cabinet to any action that is outside either of their jurisdiction, a want of jurisdiction that would ground prohibition is not apparent. Canada notes that the publication of the Notice simply informs the public that the Minister has received the Petition, gives notice as to where the Petition may be inspected, and gives interested parties the opportunity to make submissions on the Petition to the Cabinet. Publishing the Notice does not bind the Cabinet to consider or determine the Petition; the Cabinet is still able at this stage to reject the Petition as being outside its jurisdiction, to hear the Petition and not vary Decision 2010-805, or to hear the Petition and vary Decision 2010-805.

[50] Canada also notes that the roles of the Minister and the Cabinet are distinct. Though the Minister is a member of the Cabinet and as such will take part in the consideration of the Petition, the roles of these two entities are separate under subsection 12(1). The Minister's role in publishing the Notice is purely administrative, while the role of the Cabinet is deliberative. As such, the

Minister's jurisdiction to publish the Notice is separate from the jurisdiction of the Cabinet to hear and decide the Petition. Since the Minister is required to publish the notice under subsection 12(4) regardless of the Cabinet's jurisdiction to hear the Petition, the Notice must stand.

Certiorari is Premature When the Action to be Quashed is Interlocutory or Has no Effect on Rights

[51] Canada argues that for an action to be reviewable by the Court it must have some actual effect on the rights of the parties concerned; where there is no effect to exercising *certiorari*, the remedy should not be granted. In the instant case, publication of the Notice does not affect Bell's rights; Bell can make submissions regarding the Petition to the Cabinet, including submissions on jurisdiction. Further, there is a basic presumption that the courts should not fragment ongoing administrative processes through the granting of prerogative writs, particularly where the granting of the writ may be unnecessary. In the current case, the Cabinet could decline to hear the Petition, based on its determination that it has no jurisdiction to hear it. To seek *certiorari* at this stage is premature and adds an unnecessary element of complexity to the process.

[52] Canada relies on the comments of the Federal Court of Appeal in *Krever*, above, at paragraphs 29 and 30, in this regard:

> In principle, therefore, I believe that it is possible to apply to quash a notice that a commissioner decides to give under section 13. In practice, however, I believe that the courts must show extreme restraint before intervening at this stage. The notices in no way state the commissioner's opinion; they merely state the possibility that the commissioner may state the opinion that there has been misconduct. The allegations are not (or should not be) stated in legal language and must not be held under a magnifying glass. When a commissioner decides to include a number of allegations in a single notice, the notice may seem more overwhelming than the final report, in which the findings of misconduct, if such there be, will probably be spread

> out. Since a notice, by definition, states possible allegations of misconduct, it is inevitable that it will depict the conduct of its recipient unfavourably, and that the recipient will believe that its reputation is tarnished solely because a notice has been sent to it. Thus there are many reasons why the Court should view the notice in context, and not dramatize its implications.
>
> The courts should intervene only when the content of the notice implies an obvious excess of jurisdiction, or discloses a flagrant breach of the rules of natural justice. […]

The publication of a notice serves an important public purpose in allowing interested parties to file submissions with the Cabinet while, at the same time, it has very little practical effect on the rights of Bell and therefore the Notice should not be quashed. Further, since quashing the Notice would not prevent the Minister from making a recommendation to the Cabinet under section 13, and would not prevent the Cabinet from hearing and determining the Petition, *certiorari* should not be granted as it would be a meaningless exercise of the Court's discretion.

There is no Compelling Reason for the Court to Intervene to Prohibit the Cabinet From Considering the Petition

[53] Canada argues that Bell has not met the requirements to ground an order of prohibition, as it is not clear that, by hearing and determining the Petition, the Cabinet will step outside its jurisdiction. Because it is clear that the Petition relates to issues determined in Decision 2010-805, that the Cabinet can hear and determine submissions on jurisdictional issues, and that the statutory preconditions for hearing a petition are met, there is no compelling reason for the Court to prohibit the Cabinet from hearing the Petition.

No Obvious Want of Jurisdiction

[54] Canada also notes that subsection 12(1) of the Act vests a broad power to vary decisions of the CRTC in the Cabinet. Further, the only limits on this power are the statutory preconditions of a valid, subsisting decision of the CRTC and compliance with the limitation period. These statutory conditions have been met and so the Cabinet has jurisdiction to consider and determine the Petition. Canada also notes that prohibition is a drastic remedy and should be used with caution; while it is intended and useful for preventing administrative bodies from stepping outside the bounds of their jurisdiction, it should only be used where the lack of jurisdiction is obvious. The Federal Court of Appeal in *Krever*, above, at paragraph 27, quoted de Smith, Woolf and Jowell in *Judicial review of administrative action*, to the effect that "if want of jurisdiction is not apparent, the application must wait until the tribunal has actually stepped outside its jurisdiction."

The Petition Relates to Determination in CRTC Decision 2010-805

[55] Canada argues that the only thing that matters in determining if a petition relates to a determination of the CRTC is whether the relief sought in the petition relates to a valid, subsisting, and relevant order of the CRTC. In this case the relief sought in the Petition, the implementation of a competitive bidding process, relates to an explicit rejection of the same process in Decision 2010-805. When the CRTC wrote in relation to its earlier rejection of the competitive bidding process that "these reasons continue to be valid," it was making a fresh determination on that issue.

[56] Canada also argues that Bell casts Decision 2010-805 too narrowly. Bell has argued that this decision was only about the kind of technology to be used in the expansion of broadband into rural and remote communities. However, in addition to the technology to be used, Decision 2010-805 was also about the allocation of the Deferral Account funds; as the Petition seeks to reduce the

amount of the Deferral Account funds that Bell is permitted to use and to implement a competitive bidding process for the allocation of Deferral Account funds, the Petition relates to the same subject matter as Decision 2010-805. As the Petition relates to the subject matter as the Decision 2010-805, it is within the jurisdiction of the Cabinet to consider it.

The Commission Had Authority to Consider Competitive Bidding in Decision 2010-805

[57] In Decision 2010-805, it was open to the CRTC to institute a competitive bidding process to allocate Deferral Account funds. As sections 60 and 62 of the Act indicate, the power of the CRTC to decide and vary its decisions is broad. Further, there are few constraints on the CRTC's Rate Setting Authority under sections 24, 25 and 32 of the Act which, after the Supreme Court of Canada's decision in *Bell Aliant*, above, includes the power to allocate Deferral Account funds. As such, it was not necessary for Rogers to make a separate application to vary Decision 2010-637 to include a competitive bidding process. Further, the CRTC was not bound to require an amendment to the parties pleadings in the application to vary Decision 2010-637 in order to make a determination on competitive bidding.

[58] Canada argues that where the CRTC's guidelines for review show that to vary a decision an interested party must "demonstrate that there is substantial doubt as to the correctness of the original decision," the fact that the CRTC did not vary Decision 2010-637 in Decision 2010-805 demonstrates that the CRTC did not believe the threshold to vary its earlier decision had been met.

No Grounds to Believe the Cabinet Will Act Outside Its Jurisdiction

[59] Canada notes that the Notice published in the *Gazette* does not indicate that the Cabinet will consider or determine the Petition and, as discussed above, the Cabinet is not bound to consider or determine the Petition. Although the Cabinet might step outside its jurisdiction in hearing the Petition, it is not certain to do so. As the Federal Court of Appeal held in *Singh (Re)*, [1989] 1 FC 430 (FCA); [1988] FCJ No 414 at page 438,

> What is important is that the Court should not intervene to prevent a body such as the Commission from carrying out its statutorily mandated duty to enquire into matters which may arguably be within its jurisdiction unless the Court can say with confidence that those matters are not within the Commission's jurisdiction.

In the current case, the Court cannot say with confidence that the matters to be heard by Cabinet are not within its jurisdiction, so the Court should not intervene. Further, as the Cabinet is equipped and capable of hearing and deciding submissions with respect to jurisdiction, the Court should not intervene at this stage.

The Cabinet Should be Permitted to Adjudicate the Sufficiency of the Petition Before Judicial Review is Taken

[60] Because Bell has not exhausted all of the administrative remedies available to it, it is premature for Bell to seek judicial review at this stage. Canada notes that Bell is capable of making submissions to Cabinet with respect to the Petition. As such, Canada argues that the current application for judicial review is a collateral attack on a remedy available under the Act. Canada relies on *C.B. Powell Ltd. v Canada (Border Services Agency)* 2010 FCA 61 at paragraphs 30 and 31 in support of the proposition that all administrative remedies must be exhausted before judicial review may be sought:

> The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point [… .]
>
> Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

Because it is within the jurisdiction of the Cabinet to hear submissions on jurisdiction and to decide not to hear the Petition if there is no jurisdiction, there is an administrative remedy available to Bell. Since there remains an adequate administrative remedy, there is no compelling reason for the Court to intervene at this stage.

ANALYSIS

[61] The parties have presented the Court with two antithetical interpretations, or characterizations, of Decision 2010-805. The correct interpretation is important because Bell takes the position that the Petition is invalid because it seeks to vary Decision 2010-805, which involved an entirely different subject-matter, and is in substance an attempt to vary two earlier decisions

(Decisions 2006-9 and 2007-15) outside the one-year limitation period in subsection 12(1) of the Act.

[62] Bell says that Decision 2010-805, which is the alleged subject of the Petition, arose from an application by Bell to vary an earlier CRTC decision ordering it to use its Deferral Account funds to expand wireline broadband services in rural communities. Bell says it applied to the CRTC to vary that decision because it wanted to use wireless rather than wireline technology for the broadband expansion.

[63] Bell complains that Rogers intervened and raised an entirely new issue over Bell's objection: whether the CRTC should hold a competitive bidding process to determine if Rogers could perform the broadband expansion rather than Bell. Rogers had unsuccessfully raised this very issue years earlier in Decisions 2006-9 and 2007-15, when it was rejected by both Cabinet and the CRTC. Bell points out that while Rogers could have appealed, petitioned or applied for review of Decisions 2006-9 and 2007-15 at the appropriate time, it never did.

[64] Bell asserts that the true focus of the Petition is the variation of Decisions 2006-9 and 2007-15 and says that the only relief sought in the Petition is that there be competitive bidding, which the CRTC summarily dismissed in a single paragraph of Decision 2010-805 on the ground that it was already answered by Decisions 2006-9 and 2007-15.

[65] On the basis of this characterization, Bell asks the Court to find that the Petition lies outside Cabinet's jurisdiction because it deals with a different subject-matter (competitive bidding) than the

subject-matter of Decision 2010-805 (Bell's use of its Deferral Account funds for wireless technology). Instead, Bell says it is an attempt by Rogers to evade the one-year ultimate limitation period in subsection 12(1) of the Act for varying Decisions 2006-9 and 2007-15.

[66] On the other hand, Canada and Rogers say that the Petition is clearly related to the subject matter of Decision 2010-805 and is not an attempt to boot-strap the competitive bidding issue that should have been dealt with by other means. Hence, the Cabinet has jurisdiction to deal with the Petition, including the competitive bidding issue.

[67] Bell has directed the Court's attention in particular to paragraph 23 of Decision 2010-805:

> With respect to the proposals to allow for competitive bidding in order to ensure the use of least-cost technology, the Commission notes that it rejected this idea both in Telecom Decisions 2006-9 and 2007-50, since it would add a significant layer of complexity, delay the implementation of broadband expansion, and result in substantial administrative and regulatory burden. The Commission considers that these reasons continue to be valid.

[68] Bell says that the CRTC is not here making a fresh decision about competitive bidding; the CRTC is, rather, simply directing the attention of the parties to the fact that the competitive bidding issue has already been dealt with in Decisions 2006-9 and 2007-15. Hence, Bell says that Decision 2010-805 does not deal with competitive bidding and, in asking the Cabinet to address competitive bidding in the Petition, Rogers is again attempting to raise an issue that has already been dealt with in previous decisions and that is not within Cabinet's jurisdiction because it involves different subject matter from Decision 2010-805.

[69] Rogers and Canada, on the other hand, say that the CRTC is making a decision about competitive bidding in Decision 2010-805. The fact that the issue may have been raised and dealt with on previous occasions is irrelevant because the CRTC is not bound by its previous decisions and, in any event, the CRTC has not dealt with the issue in the context of Bell's proposal for HSPA+ wireless services.

[70] Both sides have indicated that paragraph 23 of Decision 2010-805 must be viewed and interpreted in the full context of a series of decisions and debate that goes back to Decision 2002-34 when the CRTC created price regulation frameworks applicable to telecommunications services offered by ILECs, including Bell.

[71] The Court has now reviewed the competing interpretations of Decision 2010-805 offered by the parties. In particular, the Court has been particularly mindful of Decision 2010-805 itself, and what it reveals about the CRTC's intention in referring to competitive bidding in that decision, as well as what the record reveals about the full context and the series of decisions that led up to Decision 2010-805, and what this tells us about whether the CRTC was making a new decision about competitive bidding, or simply directing the parties attention to the fact that the issue had already been dealt with in previous decisions.

Decision 2010-805

[72] To begin with, paragraph 23 of Decision 2010-805 acknowledges that the CRTC has received, as part of the discussion surrounding this decision, "proposals to allow for competitive

bidding in order to ensure the use of least-cost technology….” These proposals are summarized in paragraph 17 of Decision 2010-805:

> Barrett, RCI, and Videotron submitted that the revised proposal does not adhere to the principles in the deferral account decisions, as it does not represent the use of least-cost technology to deploy broadband services. These parties argued that alternative broadband service providers could provide a comparable service at significantly less cost than Bell Canada, and submitted that if the Commission approves the revised proposal, it should allow for competitive bidding to see whether other companies could provide the HSPA+ service at less cost.

[73] Paragraph 17 appears in that section of Decision 2010-805 which deals with the following question:

> Is Bell Canada’s HSPA+ wireless broadband proposal consistent with the Commission’s criteria for use of funds to expand broadband services in rural and remote areas?

[74] It is apparent from paragraph 17 of Decision 2010-805, in the context of Bell’s application (which was an application to vary Decision 2010-637 by, *inter alia*, allowing the Bell companies to use HSPA+ wireless broadband technology rather than wireline DSL technology in order to provide broadband services to communities previously approved by the commission), that the parties who resisted Bell’s application to vary Decision 2010-637 felt that any such variation would not accord with the CRTC’s established criteria for the use of Deferral Account funds and that, because of this, if the CRTC were to accept the application to vary, it would need to consider competitive bidding “to see whether other companies could provide the HSPA+ service at less cost.”

[75] In other words, on its face, and when the whole of Decision 2010-805 is taken into account, it looks to me as though the CRTC is dealing with an application from Bell to vary a previous

decision (and hence is making a new decision about the use of Deferral Account funds) as part of which the CRTC was asked to consider whether the variations were consistent with its own previously established criteria and whether, if it was disposed to grant Bell its new or revised proposal, it should not also allow for competitive bidding to see whether other companies could provide the HSPA+ service at less cost.

[76] The CRTC points out in Decision 2010-805 that it had previously addressed the issue of competitive bidding in Decisions 2006-9 and 2007-15 and rejected the idea. But Decisions 2006-9 2007-15 were not made in a context where the CRTC was being asked to consider a Bell application for the use of HSPA+ wireless technology.

[77] Hence, in the context of Decision 2010-805, I cannot read the CRTC's comment in paragraph 23 that "it rejected [competitive bidding] both in Telecom Decisions 2006-9 and 2007-50 [*sic*]…" as an indication that it does not need to, and has not, considered the proposals for competitive bidding as put forward by Barrett, RCI, and Videotron, in the context of Bell's application to vary involving a shift to HSPA+ wireless technology. In my view, all that paragraph 17 says is that competitive bidding was rejected in Decisions 2006-9 and 2007-15 because the CRTC thought "it would add a significant layer of complexity, delay the implementation of broadband expansion, and result in substantial administrative and regulatory burden." The CRTC also considers the same reasons to be valid in the context of Decision 2010-805 even though, as the opposers had pointed out, Bell's application to vary was not consistent with the CRTC's own criteria and, if the CRTC was willing to proceed with the variations, it should allow for competitive

bidding as a way of remaining consistent with the Policy Direction and its own previously stated objectives and criteria.

[78] Hence, I think that the issue of competitive bidding was very much a part of a new decision that the CRTC made in Decision 2010-805 with regards to the application that Bell was making at that time and which involved the use of HSPA+ wireless technology. I do not see how the CRTC could be saying that, for purposes of the application before it, the issue of competitive bidding had already been dealt with in Decisions 2006-9 and 2007-15 and so required no further consideration in the context of an application that now proposed using HSPA+ technology. The HSPA+ decision is one the CRTC had not made before, so the CRTC was required to consider the impact on competition in this context. In my view, the CRTC is simply saying that the justifications it offered earlier in Decisions 2006-9 and 2007-15 to reject competitive bidding are equally persuasive in the decision it is now making. Bell is, in effect, saying to the Court that the CRTC rejected the idea of competitive bidding in previous decisions that did not involve HSPA+ wireless technology and so did not need to, and did not, consider the idea of competitive bidding in an application that does involve HSPA+ wireless technology. I cannot accept this logic, and I do not think this is what the CRTC did in Decision 2010-805. Just because the CRTC references previous decisions for reasons why competitive bidding is not appropriate in the context of a new application involving a new technology, does not mean it has not considered the idea of competitive bidding as part of that new application which involves an assembly of elements that had not previously been before the CRTC.

The Wider Context

[79] I believe that this interpretation is also borne out by the wider context in which Decision 2010-805 was made. By and large, my review of the record before me confirms the rationale and sequencing recited by Rogers and endorsed by Canada.

[80] By the time of Bell's new application, or application to vary (either of them requiring a new exercise of discretion and a new decision from the CRTC) that resulted in Decision 2010-805, Rogers and the other challengers to Bell's application had made it clear to the CRTC that, in their view, an acceptance of Bell's proposal would result in inconsistency with the CRTC's own criteria and principles as forged and articulated in previous applications and decisions. This would require rejection of Bell's application, or a reconsideration of issues such as competitive bidding, in order to maintain competitive neutrality (a CRTC principal) in this market. The CRTC, as Decision 2010-805 shows, disagreed and, *inter alia*, rejected the proposal that competitive bidding was a necessary or desirable approach.

[81] Following Decision 2010-805, Rogers still felt that the CRTC had violated its own principles and that, if Bell's HSPA+ application were to be endorsed, then a reconsideration of competitive bidding was required. In my view, this is what the Petition, in essence, says, and as such it is directly and obviously related to Decision 2010-805. Among other things, the Cabinet needs to consider whether it was appropriate for the CRTC to reject competitive bidding in a context that involved a new technology, a service that is already available in most of the communities involved, and the change of conditions that has occurred since the CRTC rejected competitive bidding in Decisions 2006-9 and 2007-15. The request to the Cabinet in the Petition to consider competitive

bidding as a way of achieving competitively neutral regulation is, in my view, directly related to Decision 2010-805 and, in particular, paragraphs 17 and 23 of that decision.

[82] On 26 January 2011, Rogers submitted the Petition to the Cabinet seeking a variance of the decision. The Petition challenges the CRTC's determination in the decision that Bell's new wireless HSPA+ technology proposal satisfies the CRTC's criteria for Deferral Account funding, including the CRTC's underlying determinations in the decision on the availability of HSPA+ services in the approved locations and the distortion of the wireless market caused by approval of Bell's new proposal, as well as the CRTC's rejection in the decision of a competitive bidding process.

[83] The Petition requests the Cabinet to vary Decision 2010-805 and to affirm that approval of Bell's new wireless HSPA+ technology proposal would give rise to competitive inequities and market distortions that are not consistent with the principles established by the CRTC in earlier decisions and the Cabinet's Policy Direction, and that use of a competitive auction is necessary to satisfy the requirements of competitive neutrality and least-cost provision of service. Recognizing, however, the importance of ensuring that there is no further delay in broadband expansion, the Petition proposes that Decision 2010-805 be varied so as to approve Bell's use of Deferral Account funds to extend service to the locations Bell has proposed to serve in 2011 using HSPA+ technology and to state that a competitive auction will be convened to establish the appropriate Deferral Account subsidy for the extension of broadband service to the remaining approved communities that Bell has proposed to serve.

[84] I agree with Rogers and Canada that the decision speaks for itself on its subject matter. In the decision and in response to the record before it, the CRTC addressed whether Bell's new wireless HSPA+ technology proposal was consistent with its criteria for use of Deferral Account funds for broadband expansion to rural and remote communities in light of a number of factors, including the competitive impact of Bell's proposal and the costs of using a competitive bidding process. The CRTC's approval of Bell's new wireless HSPA+ proposal was integrally related to and based on the CRTC's "determinations" on these factors. This is plainly set out in the "Commission's analysis and determinations" in paragraph 21 to 24 of the Decision:

> With regard to the parties'submission that HSPA services are already available in some of the approved communities, the Commission notes that, in order to ensure a fair, predictable, and transparent process, it established 19 February 2007 as the cut-off date for alternative broadband service providers to verify that they were offering, or were planning to offer, broadband service in the communities. The Commission notes that broadband service was not available in the communities in question as of this cut-off date. Furthermore, the Commission notes that none of the carriers providing HSPA service in the approved communities demonstrated that their current offerings are comparable to Bell Canada's revised proposal.
>
> Regarding the parties' concerns that the revised proposal would distort the mobile voice market, the Commission notes that mobile voice services are already available in the vast majority of the 112 approved communities. Furthermore, the Commission considers that there are many economic and social benefits associated with access to broadband services in these communities, and that any associated market distortion would be minimal.
>
> With respect to the proposals to allow for competitive bidding in order to ensure the use of least-cost technology, the Commission notes that it rejected this idea in both Telecom Decisions 2006-9 and 2007-50, since it would add a significant layer of complexity, delay the implementation of broadband expansion, and result in substantial administrative and regulatory burden. The Commission considers that these reasons continue to be valid.

> **In light of all of the above**, the Commission finds that Bell Canada's HSPA+ wireless broadband proposal is consistent with its determinations in the Deferral Account decisions. The Commission therefore **approves** the revised proposal. [Some emphasis added.]

[85] As Bell and Canada point out, the Petition challenges and seeks a variance of the CRTC's determinations in Decision 2010-805on the impact of approving Bell's new proposal on wireless competition, the costs and benefits of implementing a competitive bidding process and the consequent approval of Bell's new wireless HSPA+ technology proposal.

[86] Simply put, paragraphs 21 to 24 of the Decision are the subject matter of the Petition.

Bell's Arguments

[87] Bell has sought to persuade the Court that the above interpretation of the Petition, Decision 2010-805, and the background decisions is not correct for various reasons. In my view, none of the objections put forward by Bell can withstand scrutiny.

[88] First, Bell maintains that the "the CRTC had already fully considered the competitive bidding issue in Decisions 2006-9 and 2007-15." As a matter of law, however, it is my view that while the CRTC may refer to and take guidance from its earlier decisions, those decisions cannot dictate its subsequent decisions. The CRTC is not bound by precedent and has a legal obligation not to fetter its discretion. As stated in Macauley and Sprague's *Practice and Procedure Before Administrative Tribunals*:

> … the notion of *stare decisis* is not applicable in the administrative sphere. **Agencies are not only at liberty not to treat their earlier decisions as precedent, they are positively obligated not to do so.** [emphasis added]

[89] The principle that an administrative tribunal cannot use its previous decisions to fetter its discretion was established in *Hopedale Developments Ltd. v Oakville (Town)* (1965), 47 DLR (2d) 482 (ONCA) at 486. The Ontario Court of Appeal held in that case that it would have been an error of law for the Ontario Municipal Board to use precedent to limit the number of issues that it needed to address. Administrative tribunals are permitted to rely on principles articulated in previous decisions as long as the tribunal gives "the fullest hearing and consideration to the whole problem before it."

[90] The prohibition on exclusive reliance by an administrative tribunal on previous decisions includes not only factual and policy decisions but also legal determinations and is essential to ensure that administrative tribunals have the flexibility to respond to new circumstances on a case-by-case basis. The need for flexibility is particularly acute in the case of policy and factual determinations, such as those at issue in Decision 2010-805 and the Petition.

[91] The CRTC also did not have before it in its previous decisions Bell's new wireless HSPA+ technology proposal, which Bell characterized as establishing new facts, resulting in a new application. In my view, the CRTC could not have considered competitive bidding in light of these new facts in its previous decisions anymore than the CRTC could have considered Bell's new wireless HSPA+ technology in its previous decisions. The relevant facts, quite simply, were not previously before the CRTC.

[92] Therefore, in my view, the CRTC cannot, as a matter of law, have "fully considered" in previous decisions whether competitive bidding should be used to allocate Deferral Account funds in light of Bell's new wireless HSPA+ technology proposal.

[93] Second, Bell argues that consideration of a competitive bidding process was not "properly before the CRTC in the Decision" because Rogers "intervened" and raised this issue "over Bell's objection." In support of this proposition, Bell cites jurisprudence on the ability of the interveners to raise new issues at trial and on appeal in the courts. In my view, this jurisprudence has no application to administrative proceedings. Even if it did, Rogers, Barrett and Videotron – all of whom requested a competitive bidding process should Bell's application be granted – were not interveners; they were interested parties to Decisions 2010-637 and 2010-805, entitled to respond to Bell's application based on factual, policy, and legal grounds relevant to the CRTC's assessment of whether Bell's new wireless HSPA+ technology proposal satisfied the CRTC's criteria for Deferral Account funding. Opposing parties' submissions focused specifically on these criteria, including in particular the objectives of extending service to underserved communities, competitive neutrality and least-cost service provision, and it is in this context that the CRTC's addressed these arguments.

[94] I agree with Rogers and Canada that there was also no prohibition under the former *CRTC Telecommunications Rules of Procedure* (and there is no prohibition under the new *CRTC Rules of Procedure*) on an interested party to a CRTC proceeding to raise policy, factual or legal arguments that have not been expressly identified by an applicant in the application. Rules 13 and 27 of the former *CRTC Telecommunications Rules of Procedure*, cited by Bell, simply provide the CRTC with the discretion to require parties to clarify issues in dispute or to order amendments necessary

for determining the real question in issue. No such steps were taken by the CRTC in the Decision 2010-805 proceeding.

[95] Nor was there any requirement, in my view, for Rogers or other interested parties to "formally request" a variance of Decisions 2006-9 and 2007-15 in their submissions in the Decision 2010-805 proceeding or by separate application. The submissions of opposing parties identify competitive neutrality and competitive bidding as factors that the CRTC needed to consider in its assessment of whether Bell's new wireless HSPA+ technology proposal was consistent with its criteria for Deferral Account funding.

[96] There is also no question, in my view, that the CRTC had the authority to order the implementation of a competitive bidding process in the Decision had it determined that this was necessary to ensure competitive neutrality and/or least-cost provision of service. In this regard, section 60 of the Act especially authorizes the CRTC to "grant the whole or any portion of the relief applied for in any case, and may grant any of the relief in addition to or in substitution for the relief apply for as if the application had been for that relief."

[97] Bell's third proposition is that "the text of Decision 2010-805 does not suggest that the CRTC intended to render any new decision on competitive bidding." As I have said previously, it is my view that the Decision clearly and unequivocally makes a decision on this issue. In the Decision, the CRTC analyzed and determined the appropriateness of implementing a competitive bidding process, as it was required by law to do, referencing its earlier determinations that such a process would result in complexity, delay and substantial administrative and regulatory burden and concluding that "these reasons continue to be valid."

[98] I do not think this can be characterized as a "courtesy response" in correspondence to a request for a review or clarification of its earlier decisions. The Decision is identified as "Telecom Decision CRTC Decision 2010-805" and is plainly a decision of the CRTC in all respects. In this regard, the following statement of Justice Noël in *Dumbrava*, above, is instructive:

> Whenever a decision-maker who is empowered to do so agrees to reconsider a decision on the basis of new facts, a fresh decision will result whether or not the original decision is changed, varied or maintained. **What is relevant is that there be a fresh exercise of discretion, and such will always be the case when a decision-maker agrees to reconsider his or her decision by reference to facts and submissions which were not on the record when the original decision was reached.** [emphasis added]

[99] The CRTC was empowered to and did expressly reconsider its previous decisions on competitive bidding in Decision 2010-805 as it was legally obligated to do in light of the new facts and arguments before it. These facts and arguments, including Bell's new wireless HSPA+ technology proposal and the submissions of interested parties, were not before the CRTC in Decisions 2006-9 or 2007-15. The CRTC's determination that its reasons for declining to use a competitive bidding process in earlier decisions "continue to be valid" does not make Decision 2010-805 any less a decision of the CRTC. What matters is whether CRTC made a fresh exercise of discretion, which, in my view, it did.

[100] I also agree with Rogers and Canada that, as a purely practical matter, the CRTC could <u>not</u> have decided in earlier decisions that its analysis in those decisions would "continue" to be valid in a future proceeding, conducted 3-4 years later to assess a fundamentally different technology proposal for expanding broadband service to rural and remote communities. As discussed above, Bell itself characterized its application as a new application, on the grounds that its new wireless

HSPA+ technology proposal involved new facts not previously before the CRTC. The CRTC could not have previously assessed the appropriateness of using a competitive bidding process in light of these new facts.

[101] Bell also says that, in essence, the Petition is nothing more than a collateral attack on earlier decisions that has been brought out of time. It is true that the record shows that Rogers did threaten to attack and petition Cabinet on similar grounds and using wording that can also be found in the Petition. In my view, however, the fact that Rogers may have threatened to attack earlier decisions but did not follow through on those threats does not make the present Petition a time-barred collateral attack upon those earlier decisions. It is hardly surprising that similar wording is used, or that previous decisions are cited, when the concerns raised are the same. But the fact is that those earlier decisions did not involve the HSPA+ wireless technology and in Decision 2010-805 the CRTC was asked to exercise its discretion anew by addressing that new technology and whether allowing its deployment now gave rise to a need for competitive billing in order to ensure neutrality and compliance with the CRTC's own policies and principles.

Conclusions

[102] I think that the conclusions I have reached at this point effectively deal with the application, and that there is no need to consider additional points raised by Bell or Canada. The heart of Bell's application is that Decision 2010-805 does not contain a fresh exercise of the CRTC's discretion to consider, or reconsider, competitive billing. In my view, it does involve a fresh exercise of that discretion. Hence, the Petition does not deal with subject matter that is unrelated to the Decision and

is not out of time. Consequently, in my view, there are no jurisdictional issues that would justify quashing and setting aside the Notice and/or prohibiting the Cabinet from considering the Petition in accordance with the Act.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. Rogers and the Minister shall have their costs in this matter.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-514-11
STYLE OF CAUSE:	**BELL CANADA and ATTORNEY GENERAL OF CANADA, MINISTER OF INDUSTRY and ROGERS COMMUNICATIONS INC.**
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 12, 2011
REASONS FOR JUDGMENT AND JUDGMENT	**Russell J.**
DATED:	September 29, 2011

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