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Vice President
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25 August 2006

Ms. Diane Rhéaume
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, ON K1A 0N2

Dear Ms. Rhéaume:

Subject: ***Review of price cap framework*, Telecom Public Notice CRTC 2006-5 – MTS Allstream Request to Exclude the Regulatory Treatment of Competitor Services from the Scope of the Proceeding**

1. This constitutes the answer of TELUS Communications Company ("TELUS") to the application made by MTS Allstream Inc ("MTS Allstream") dated 21 August 2006. MTS Allstream seeks a declaratory ruling excluding all issues relating to the regulatory treatment of Competitor Services from the scope of the proceeding initiated by *Review of Price Cap Framework*, Telecom Public Notice CRTC 2006-5 ("PN 2006-5").

2. The thrust of the MTS Allstream application is that "it is improper for the Commission to examine or rule on only one aspect of the treatment of Competitor Services, namely, the pricing constraints applicable to Competitor Services, while excluding comment on all other issues relating to the price treatment of Competitor Services."[1] The first issue, MTS Allstream asserts, cannot be determined "in isolation of these other matters."[2]

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[1] MTS Allstream Application, 21 August 2006, paragraph 2.
[2] *Ibid.*, paragraph 2.

3. Before addressing the merits of the present application, it is useful to commence with an examination of the terms of PN 2006-5.

4. In PN 2006-5, paragraph 22, the Commission invited interested parties to submit comments on what changes, if any, should be made to the price cap regime with regard, *inter alia*, to the following:

- objectives of the regime;
- basket structure and assignment of service, ***except for Competitor Services;***
- constraints for basket(s) of services (e.g., I - X);
- constraints for individual services or rate elements (e.g., the percentage increase per year allowable for basic Residential Services), ***except for Competitor Services***.

[emphasis added]

5. The PN then states as follows at paragraph 24:

"This proceeding will strictly focus on issues directly related to those identified above and ***will not include*** the following:

- proposals for new ***Competitor Services*** or new categories of Competitor Services;
- examination of Phase II costs for existing ***Competitor Services*;**
- existing assignments of ***Competitor Services*** between Categories I and II; and
- definition of Category 1 and Category II ***Competitor Services...***"

[emphasis added]

6. PN 2005-6 is very precise: where it is intended to exclude Competitor Services from the scope of the proceeding, this is stated. In all other cases, one must conclude, Competitor Services are <u>not</u> excluded. Such is the case, notably, where "constraints for basket(s) of services" are concerned. MTS Allstream acknowledges this:

"MTS Allstream acknowledges that the third bullet in paragraph 22 of PN 2006-5 does not expressly exclude Competitor Services; ..."[3]

7. Despite MTS Allstream's protest that the Commission posing interrogatories in relation to constraints for the Competitor Services basket that are out of scope,[4] it is plain that the Commission was acting entirely consistently with the terms of reference for this proceeding when it posed such interrogatories.

8. MTS Allstream contends that, "[i]n order for interested parties to comment meaningfully on the types of pricing constraints, if any, that should apply to the Competitor Services basket overall, interested parties must know the answers to, or must be able to make full and complete submissions to the Commission on a whole host of interrelated issues."[5] MTS Allstream identifies the following issues:

(i.) what services should be included in the Competitor Services basket;

(ii.) whether existing prices for services and rate elements thereof within the basket are appropriate;

(iii.) what pricing constraints should apply to individual services and rate elements within the basket; and

(iv.) whether these pricing constraints should vary depending on the services or rate elements in question.[6]

9. The Commission has made it clear that it does not want to address the latter issues in the context of the present proceeding. The Commission is perfectly entitled to define the terms of reference for proceedings before it. At some level, every issue that comes before the Commission is inter-related with a whole set of other issues. Thus, one could equally make the case, for example, that prices for residential services should not be considered in isolation of a full assessment of Bell's pending application forbearance from regulation of discretionary services.

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3 MTS Allstream Application, 21 August 2006, paragraph 12.
4 *Ibid.*, paragraphs 8-11.
5 *Ibid.*, paragraph 12.
6 *Ibid.*, paragraph 12.

However, the Commission cannot entertain all conceivable issues in the context of every proceeding before it. It is perfectly proper for the Commission to establish some limits on the scope of this proceeding.

10. MTS Allstream says that to proceed without joining issues such as those identified in paragraph 8, above, would breach the Commission's duty to act fairly,

> "because it prejudices the rights of interested parties to adduce evidence and to make full and complete submissions on the issue at hand. In administrative law, a breach of the duty of fairness constitutes a jurisdictional error which is reviewable by the courts"[7] [footnotes omitted]

11. MTS Allstream makes two claims. First, it says that the Commission has, in defining the issues as did in the PN, "fettered the exercise of its discretion."[8] Second, it says that the Commission has refused to entertain relevant considerations.[9] These claims are not well-founded in law.

12. The suggestion that the Commission has "fettered the exercise of its discretion." reflects a misunderstanding of what is entailed in changing a basket constraint. Establishment of a basket constraint for Competitor Services does not require consideration of whether changes should also be made to the *content* of the Competitors Services basket, or whether *pricing constraints applicable to individual rate elements* should be changed (etc.). Conversely, the establishment of a basket constraint does not pre-empt the Commission's ability to decide issues related to the content of the basket or appropriate pricing constraints applicable to individual rate elements at a later date, based on a record pertinent to those issues.

13. The suggestion that the Commission is refusing to take relevant evidence into account in setting the basket constraint for Competitor Services by refusing to hear evidence related to the appropriate *content* of the basket or appropriate

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7 *Ibid.*, paragraph 15
8 *Ibid.*, paragraph 16.
9 *Ibid.*, paragraph 16.

pricing constraints applicable to individual rate elements is similarly flawed. One does not need to hear evidence related to those matters to set an appropriate basket constraint for Competitor Services.

14. MTS Allstream would have done well to read more carefully the decision in *Université du Québec à Trois Rivières v. Larocque.* [1993] 1 SCR 471 (copy attached), which it cites for the proposition that it is a breach of the Commission's duty to act fairly to prejudice the rights of interested to adduce evidence and to make full and complete submissions on an issue before it.[10]

15. The facts of that case are of interest. A labour arbitrator was appointed to consider a grievance under a collective agreement arising from a termination of employment. The same arbitrator was appointed to consider three additional grievances arising out of disciplinary action against the same employee which preceded his dismissal. The arbitrator refused to hear the three earlier grievances and excluded evidence relating to these incidents in hearing the grievance relating to the dismissal on the ground that the employer was trying to prove a cause for dismissal not mentioned in the notices of termination.

16. The Supreme Court affirmed that, where a tribunal [in that case, the arbitrator] has jurisdiction to conduct proceedings, the tribunal has "complete jurisdiction to define the scope of the issue" before it. Only if the tribunal makes a patently unreasonable error or commits a breach of natural justice is there an excess of jurisdiction giving rise to judicial review. Whatever misgivings MTS Allstream may have about the scope of this proceeding, it has not alleged that the Commission's decision was "patently unreasonable" or tainted by a breach of natural justice.

17. Granted, once a tribunal defines its terms of reference, failure to admit relevant evidence of such import that it results in unfairness may constitute a breach of the

[10] MTS Allstream also cites *Cohnstaedt v University of Regina,* [1989] 1 SCR 1011. That case involved an employment contract. The Supreme Court decided the case on a point of contract law and found it unnecessary to discuss the arguments raised concerning natural justice. The case is of no relevance to the matter at hand.

rules of natural justice giving rise to judicial review. But MTS Allstream does not get this far: it falls at the first hurdle. The issues it says must be addressed are not part of the terms of reference the Commission has set. In short, it has a right to adduce evidence relevant to those terms of reference; it does not have a right to change the terms of reference.

18. There is an additional reason why the MTS Allstream request should be denied. The PN in this proceeding was issued on 9 May 2006. The terms of reference for this proceeding were defined at that time. They have not been changed since that time. MTS Allstream offers no explanation for the delay in bringing the present application calling into question the legitimacy of those terms of reference, which comes almost 100 days after the release of the PN. As the Federal Court of Appeal said in *Bell Canada v Allstream Corp,* [2004] F.C.J No. 1491, 2004 FCA 295, Docket A-86-04 (copy attached), at paragraph 7, "A person is expected to raise a procedural concern at the earliest reasonable opportunity."

19. TELUS respectively submits that the MTS Allstream application should be denied.

Yours truly,

Willie Grieve
Vice-President
Telecom Policy and Government Affairs

HR/cs

Attachment

cc: Interested Parties to PN 2006-5

* * * End of Document * * *

LEXSEE 1993-1 S.C.R. 471,AT 52

[*471] Syndicat des employes professionnels de l'Universite du Quebec a Trois-Rivieres Appellant v. Universite du Quebec a Trois-Rivieres Respondent and Alain Larocque Mis en cause and Claude-Elizabeth Perreault and Celine Guilbert Mis en cause

INDEXED AS: UNIVERSITE DU QUEBEC A TROIS-RIVERES v. LAROCQUE

File No.: 22146

SUPREME COURT OF CANADA

[1993] 1 S.C.R. 471; 1993 S.C.R. LEXIS 1078

Heard: November 30, 1992

Judgment: February 25, 1993

PANEL: [**1] Lamer C.J. and La Forest, L'Heureux-Dube, Gonthier and Iacobucci JJ.

PRIOR-HISTORY: ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

CATCHWORDS:
Labour relations — Judicial review — Excess of jurisdiction — Arbitration — Dismissal due to lack of funds — Whether refusal by arbitrator to admit relevant and admissible evidence necessarily a breach of rules of natural justice — New arbitration before another arbitrator.

HEADNOTE:
Pursuant to an agreement between the respondent University and the Government of Quebec to conduct research, the University hired two research assistants for a period of 14 months. Before the end of that period, they were advised that "as the result of a lack of funds" the University was forced to terminate their contracts. The employees filed grievances challenging this decision. At the hearing, the University sought to introduce evidence that the employees had done their work badly and that it was accordingly necessary to hire from the research funds provided for in the agreement another experienced person who would be able to redo the work already done. It was this additional expenditure which, [*472] according to the University, had led to the shortage of funds to pay the employees. The appellant [**2] union objected to this evidence and argued that the University was trying to alter the grounds relied on in the notices of termination of employment. The arbitrator allowed the objection. He subsequently allowed the grievances and ordered the University to pay the employees their full salaries. The arbitrator stated that when the University referred to a lack of funds, it could only mean funds of the University, with which the employees had entered into a contract. He concluded that the University had not discharged its burden of proving the lack of funds and that accordingly there was no cause for interrupting the contracts. He added that even if there had been a lack of funds, that lack could not be a valid reason for breaching a term contract, since this was a cause which was not within the employee's control, but "due to an agreement made between the University and a third party". The Superior Court allowed the motion in evocation submitted by the University, concluding that the arbitrator had exceeded his jurisdiction by refusing to hear relevant and admissible evidence. The court noted that the arbitrator had confined his ruling to the contractual relationship between the University [**3] and the employees in deciding on the merits of the grievance and had refused to hear the evidence that the reason the University lacked funds was precisely the poor quality of the work done by the employees. The court ordered that a new arbitration be held before another arbitrator. The Court of Appeal, in a majority decision, affirmed this judgment. This appeal is primarily to determine whether the refusal by a grievance arbitrator to admit evidence is a decision subject to judicial review.

Held: The appeal should be dismissed.

Per Lamer C.J. and La Forest, Gonthier and Iacobucci JJ.: The grievance arbitrator has jurisdiction to define the

scope of the issue presented to him, and in this regard only a patently unreasonable error or a breach of natural justice can constitute an excess of jurisdiction and give rise to judicial review. The necessary corollary of this jurisdiction of the arbitrator is his exclusive jurisdiction then to conduct the proceedings, and he may inter alia choose to admit only the evidence he considers relevant to the case as he has chosen to define it. The arbitrator's exclusive jurisdiction to define the scope of the case is not a jurisdictional question. [**4]

An arbitrator does not necessarily commit a breach of the rules of natural justice, and therefore an excess of [*473] jurisdiction, when he erroneously decides to exclude relevant evidence. The arbitrator is in a privileged position to assess the relevance of evidence presented to him and it is not desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the arbitrator. An arbitrator commits an excess of jurisdiction, however, if his erroneous decision to reject relevant evidence has such an impact on the fairness of the proceeding that it can only be concluded that there has been a breach of the rules of natural justice.

In this case, the Superior Court was justified in exercising its review power and ordering a new arbitration hearing. By refusing to admit evidence presented by the University, the arbitrator infringed the rules of natural justice. In the context of a hearing involving a dismissal due to a lack of funds, such evidence was crucial. Its purpose was to establish the cause of the lack of funds. The arbitrator added, moreover, that even if there had been a lack of funds, that [**5] lack could not be a valid reason for breaking a term contract, since that was a cause which was not within the employee's control but was due to an "agreement between the University and a third party". He thus recognized the importance of the lack of cause attributable to the employees but found himself in the position of disposing of it without having heard any evidence whatever from the University on the point, and even having expressly refused to hear the evidence which the University sought to present on the point. This quite clearly amounts to a breach of natural justice. The denial of the right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision.

The union did not succeed in establishing that the Superior Court had erred in the exercise of its discretion in ordering that the new arbitration be held before another arbitrator. The court was probably of the view that there could quite reasonably be doubt as to the ability of an arbitrator to objectively hear evidence which he already thought was so lacking in significance as to declare it irrelevant.

Per L'Heureux-Dube [**6] J.: Although a reviewing court is held to a high standard of deference toward an administrative tribunal protected by a privative clause, an error on a question of law which goes to jurisdiction will always be reviewable. In this case, the arbitrator had jurisdiction to dispose of the grievances but committed an excess of jurisdiction by refusing to consider the evidence [*474] presented by the University. That evidence was relevant to the consideration and disposition of the grievances. Refusing to hear relevant and admissible evidence is a breach of the rules of natural justice.

CASES-CITED:
Cases Cited

By Lamer C.J.

Not followed: Toronto Newspaper Guild, Local 87 v. Globe Printing Co., [1953] 2 S.C.R. 18; distinguished: Roberval Express Ltee v. Transport Drivers, Warehousemen and General Workers Union, Local 106, [1982] 2 S.C.R. 888; referred to: St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper workers Union, Local 219, [1986] 1 S.C.R. 704; Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227; U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048; National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324; Cardinal v. Director [**7] of Kent Institution, [1985] 2 S.C.R. 643.

By L'Heureux-Dube J.

Referred to: Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554; Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses Association, [1975] 1 S.C.R. 382.

LEGISLATION-REFERRED-TO:
Statutes and Regulations Cited

Labour Code, R.S.Q., c. C-27, s. 100.2 [ad. 1983, c. 22, s. 65].

AUTHORS-CITED:
Authors Cited

Evans, J. M., et al. Administrative Law, 3rd ed. Toronto: Emond Montgomery Publications Ltd., 1989.

Garant, Patrice. Droit administratif, vol. 2, Le contentieux, 3<e> ed. Cowansville: Yvon Blais, 1991.

Ouellette, Yves. "Aspects de la procedure et de la preuve devant les tribunaux administratifs" (1986), 16 R.D.U.S. 819.

INTRODUCTION:
APPEAL from a judgment of the Quebec Court of Appeal, [1990] R.J.Q. 2183, affirming a judgment of the Superior Court* allowing a motion in evocation. Appeal dismissed.

n* Universite du Quebec a Trois-Rivieres v. Larocque, Sup. Ct. Trois-Rivieres, No. 400-05-000148-875, August 26, 1987 (Lebrun J.).

----------End Footnotes----------

[**8]

COUNSEL: [*475] Pierre Theriault, for the appellant
Marc St-Pierre and Louis Masson, for the respondent

JUDGMENT-1:
English version of the judgment of Lamer C.J. and La Forest, Gonthier and Iacobucci JJ. delivered by

LAMER C.J.—

Facts

In October 1985 an agreement was concluded between the Government of Quebec and the respondent Universite du Quebec a Trois-Rivieres whereby research was to be conducted by the respondent by means of questionnaires and interviews. The agreement provided for an initial payment of $25,000 on the signing of the agreement and a second payment of $33,000 after the questionnaire and the interview plan were submitted. A committee was set up under the authority of the director of research at the Ministere de l'education to provide follow-up on the research. Responsibility for the work was assigned to Professor Jean-Luc Gouveia, who hired the mis en cause Perreault and Guilbert as grant-aided part-time professional research assistants. The date the employment commenced was to be October 15, 1985 and its termination December 15, 1986 [TRANSLATION] "or on notice from the University for cause".

An initial working document prepared by the mis en cause was submitted to the follow-up [**9] committee on or about April 15, 1986. This presentation was behind the schedule specified in the agreement between the Government and the respondent.

On May 1, 1986 the respondent advised the mis en cause by letter that [TRANSLATION] "as the result of a lack of funds" it would be forced to terminate their contract as of April 25, 1986.

A grievance was then filed for each of the mis en cause and at the first arbitration hearing, the respondent contended that the arbitrator lacked [*476] jurisdiction by alleging that the grievance could not be arbitrated under the collective agreement. This allegation was dismissed by the mis en cause arbitrator in a preliminary decision dated December 16, 1986.

In February 1987 the mis en cause arbitrator proceeded to hear the grievances on the merits. The respondent then sought to introduce evidence that the two mis en cause employees had done their work badly and that, accordingly, in order to meet the schedule agreed on in the contract between the Government and the respondent, it was necessary to hire from the research funds another experienced person who would be able to redo the work done by the mis en cause employees in April 1986 and found [**10] by the Government's representatives to be of poor quality. It is this additional expenditure which, on the evidence which the respondent sought to present, led to the shortage of funds to pay the two assistants.

The appellant objected to this evidence on the ground that the respondent was trying to add to or alter the grounds relied on in the notices of termination of employment of May 1, 1986. The appellant contended that the respondent wanted to present evidence on the competence of the two mis en cause professionals when the sole and exclusive reason given by the respondent for ordering the termination of employment was a lack of funds. The mis en cause arbitrator allowed the appellant's objection. On March 19, 1987, he made an award allowing the two grievances and ordering the respondent to pay the mis en cause employees their full salary.

The respondent then submitted a motion in evocation to the Superior Court, alleging first that the arbitrator had assumed jurisdiction which he did not have in deciding that the mis en cause employees benefited from the grievance procedure laid down in the collective agreement. Alternatively, it argued that the arbitrator had exceeded his jurisdiction [**11] by not admitting evidence of the lack of competence of the two mis en cause employees. The Superior Court allowed the motion, rejecting the respondent's arguments as to the arbitrator's jurisdiction to hear the grievances but finding that [*477] his refusal to hear the evidence offered by the respondent constituted an excess of jurisdiction. It ordered that the case be re-heard before another arbitrator.

The appellant appealed the part of the judgment vacating the arbitral award and ordering a new arbitration. The respondent then filed a cross-appeal, challenging the other part of the judgment which recognized the arbitrator's jurisdiction to hear the grievances filed by the mis en cause employees. On August 21, 1990, the Court of Appeal dismissed the two appeals, Rousseau-Houle J.A. dissenting on the main appeal. The present appeal is from the Court of Appeal's judgment on the main appeal.

Applicable Legislation

Section 100.2 of the Labour Code, R.S.Q., c. C-27, reads as follows:

"100.2 The arbitrator shall proceed with all dispatch with the inquiry into the grievance and, unless otherwise provided in the collective agreement, in accordance with such procedure and mode of [**12] proof as he deems appropriate.

For such purpose, he may, ex officio, call the parties to proceed with the hearing of the grievance."

Applicable Provisions of the Collective Agreement

Clauses 2-1.03 (A), 5-1.01 and 5-5.01 of the collective agreement read as follows:

"[TRANSLATION]

2-1.03 (A) A supernumerary, temporary, replacement or grant-aided professional is subject to the following provisions:

. . .

(5) Hiring, probation, resignation (article 5-1.00), except for clauses 5-1.03, 5-1.04 and 5-1.05.

. . . [*478] (19) Procedure for the settlement of grievances and disputes and arbitration (chapter 11-0.00) to claim the benefits conferred herein.

5-1.01 All professionals shall be hired by a contract which the personnel branch will deliver to the professional, indicating to him certain of his terms and conditions of employment (group, classification, salary, date of hiring, probation period, probable length of employment in the case of a supernumerary, temporary, replacement, grant-aided or casual professional). A copy of this contract shall be sent to the union when the professional commences his or her employment.

5-5.01 (a) When an act done by a professional leads to [**13] disciplinary action the University, depending on the seriousness of the alleged act, shall take one of the following three (3) steps:

— written warning;

— suspension;

— dismissal.

(b) The University shall inform the professional in writing that he or she is subject to disciplinary action within twenty (20) working days of the time the University becomes aware of the offence alleged against him or her: this is a strict time limit and the burden of proof of subsequent knowledge of the facts by the University is on the University.

(c) In all cases in which the University takes disciplinary action, the professional concerned or the Union may have

recourse to the grievance and arbitration procedure; the burden of proof that the cause in question is just and sufficient for disciplinary action to be taken is on the University.

(d) In the event that the University wishes to take disciplinary action against a professional, it shall summon the said professional by at least twenty-four (24) hours' written notice; at the same time, the University shall advise the Union that the professional has been summoned.

(e) The notice sent to the professional shall specify the time and place at which [**14] he shall attend and the nature of the facts alleged against him. The professional may be accompanied by a union representative." [*479]

Judgments

Arbitration Tribunal—Preliminary Decision

In the preliminary decision of December 16, 1986 the arbitrator held that he had total, absolute and exclusive jurisdiction to hear and decide the grievances presented by the complainants. He accordingly dismissed the objection made by counsel for the University that the dismissal of the grant-aided professionals was not subject to arbitration. The arbitrator pointed out that clause 2-1.03 (A) of the collective agreement, governing grant-aided professionals, makes them subject to the grievance procedure in claiming the benefits conferred by the collective agreement. Clause 5-1.01 provides that the hiring of any professional shall be by contract and that this contract shall specify, inter alia, the group, classification, salary, date of hiring, probation period and probable length of the employment in the case of a grant-aided professional. According to the arbitrator, it follows that if there is disagreement as to the interpretation or application of any of the provisions of the hiring [**15] contract, that disagreement is a grievance within the meaning of the Act and the collective agreement. The arbitrator stated that the contrary solution, namely referring complainants to proceedings in the ordinary courts of law, would be contrary to the manifest intention of the legislature that all grievances be subject to arbitration. This solution would also, the arbitrator concluded, be contrary to the spirit of the Supreme Court decision in *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R. 704.* Finally, the arbitrator stated that there would have to be a very clear provision to exempt a privilege conferred under a collective labour agreement from the arbitration mechanism provided for in the event of a dispute.

Arbitration Tribunal—Decision on the Merits

In his decision on the merits of the grievances rendered on March 19, 1987, the arbitrator first stated that when the University referred to a lack of funds, it could only mean funds of the employer, the Universite du Quebec a Trois-Rivieres, with which the complainants had entered [*480] into a contract. He noted that the University had the burden of establishing the lack of [**16] funds, and found that the University had not succeeded in showing that it lacked funds to pay the two employees up to the date of termination provided for in the contract. He observed that there was no evidence that the Government had broken its contract with the University and indicated that the University was under no obligation to offer 14-month contracts. He concluded that the University had not discharged its burden of proving the lack of funds and that accordingly there was no cause for interrupting the contracts.

The arbitrator added that even if there had been a lack of funds, that lack could not be a valid reason for breaching a term contract, since [TRANSLATION] "it is a cause which is not within the employee's control, but is due to an agreement between the University and a third party". He stated that, in cases of dismissal for cause in the context of term contracts, the authors and cases require that the employer establish a breach of an essential condition of the contract of employment, a breach for which the employee is responsible. This is why he found that a [TRANSLATION] "... fact beyond the employee's control, such as the non-payment of money by a third party to [**17] the employer, and indeed the employer's poor economic situation, cannot be a cause for the breach of a contract of employment that relieves the employer of its obligations".

Superior Court

On the question of the arbitrator's jurisdiction Lebrun J., after recalling the principles set out by the Supreme Court in *St. Anne Nackawic Pulp & Paper, supra;* and listing the provisions of the collective agreement in effect between the parties and applicable to the complainants, held that:

"[TRANSLATION] In deciding to hear the grievance, the respondent arbitrator applied what I would call the presumption that a grievance is arbitrable when, as here, everything tends to show that the individual contract of the parties is clearly subject to the provisions of the collective agreement and therefore to the arbitration mechanisms provided for

therein." [*481]

However, Lebrun J. accepted the respondent's alternative argument. Referring to the arbitral award, he noted that the arbitrator had confined his ruling to the contractual relationship between the respondent and the mis en cause employees in deciding on the merits of the grievance and had refused to hear the evidence that the reason the [**18] respondent lacked funds was precisely the poor quality of the work done by the mis en cause employees. Accordingly, he was of the view that:

"[TRANSLATION] On the one hand, by blaming [the respondent] for not establishing that the cause of dismissal was something for which the mis en cause employees were responsible, and on the other, by denying [the respondent] the opportunity to establish that very fact based on a narrow interpretation of the "cause" of dismissal, the [mis en cause] arbitrator was refusing to hear admissible and relevant evidence ... ."

Relying on the Supreme Court judgment in *Roberval Express Ltee v. Transport Drivers, Warehousemen and General Workers Union, Local 106, [1982] 2 S.C.R. 888,* the judge concluded that the arbitrator had exceeded his jurisdiction by refusing to hear relevant and admissible evidence.

Court of Appeal, [1990] R.J.Q. 2183

Baudouin J.A.

On the question of the arbitrator's jurisdiction, Baudouin J.A. agreed that the relevant provisions of the collective agreement were not [TRANSLATION] "crystal clear". However, he held that this document should be read as a whole and its purposes taken into account. He also referred to the general philosophy [**19] of Quebec labour law and concluded that the arbitrator had jurisdiction to decide the two grievances and so had not arrogated to himself jurisdiction exercisable only by the ordinary courts of law.

On the second issue, Baudouin J.A., for the majority, upheld the Superior Court's decision that the arbitrator had exceeded his jurisdiction. Noting first that the Superior Court had found in the respondent's favour mainly owing to the fact that [*482] the arbitrator had not observed the audi alteram partem rule, the judge went on to say (at p. 2187):

"[TRANSLATION] With all due respect, it does not seem to me that that resolves the problem. It is still necessary to determine whether this evidence was relevant and admissible. There does not seem to be any doubt as to the relevance of the evidence, since it seeks to establish that the need to terminate the employment before the time specified was caused by what the two research assistants themselves did. I am of the view that its admissibility results from the very interpretation of the collective agreement between the parties. No provision is to be found in that agreement requiring the employer in cases of grant-aided professionals ... [**20] to give the facts or reasons behind the dismissal. On the contrary, article 2-1.03 expressly excludes the application to this class of employees of clause 5-5.01 requiring the employer to do that. The university accordingly had no contractual obligation to give in writing the specific reasons for terminating the employment, subject to not being able to rely on them in the event of arbitration. The allegation of lack of funds was sufficient. Evidence of the reasons for this lack of funds was nonetheless not irrelevant or inadmissible."

Rousseau-Houle J.A. (dissenting on the main appeal)

Rousseau-Houle J.A. concurred with the reasons of Baudouin J.A. regarding the arbitrator's jurisdiction. However, she was of the view that the arbitrator had not exceeded his jurisdiction in not admitting evidence of the poor quality of the work done by the mis en cause employees.

Rousseau-Houle J.A. held that under s. 100.2 of the Labour Code, it is up to the arbitrator to decide on the relevance and admissibility of the evidence the parties intend to submit. His decisions are thus subject to judicial review only if there is a breach of natural justice or patently unreasonable error.

The judge considered [**21] that the respondent had been allowed to present argument on the lack of funds and that it had only been prevented from establishing another ground of dismissal, namely the incompetence of the research assistants, a [*483] ground which it had not mentioned in the employment termination notices.

Bearing in mind the limited purpose of the arbitrator's jurisdiction, namely to hear and decide the grievance before him, the judge was of the view that the arbitrator [TRANSLATION] "may consider the notion of relevance of the evidence more narrowly than a judge would when hearing witnesses" (p. 2188). She noted that the dispute submitted to the arbitrator here concerned the probable length of the contracts hiring the two mis en cause employees and the reason

given by the respondent for terminating them.

The judge considered that the arbitrator's decision to refuse to admit the evidence on the ground that the respondent was actually trying to prove a cause of dismissal not mentioned in the notices was not unreasonable. She went on to say (at p. 2189):

"[TRANSLATION] That decision does not seem arbitrary or illogical to me either, since it was a necessary part of determining the point at issue [**22] and noted that there was not really an adequate connection between that point and the evidence presented.

. . .

In adopting a strict interpretation of the cause of dismissal, rather than granting an adjournment or admitting the evidence under advisement, the arbitrator did not exercise his jurisdiction unreasonably."

The judge further held that the arbitrator's refusal to allow the evidence also should not be regarded as a refusal to exercise his jurisdiction contrary to the rules of natural justice, since it is only a refusal to hear relevant and admissible evidence which constitutes an excess of jurisdiction. She felt that the respondent here had had an opportunity to put forward evidence regarding the lack of funds. She noted that the arbitrator had to reconcile the demands of the decision-making process with the rights of all parties and pointed out that the audi alteram partem rule was intended essentially to give the parties a reasonable opportunity to respond to the evidence presented against them. [*484]

Issues

Though the appellant formulated six questions, in my opinion this appeal really only raises two. First, it must be determined whether the refusal by a grievance [**23] arbitrator to admit evidence is a decision subject to judicial review, and in particular whether the Superior Court was justified in exercising its review power in the case at bar. Secondly, the Court must decide whether the Superior Court erred in ordering that the new arbitration hearing would be before another arbitrator.

Analysis

(a) Refusal to Admit Evidence and Judicial Review

The question therefore is whether, in deciding not to admit the evidence offered by the respondent, the arbitrator committed an error giving rise to judicial review. In their consideration of this question, Lebrun J. of the Superior Court and Baudouin J.A. speaking for the majority of the Court of Appeal both referred to the following passage from Chouinard J.'s judgment in *Roberval Express, supra, at p. 904:*

"Appellant alleged a refusal by the arbitrator to hear admissible and relevant evidence. A refusal to hear admissible and relevant evidence is so clear a case of excess or refusal to exercise jurisdiction that it needs no further comment."

It should be noted, however, that Roberval Express did not involve a simple refusal by a grievance arbitrator to hear relevant evidence. The arbitrator, [**24] who was to hear four grievances, had refused to hear the first three and heard only the grievance relating to the dismissal of the employee in question. The first three grievances concerned disciplinary action leading up to that dismissal. The employer contended that the dismissal resulted from incidents which gave rise to the disciplinary action, and it was therefore necessary to hear all the grievances at the same time. Accordingly, it attacked the arbitrator not only for not hearing certain evidence, but more importantly, for refusing [*485] to exercise his jurisdiction over three of the grievances presented to him.

When thus seen in their context it is not clear that Chouinard J.'s remarks can be used to dispose of this case. Accordingly, this Court must examine the question presented to it on the basis of the particular circumstances of this case, the arguments made by the parties and the general principles governing judicial review in the field of grievance arbitration.

(i) Determining the Scope of This Case

The appellant first argued that the present appeal actually concerns not the mis en cause arbitrator's failure to admit the evidence submitted by the respondent, but the [**25] mis en cause arbitrator's understanding of the issue presented to him, a question over which the grievance arbitrator has exclusive jurisdiction, free from judicial review except in the case of a patently unreasonable error or a breach of natural justice. In other words, the appellant argued that the exclusion of the evidence resulted here from the mis en cause arbitrator's decision to confine himself to the cause mentioned in

the notice of dismissal and that that decision could only be reversed once it was shown to be patently unreasonable or a breach of natural justice.

As far as this argument is concerned, in my opinion, there is no doubt that the mis en cause arbitrator had complete jurisdiction to define the scope of the issue presented to him, and that in this regard only a patently unreasonable error or a breach of natural justice could give rise to judicial review. The question is in no way one which could be characterized as jurisdictional in nature.

For some years, since the decision of Dickson J. in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227,* this Court has made an effort to limit the scope of the theory of preliminary [**26] questions. In *U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R.* [*486] *1048,* Beetz J. favoured instead a functional and pragmatic approach to identifying questions of jurisdiction. He said (at p. 1087):

"The concept of the preliminary or collateral question diverts the courts from the real problem of judicial review: it substitutes the question "Is this a preliminary or collateral question to the exercise of the tribunal's power?" for the only question which should be asked, "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?"

Applying this approach to the question of the grievance arbitrator's jurisdiction to define the scope of the issue presented to him, I am unable to conclude that the legislature intended such a matter to be beyond the arbitrator's exclusive jurisdiction. This is especially true in the instant case in that in order to determine the scope of the issue presented to him the arbitrator had primarily to interpret the collective agreement, the contracts concluded between the mis en cause Perreault and Guilbert and the respondent—contracts covered by clause 5-1.01 of the collective agreement—and the wording of the grievances [**27] filed by the appellant. Interpretation of such documents is clearly within the grievance arbitrator's exclusive jurisdiction.

This approach may seem to be at odds with the decision of this Court in *Toronto Newspaper Guild, Local 87 v. Globe Printing Co., [1953] 2 S.C.R. 18.* In that case, which also involved the exclusion of evidence, Kerwin J. suggested that, far from being non-reviewable by the courts, the error of an administrative tribunal in determining the questions which were the subject of its inquiry was on the contrary, depending on whether the tribunal was wrongly refusing to examine a question or concerning itself with a question not presented to it, a refusal by that tribunal to exercise its jurisdiction or an excess of jurisdiction justifying intervention by the courts.

This judgment, however, may be classified among the decisions of this Court which, as Wilson J. noted in *National Corn Growers Assn. v.* [*487] *Canada (Import Tribunal), [1990] 2 S.C.R. 1324,* demonstrates the reluctance Canadian courts had long shown "... to accept the proposition that tribunals should not be subject to the same standard of review as courts" (p. 1335). As Wilson J. explained, administrative [**28] law has developed considerably since that time, so that courts of law now allow administrative tribunals much greater independence. *New Brunswick Liquor Corp., supra,* represents the culmination of this development.

In view of the foregoing, I have no hesitation in concluding that the arbitrator had complete jurisdiction to define the scope of the issue presented to him, and that only an unreasonable error on his part in this regard or a breach of natural justice could have constituted an excess of jurisdiction. I also think, though in my opinion it is not necessary to decide this point in the case at bar, that the necessary corollary of the grievance arbitrator's exclusive jurisdiction to define the issue is his exclusive jurisdiction then to conduct the proceedings accordingly, and that he may inter alia choose to admit only the evidence he considers relevant to the case as he has chosen to define it.

In my opinion, however, these comments do not dispose of the case at bar. The respondent is not complaining only, or even primarily, of the fact that in refusing to admit the evidence it had to offer the arbitrator erred in understanding the issue presented to him. Rather, it is arguing [**29] that even within the issue as defined by the arbitrator—that is, an issue limited to the cause relied on in the notices of dismissal, the lack of funds—this evidence was relevant since its very purpose was to establish the reason for this lack of funds. It maintained that the refusal to admit relevant and admissible evidence infringes the rules of natural justice and for that reason constitutes an excess of jurisdiction. [*488]

In other words, the question now before this Court is not whether, after deciding wrongly but not unreasonably that he should limit his analysis to a single ground of dismissal, an arbitrator who then decides to exclude evidence of other possible reasons for dismissal commits an error that is beyond judicial review by the courts. The answer to this question is simple: it is yes. The arbitrator is then acting within his jurisdiction.

The question before this Court is instead whether, in erroneously deciding to exclude evidence relevant to the ground of dismissal which he has himself identified as being that which he must examine, the arbitrator necessarily commits an excess of jurisdiction. In my view the answer to this question must in general be no. [**30] It will be yes, however, if by his erroneous decision the arbitrator was led to infringe the rules of natural justice. I therefore now turn to considering this question.

(ii) Refusal to Admit Relevant Evidence and Natural Justice

The only rule of natural justice with which the Court is concerned here is the right of a person affected by a decision to be heard, that is, the audi alteram partem rule. The question is whether there is a breach of that rule whenever relevant evidence is rejected by a grievance arbitrator. In order to answer this question, we must determine whether judicial review should be available whenever an arbitrator errs, regardless of the seriousness of his error, in declaring evidence submitted by the parties to be irrelevant or inadmissible.

The difficulty of this question arises from the tension existing between the quest for effectiveness and speed in settling grievances on the one hand, and on the other preserving the credibility of the arbitration process, which depends on the parties' believing that they have had a complete opportunity to be heard. Professor Ouellette speaks in this regard of the [TRANSLATION] "... perpetual contradiction between freedom of [**31] operation and its [*489] necessary procedural aspects" (Y. Ouellette, "Aspects de la procedure et de la preuve devant les tribunaux administratifs" (1986), 16 R.D.U.S. 819, at p. 850). Professor Evans also states:

"There is a certain tension between the proposition that an administrative tribunal, even if required to hold an adjudicative-type hearing, is not bound by the whole body of the law of evidence applied in proceedings in courts of law, and the imposition of a duty to decide in a procedurally fair manner."

(J. M. Evans et al., Administrative Law (3rd ed. 1989), at p. 452.)

For this reason, the question before the Court cannot simply be answered, as the appellant suggests, by reference to s. 100.2 of the Labour Code, which provides:

"100.2 [Inquiry into grievance] The arbitrator shall proceed with all dispatch with the inquiry into the grievance and, unless otherwise provided in the collective agreement, in accordance with such procedure and mode of proof as he deems appropriate."

The appellant argued that this provision gave a grievance arbitrator exclusive jurisdiction to decide on the relevance of the evidence presented to him and that his decisions in this regard [**32] are consequently beyond the scope of judicial review except in the event of patently unreasonable error.

This argument cannot be accepted. Section 100.2 of the Labour Code does give a grievance arbitrator complete autonomy in dealing with points of evidence and procedure; but the rule of autonomy in administrative procedure and evidence, widely accepted in administrative law, has never had the effect of limiting the obligation on administrative tribunals to observe the requirements of natural justice. This is what Professor Ouellette says in this regard, supra, at p. 850:

"[TRANSLATION] ... the major decisions which formulated the principle of the independence of administrative evidence from technical rules have in the same breath made it clear that this independence must be exercised in accordance with the rules of fundamental justice. It is [*490] not sufficient for administrative tribunals to operate simply and effectively: they must attain this high ideal without sacrificing the fundamental rights of the parties."

It is true that the error of an administrative tribunal in determining the relevance of evidence is an error of law, and that in general the decisions of administrative [**33] tribunals which enjoy the protection of a complete privative clause are beyond judicial review for mere errors of law.

That is not true, however, in cases where, as occurred here in the submission of the respondent, the arbitrator's decision on the relevance of evidence had the effect of breaching the rules of natural justice. A breach of the rules of natural justice is regarded in itself as an excess of jurisdiction and consequently there is no doubt that such a breach opens the way for judicial review; but that brings us back to the point at issue in this case: was there a breach of natural justice as a result of the mis en cause arbitrator's refusal to admit the evidence submitted by the respondent?

The proposition that any refusal to admit relevant evidence is in the context of a grievance arbitration a breach of

natural justice is one which could have serious consequences. It in effect means that the arbitrator does not have the power to decide in a final and exclusive way what evidence will be relevant to the issue presented to him. That may seem incompatible with the very wide measure of autonomy which the legislature intended to give grievance arbitrators in settling disputes [**34] within their jurisdiction and the attitude of restraint demonstrated by the courts toward the decisions of administrative bodies.

At the same time, it is clear that the confidence of the parties bound by the final decisions of grievance arbitrators is likely to be undermined by the reckless rejection of relevant evidence. A certain caution is therefore unquestionably necessary in this regard. As Professor Garant observes: [*491]

"[TRANSLATION] A tribunal must be cautious, however, as it is much more serious to refuse to admit relevant evidence than to admit irrelevant evidence, which may later be rejected in the final decision. The practice of a tribunal taking objections to evidence "under advisement" where possible, and when the party making them does not absolutely insist on having a decision right then, is usually advisable; it does not in any way contravene natural justice."

(P. Garant, Droit administratif, vol. 2, Le contentieux (3rd ed. 1991), at p. 231.)

For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. A grievance arbitrator is in a privileged position to assess the relevance of evidence presented [**35] to him and I do not think it is desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice.

Accordingly, in the case before the Court there is no doubt, in my opinion, that there was a breach of natural justice. The respondent wished to present evidence of the poor quality of the work of the mis en cause Perreault and Guilbert. It sought to show that as a consequence of the poor quality of their work it had been forced to obtain other resources in order to meet the requirements of the granting organization, and that accordingly not enough money remained from the grant to pay the salaries of the mis en cause employees. In the context of a hearing involving a dismissal due to a lack of funds, such evidence is prima facie crucial. Its purpose is to establish the cause of the lack of funds. If there are still any doubts as to the significance of this evidence, they are [**36] dispelled by the following remarks by the mis en cause arbitrator:

"[TRANSLATION] Even if there was a lack of funds, that lack could not be a valid reason for breaking a term contract. It is a cause which is not within the employee's [*492] control, but is due to an agreement between the University and a third party."

In light of these remarks by the mis en cause arbitrator, one can only conclude that there was a breach of natural justice. As Lebrun J. pointed out, re mis en cause arbitrator adopted a paradoxical position:

"[TRANSLATION] On the one hand, by blaming [the respondent] for not establishing that the cause of the dismissal was something for which the mis en cause employees were responsible, and on the other, by denying [the respondent] the opportunity to establish that very fact based on a narrow interpretation of the "cause" of dismissal. ..."

The consequence of this paradoxical position taken by the mis en cause arbitrator is that he found himself in the position of disposing of an extremely important point in the case before him—namely the lack of cause attributable to the employees—without having heard any evidence whatever from the respondent on the point, and [**37] even having expressly refused to hear the evidence which the respondent sought to present on the point. This quite clearly amounts to a breach of natural justice.

The appellant argued that the arbitrator's comments on the lack of any cause attributable to the mis en cause employees were only obiter and that the arbitrator would quite clearly have come to the same decision even if he had heard the evidence the respondent was seeking to present. It contended that the real reason for the arbitrator's decision was that the lack of funds itself had not been established in this case and moreover could never be a valid cause for dismissal.

This argument cannot be accepted. First, it is impossible to say with any certainty what the decision of the mis en cause arbitrator would have been if he had heard the evidence offered by the respondent. That evidence might have convinced him that in the particular circumstances of this case, and especially in view of the relationship existing between the respondent and the granting organization, the lack of funds could be a cause for dismissal attributable to the fault of the employees [*493] and that this ground could accordingly justify the respondent [**38] in terminating the employment

contracts.

Secondly, and more fundamentally, the rules of natural justice have enshrined certain guarantees regarding procedure, and it is the denial of those procedural guarantees which justifies the courts in intervening. The application of these rules should thus not depend on speculation as to what the decision on the merits would have been had the rights of the parties not been denied. I concur in this regard with the view of Le Dain J., who stated in *Cardinal v. Director of Kent Institution, [1985] 2 S.C.R. 643, at p. 661:*

"...the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have."

For all these reasons, I conclude that by refusing to admit the evidence which the respondent was seeking to present the mis en cause arbitrator infringed the rules of natural justice. The Superior [**39] Court therefore did not err in ordering a new arbitration. Did the Superior Court however err in ordering that the new arbitration be held before another arbitrator?

(b) Referral of Case to Another Arbitrator

The appellant contended that the Superior Court had erred in ordering that the new arbitration be held before another arbitrator, since there was no real, objective reason for doubting the impartiality of the mis en cause arbitrator.

On this point, in my opinion, the appellant did not succeed in establishing that the Superior Court had erred in the exercise of its discretion so as to justify intervention by this Court. Though he did not actually say so, Lebrun J. was probably of the view that there could quite reasonably be doubt as [*494] to the ability of a grievance arbitrator to objectively hear evidence which he already thought was so lacking in significance as to declare it irrelevant.

Conclusion

For these reasons, the appeal is dismissed with costs.

The following are the reasons delivered by

L'HEUREUX-DUBE J.—I agree entirely with the Chief Justice on the outcome of this case. However, I would adopt the approach taken by the trial judge, Lebrun J., and by Baudouin [**40] J.A. for the majority of the Court of Appeal, [1990] R.J.Q. 2183.

When faced with a privative clause an appellate court will be held to a high standard of deference toward an administrative tribunal. However, an error on a question of law which goes to jurisdiction will always be reviewable (see *Canada (Attorney General) v. Mossop, [1993]1 S.C.R. 554,* and the decisions cited therein).

Although the arbitrator in the case at bar had jurisdiction to dispose of the grievances before him, as the lower courts correctly held, he could not in so doing commit an excess of jurisdiction. In *Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses Association, [1975] 1 S.C.R. 382,* Dickson J. (as he then was), speaking for the Court, made this point very clearly (at p. 389):

"[Underlining start]A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include[Underlining end] acting in bad faith, basing the decision on extraneous matters, [**41] failing to take relevant factors into account, [Underlining start]breaching the provisions of natural justice[Underlining end] or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it." [Emphasis added.] [*495]

Refusing to hear relevant and admissible evidence is a breach of the rules of natural justice. It is one thing to adopt special rules of procedure for a hearing, and another not to comply with a fundamental rule, that of doing justice to the parties by hearing relevant and therefore admissible evidence. That is the case here.

In my view, the formalism and inflexibility demonstrated by the arbitrator in this case have no place in the hearing of a grievance. If the arbitrator had doubts as to the relevancy of the evidence sought to be introduced, he could have taken it under advisement as courts regularly do. This would have facilitated and speeded up the hearing. Furthermore, as is often the case, the relevance or otherwise of the evidence in question would have become apparent during the proceedings. In

these circumstances, the ends of justice would have been better served for all the parties involved.

In any event, [**42] I subscribe entirely to the reasons of the majority of the Court of Appeal that the evidence presented by the respondent was relevant to the consideration and disposition of the grievances before the arbitrator. The arbitrator's refusal to consider such evidence was an excess of jurisdiction.

For these reasons, I would dispose of the appeal as the Chief Justice suggests, with costs.

Appeal dismissed with costs.

SOLICITORS: Solicitors for the appellant: Lapierre, St-Denis & Associes, Montreal
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Case Name:

Bell Canada v. Allstream Corp.

Between
Bell Canada, appellant, and
Allstream Corp. (formerly AT&T Canada Corp. and AT&T Canada Telecom Services Company), Call-Net Enterprises Inc., Sprint Canada Inc. and François Ménard, respondents

[2004] F.C.J. No. 1491
2004 FCA 295
Docket A-86-04

Federal Court of Appeal
Ottawa, Ontario
Létourneau, Nadon and Evans JJ.A.

Heard: September 14, 2004.
Oral judgment: September 14, 2004.
(10 paras.)

Counsel:

Patricia J. Wilson and Patricia Brady, for the appellant.

Michael Koch and Dina Graser, for the respondents, Allstream Corp., Call-Net Enterprises Inc. and Sprint Canada Inc.

The judgment of the Court was delivered by

¶ 1 **EVANS J.A.** (orally):— This is an appeal under subsection 64(1) of the Telecommunications Act, S.C. 1993, c. 38, by Bell Canada from the order of the Canadian Radio-television Telecommunications Commission ("CRTC") in Telecom Decision CRTC 2003-63, dated September 23, 2003. That order was made in the course of an application by Bell for the approval of proposed tariffs for the rates, terms and conditions on which it supplied telecommunications services to 164 large-account customers, such as banks and airlines. The order requires Bell to disclose additional information about its contractual relations with its customers to support its tariff applications.

¶ 2 Bell argues that the designated information is confidential to it and its customers and that its disclosure would cause prejudice to their competitive positions: subsection 39(1). Consequently, the CRTC may order disclosure only after it has considered "any representations from interested parties", as required by subsection 39(4).

¶ 3 The CRTC considered representations made by Bell on the disclosure issue, but gave no notice to Bell's customers advising them that they also had a right to make representations opposing further disclosure. Bell says that the customers were entitled to notice because they are "interested parties" since they are directly affected by the CRTC's order to disclose their confidential information, including the terms of their contracts with Bell. Accordingly, Bell maintains, the

CRTC's failure to give notice was a breach of the duty of fairness, the disclosure order was therefore erroneous in law, and Bell's appeal should be allowed.

¶ 4 In our view, there is no merit to this appeal. As a general rule, a party may not attack a decision of an administrative tribunal for breach of the duty of fairness solely on the basis of the tribunal's failure to afford some other person their procedural rights. It is not sufficient that the person relying on the alleged procedural defect would have benefited if, as a result of the fair hearing given to the other person, the tribunal had made a different decision.

¶ 5 When conferred on persons whose interests may be adversely affected by an administrative decision, procedural rights are designed primarily to protect the interests of the holders of the procedural rights. If those persons choose not to impugn a decision for a breach of their procedural rights, normally no one else can.

¶ 6 In this case, Bell's customers have not sought intervener status in this appeal, nor initiated any other step in an attempt to obtain legal redress. Affidavits have been filed in connection with this appeal by some of the customers, describing the kinds of prejudice to them that might result from disclosure. However, none of the affiants states that, if they had had notice that the CRTC was considering ordering additional disclosure, they would have made submissions to it.

¶ 7 Moreover, a person is expected to raise a procedural concern at the earliest reasonable opportunity, and not await the result of the proceeding. Although Bell was aware that the CRTC had not given notice to the customers before the CRTC made its decision to order additional disclosure, it did not insist at that time that a notice be issued to them to enable them to make representations.

¶ 8 Having concluded that Bell may not base an appeal on the ground of an alleged breach of the duty of fairness owed by the CRTC to Bell's customers, we do not have to decide whether an appeal under subsection 64(1) or an application for judicial review would have been the appropriate proceeding in which customers could have raised the allegation that they were entitled to be given notice by the CRTC before it decided the disclosure issue. Nor do we have to decide whether the CRTC was under an obligation to give notice to the customers or, if it was, what form the notice had to take in order to comply with the duty of fairness.

¶ 9 We would also observe that, even if the failure to give personal notices to the customers constituted a breach of the duty of fairness, the breach might have been cured by Bell's written submissions to the CRTC, which described the kinds of harm that it and they might suffer as a result of the disclosure of their confidential information. However, we need not decide this question either.

¶ 10 For these reasons, the appeal will be dismissed with costs.

EVANS J.A.

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