CITATION: Fareau v. Bell Canada, 2022 ONSC 2479
COURT FILE NO.: CV-20-00635778-00CP
DATE: 20220426

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
VANESSA FAREAU and RANSOME CAPAY	)	*David Sterns, Mohsen Seddigh, Tassia Poynter, Kirsten L. Mercer, Jody Brown* and *Geetha Philipupillai* for the Plaintiffs
Plaintiffs	)	
- and –	)	
BELL CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO	)	*Paul Le Vay, Carlo Di Carlo,* and *Caitlin Milne* for the Defendant Bell Canada
	)	*Christopher P. Thompson, Padraic Ryan,* and *Andi Jin* for the Defendant Her Majesty the Queen in Right of Ontario
Defendants	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: March 8-10, 2022

PERELL, J.

REASONS FOR DECISION

Contents

A. Introduction and Overview

[1] The Plaintiff Vanessa Fareau was a prisoner at an Ontario correctional facility. The Plaintiff Ransome Capay's son, Adam, was a prisoner at an Ontario correctional facility. Pursuant to the *Class Proceedings Act, 1992*,[1] Ms. Fareau and Mr. Capay bring a proposed class action on behalf of all prisoners in Ontario prisons and everyone who paid for a collect call originating from an Ontario prison, including consumers and non-consumers.

[2] The essential grievance of the Plaintiffs and the putative Class Members is that from June 1, 2013 to July 29, 2021 prisoners in Ontario's correctional facilities were only allowed to make collect telephone calls and only on a phone service provided by Bell Canada. Bell charged for the collect calls at what is alleged to be unconscionable rates and in a manner that is alleged to breach the *Telecommunications Act*,[2] and Ontario's *Consumer Protection Act, 2002*[3] and the analogous consumer statutes in other provinces. Ontario took a share of Bell's charges for the collect calls, and this taking is alleged to be *ultra vires* taxation, being an indirect tax outside a province's right to levy only direct taxes under the *Constitution Act, 1867*.[4]

[3] Ms. Fareau and Mr. Capay plead the following causes of action against Bell: (a) breach of the *Telecommunications Act*; (b) unjust enrichment; (c) breach of consumer protection legislation; and (d) unconscionable contracts. Ms. Fareau and Mr. Capay plead the following causes of action against Ontario: (a) breach of the *Telecommunications Act*; (b) unjust enrichment; (c) breach of fiduciary duty; and (d) imposition of an *ultra vires* tax.

[4] Ms. Fareau and Mr. Capay move for certification of their proposed class action. Bell Canada and Ontario resist certification. In addition, the Defendants bring jurisdiction motions for a stay of the Plaintiffs' action as within the jurisdiction of the Canadian Radio and Television Commission ("CRTC").

[5] For the reasons that follow, after I rule on the Plaintiffs' imposition of an unlawful tax cause of action and their statutory cause of action under s. 72(1) of the *Telecommunications Act*, I shall permanently stay the Plaintiffs' other claims against Bell and Ontario. Their claims should be dealt with by the CRTC. It is plain and obvious that: (a) there is no viable cause of action for

[1] S.O. 1992, c. 6.
[2] S.C. 1993, c.38.
[3] S.O. 2002, c 30, Sched A.
[4] 30 & 31 Vict., c. 3.

an unconstitutional indirect tax; and (b) there is no viable statutory cause of action pursuant to s. 72(1) of the *Telecommunications Act.* The Plaintiffs' other claims should be addressed by the CRTC.

B. Procedural Background

[6] Ms. Fareau and Mr. Capay commenced this proposed class action against Ontario and Bell on **February 5, 2020**. Proposed Class Counsel are **Sotos LLP** and **Goldblatt Partners LLP**.

[7] On **August 14, 2020**, Ms. Fareau and Mr. Capay delivered a Fresh as Amended Statement of Claim.

[8] On **January 6, 2021**, Ms. Fareau and Mr. Capay delivered their motion record for certification.

[9] On **January 21, 2021**, Bell delivered a Demand for Particulars.

[10] On **February 1, 2021**, Ms. Fareau and Mr. Capay delivered a Response to the Demand for Particulars.

[11] On **June 30, 2021**, Bell served a responding record and cross-motion record in response to the Plaintiffs' certification motion and in support of Bell's cross-motion seeking to dismiss the Plaintiffs' action on jurisdictional grounds.

[12] On **June 30, 2021**, Ontario served a responding record in the certification motion and brought a cross-motion to stay the action on jurisdictional grounds.

[13] On **August 25, 2021**, Ms. Fareau and Mr. Capay delivered an Amended Fresh as Amended Statement of Claim.

[14] Ms. Fareau and Mr. Capay propose the following class definition:

> All persons in Canada who made a Collect Call or accepted and/or paid for a Collect Call from a person in custody or otherwise in an Ontario correctional Facility through the Offender Telephone Management System between June 1, 2013 and the certification of this lawsuit as a class action or such other time as the Court deems appropriate.

[15] Ms. Fareau and Mr. Capay propose the following common issues:

> *Breach of the Ontario Consumer Protection Act and Equivalent Consumer Protection Legislation*
>
> (1) Does the Consumer Protection Legislation apply to the claims of the plaintiffs and Class Members?
>
> (2) Did the defendant Bell Canada ("Bell") make, approve and/or authorize any false, misleading or deceptive representations ("Representations") within the meaning of the Consumer Protection Legislation?
>
> (3) If the answer to common issue 2 is Yes, what are the Representations?
>
> (4) If the answer to common issues 2-3 is Yes, are Class Members entitled to rescission or the recovery of damages and other monetary remedies, or both?
>
> (5) Are the Class Members entitled, to the extent necessary, to a waiver of any notice requirements under the Consumer Protection Legislation?

Unconscionable Rates

(6) Did Bell enter into a contract with the Class Members for each Collect Call through the OTMS?

(7) If the answer to common issue 6 is Yes, were these contracts one-sided contracts of adhesion?

(8) If the answer to common issues 6-7 is Yes, did these contracts impose improvident rates and other amounts on the Class?

(9) If the answer to common issues 6-8 is Yes, were these contracts unconscionable and therefore invalid?

Breach of the Telecommunications Act

(10) Did the defendants or either of them fail to disclose information regarding the rates and other amounts charged to Class Members for Collect Calls through the OTMS as directed by the CRTC, contrary to section 24 of the *Telecommunications Act*?

(11) Did the defendant Her Majesty the Queen in right of Ontario ("Crown") fail to require that Bell comply with the *Telecommunications Act*?

(12) Did Class Members suffer loss and damage as a result of the defendants' conduct contrary to the *Telecommunications Act*?

Unlawful Taxes

(13) Were the Commissions collected by the Crown on the OTMS Collect Calls an indirect tax outside the legislative authority of the Crown under s.92(2) of the *Constitution Act, 1867*?

(14) Alternatively, were the Commissions collected by the Crown on the OTMS Collect Calls unlawful on the ground that they were imposed by a body other than the Legislature of Ontario in contravention of s. 90 (incorporating by reference ss. 53 and 54 of the *Constitution Act, 1867*?

(15) If the answer to common issue 13 or 14 is Yes, should the Crown not be allowed to retain the Commissions?

Breach of Fiduciary Duty

(16) Did the Crown owe the plaintiffs and/or Class Members who were Prisoners in Ontario Facilities a fiduciary duty?

(17) If the Crown owed a fiduciary duty, did the Crown breach that duty by allowing Bell to charge the rates and other amounts on Collect Calls through the OTMS?

Remedy and Damages

(18) Are the defendants or either of them liable for damages to the Class for breach of Consumer Protection Legislation, the imposition of unconscionable terms, breach of the *Telecommunications Act*, unlawful taxation, and/or breach of fiduciary duty?

(19) Is this an appropriate case for the defendants to disgorge profits?

(20) Are the defendants liable for punitive, exemplary, or aggravated damages?

(21) Can the court assess damages in the aggregate, in whole or in part, for the Class? If so, what is the amount of the aggregate damage assessment(s) and who should pay it to the Class?

> (22) Should the defendants, or either of them, pay the costs of administering and distributing any amounts awarded under ss. 24 and 25 of the CPA? If so, who should pay what costs, in what amount and to whom?
>
> (23) Should the defendants, or any of them, pay prejudgment and postjudgment interest? If so, at what annual interest rate? Should the interest be simple or compound?
>
> (24) Has the conduct of the defendants, or either of them, resulted in an unjust enrichment? If yes, is restitution an appropriate remedy?

C. Evidentiary Background

[16] Ms. Fareau and Mr. Capay supported their certification motion and defended the cross-motions with the following evidence:

- Affidavits of **Nadine Blum** dated December 21, 2020 and May 13, 2021. Ms. Blum is a lawyer at Goldblatt Partners LLP, co-Class Counsel.
- Affidavit of **Ransome Capay** dated December 15, 2020. He was cross-examined. Mr. Capay is a proposed Representative Plaintiff. He is a resident of the Lac Seul First Nation. For approximately 4.5 years, his son, Adam Capay, was held in pre-trial custody at the Thunder Bay Correctional Jail and the Kenora Jail in administrative segregation (solitary confinement).
- Affidavit of **Douglas Dawson** dated January 5, 2021. Mr. Dawson is the president and owner of Competitive Communications Group, LLC, an American telecommunications consulting firm located in North Carolina. He was retained as an expert to determine benchmark prices for long-distance and local calls originating in Ontario prisons.
- Affidavit of **Vanessa Fareau** dated December 17, 2020. Ms. Fareau is a proposed Representative Plaintiff. She is a resident of Gatineau Québec. She was incarcerated at Ottawa-Carleton Detention Centre in 2015 for two months having been denied bail on criminal charges. She was cross-examined.

[17] Bell resisted the certification motion and supported its cross-motion with the following evidence:

- Affidavits of **Paul Gortana** dated June 30, 2021 and October 1, 2021. Mr. Gortana is the Director, Sales – Ontario Public Sector at Bell Canada. He was cross-examined.
- Affidavits of **Pierre-Luc Herbert** dated June 30, 2021, October 1, 2021, and November 22, 2021. Mr. Herbert is the Assistant General Counsel at BCE Inc., the parent company of Bell Canada. His responsibilities include advising with respect to the regulatory framework of telecommunications services. He was cross-examined.

D. The Jurisdiction of the CRTC

[18] The CRTC is an agency formed pursuant to the *Canadian Radio-television and Telecommunications Act*.[5] Among other things, it administers the *Telecommunications Act.* Courts recognize a broad and generous interpretation of the CRTC's mandate to which the courts

[5] S.C. 1985, c C-22.

confer considerable judicial deference.[6]

[19] Pursuant to s. 47 of the *Telecommunications Act*, the CRTC is directed to exercise its powers and perform its duties in accordance with the policy objectives identified by s. 7 of the Act, which include facilitating the orderly development through Canada of a telecommunications system, rendering reliable and affordable telecommunications services throughout Canada, and fostering increased reliance on market forces. The CRTC is also directed to ensure that Canadian carriers provide telecommunications services and charge rates in accordance with s. 27 of the *Telecommunications Act*.

[20] Under Part III of the *Telecommunications Act* (Rates, Facilities and Services), s. 24 provides that the CRTC may impose conditions of service on the offering and provision of telecommunications services. Section 24 states:

> *Conditions of service*
>
> 24 The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.

[21] Section 25 of the *Telecommunications Act* provides that the rates for any telecommunications services must be approved by the CRTC. Section 25 states:

> *Telecommunications rates to be approved*
>
> 25 (1) No Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.

[22] Section 27(1) of the *Telecommunications Act* provides that all rates charged by a Canadian carrier for a telecommunications service "shall be just and reasonable". The Supreme Court of Canada has held that a central responsibility of the CRTC is to determine and approve just and reasonable rates to be charged for telecommunications services.[7]

[23] Section 27(2) of the *Telecommunications Act* provides that no Canadian carrier shall "unjustly discriminate" in the providing of a service or the charging of a rate or give "undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage."

[24] Section 27(3) of the *Telecommunications Act* empowers the CRTC to make determinations, as a question of fact, as to whether: (a) a Canadian carrier has complied with the requirements of s. 27; (b) a Canadian carrier has complied with the requirements of s. 25; and (c) a Canadian carrier has complied with a decision made under s. 24 imposing conditions on the offering and providing of a telecommunications service.

[25] Pursuant to s. 27(5) of the *Telecommunications Act*, in determining whether a rate is "just and reasonable", the CRTC may "adopt any method or technique that it considers appropriate, whether based on a carrier's return on its rate base or otherwise".

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[6] *Penney v. Bell Canada* 2010 ONSC 2801; *Bell Canada v. Bell Alliant Regional Communications*, [2009] 2 S.C.R. 764; *Mahar v. Rogers Cablesystems Ltd*. (1995), 25 O.R. 93d) 690 (Gen. Div.); *CTV Television Network Ltd. v. Canadian Radio-Television & Telecommunications Commission*, [1982] 1 S.C.R. 530; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141.

[7] *Bell Canada v. Bell Alliant Regional Communications*, [2009] 2 S.C.R. 764 at paras. 36-38.

[26] Under the subheading "Forbearance", s. 34 of the *Telecommunications Act* provides that the CRTC may forbear from regulating a rate if it finds, as a question of fact: (1) that such forbearance would be consistent with the policy objectives set out in section 7 of the Act; or (2) that the service "is or will be subject to competition sufficient to protect the interests of users".

[27] Under the subheading "Order to Provide Services", s. 35 of the *Telecommunications Act* provides that where there is not a sufficient degree of competition to ensure just and reasonable rates and prevent unjust discrimination, and undue or unreasonable preference or disadvantage, the CRTC can require the provision of the service in any manner subject to any conditions determined by the CRTC.

[28] Section 48 of the *Telecommunications Act* grants the CRTC the authority, by application of any interested person or on its own motion, to make inquiries and determinations in respect of anything prohibited, required, or permitted to be done under Part III, among other Parts. Section 55 provides the CRTC "the powers of a superior court" with respect to all the key powers of the court. Section 52 provides that the CRTC is entitled to "determine any question of law and fact, and its determination on a question of fact is binding and conclusive."

[29] Pursuant to section 60 of the *Telecommunications Act*, the CRTC is empowered to grant remedies. Section 60 states:

> *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.

[30] In *Penny v Canada*,[8] Justice Strathy, as he then was, described at paragraphs 139 and 188, the broad remedial jurisdiction of the CRTC as follows:

> 139. Section 27(3) of the *Telecommunications Act* gives the CRTC explicit authority to determine whether Bell has complied with its duty to provide telecommunications service in accordance with its tariff and gives it authority to inquire into and make a determination of anything required to be done in connection with rates and services (s. 48(1)). The statute allows the CRTC to fashion a broad range of remedies, including the amendment or suspension of a tariff and the award of costs. In an appropriate case, the CRTC has exercised jurisdiction to order relief on what is effectively a class-wide basis (see Telecom Decision CRTC 2004-8).
>
> *****
>
> 188. […] Where the CRTC finds that the rates charged by a carrier are improper or unauthorized or that a carrier has failed to provide a service in accordance with its tariff, the CRTC can grant retroactive relief to all adversely affected customers; […] While the CRTC may not be able to provide compensation in precisely the same form as a court, it has the capacity to order and implement compensatory relief in a manner that is fair and efficient.

[31] Under Part V of the *Telecommunications Act* (Investigation and Enforcement), the CRTC has broad inquiry and inspection powers.

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[8] 2010 ONSC 2801.

E. Facts

1. Telephones in Prisons

[32] Prisoners in Ontario prisons make approximately 15,000 collect telephone calls a day. They are allowed to only make collect calls to North American phone numbers. The calls are placed on conventional pay phones located in the correctional facility. They are allowed up to 20 minutes per call.

[33] From June 1, 2013 to July 29, 2021, the telephone calls were made in accordance with the Offender Telephone Management System ("OTMS") pursuant to a contract between Ontario and Bell.

[34] Under the OTMS Agreement, Bell was required to have the capability to provide services via collect call as well as through a PIN-based system. However, with one insignificant exception, the Ministry only utilized a collect call service.

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

[36] To place a call, the prisoner dials the call from the payphone in the prison. The payphones in the correctional facilities installed by Bell do not have information about the cost of the collect calls. The prisoner's call is automatically vetted at a control centre. Some calls are blocked for security reasons. If the call is not blocked, the recipient of the call is asked by a programmed recording whether he or she will accept the call. The message does not provide information about the cost of the call. The person accepting the call finds out what the call cost when he or she receives their next monthly bill.

[37] In 2020, Ontario selected Synergy Inmate Phone Solutions Inc. to replace Bell as the service provider for the correctional facilities. Under the contract with Synergy debit card calls are introduced along with collect calls, and the rates for local calls range from 44 cents/minute to 54 cents/minute for local calls compared to Bell's $1.00/minute rate. Under the contract with Synergy, the rates for Canada-wide collect debit and collect calls ranges from 3 cents/minute to 6 cents/minute compared to Bell's charge of $1.00/minute.

[38] Until recently, prisoners in Ontario prisons have paid collect call rates four times more than do prisoners in other provinces. In the United States, prisoners pay for collect calls at rates between 7.0 cents per minute to 25.0 cents per minute.

[39] The Plaintiffs' pricing expert, Doug Dawson, provided a methodology for establishing a fair and reasonable price for local and long-distance calls from prisons.

[40] The Plaintiffs plead that each time a Class Member placed a collect call from an Ontario correctional facility, he or she entered into a contract with Bell. The Plaintiffs plead that the contracts were invalid on account of unconscionability because of the inequality of bargaining power and the improvidence of the bargain.

[41] The Plaintiffs plead that where a collect call was made for a purpose protected by the

Consumer Protection Act, 2000 and analogous consumer protection legislation in other provinces, the legislation applies to Bell which is a "supplier" of a telephone service. These statutes prohibit unfair practices and create cause of action against suppliers of consumer services. Unfair practices include misrepresentations, exaggerations, innuendo, ambiguity, or omissions relating to a material fact.

[42] The Plaintiffs allege that Bell made misrepresentations in its response to Ontario's RFP (Request for Proposal) that led to Ontario choosing Bell as its service provider.

[43] The Plaintiffs alleged that Ontario breached its fiduciary duty to the prisoners, who are a vulnerable class, in accepting Bell's response to the RFP. The Plaintiffs allege that in accepting Bell's proposal and phone rates, Ontario acted in an agency-like capacity on behalf of the prisoners who were required to pay the unconscionable rates imposed by Bell.

[44] The Plaintiffs allege that Bell and Ontario have breached the *Telecommunications Act*. Section 72(1) of the Act provides a statutory cause of action for compensation for loss or damage as a result of any act or omission that is contrary to the Act. In response to a Demand for Particulars, the Plaintiffs pleaded that the Defendants had breached: (a) Telecom Order CRTC 95-316; (b) Telecom Decision CRTC 98-8; (c) Telecom Regulatory Policy CRTC 2015-546; and (d) Telecom Regulatory Policy CRTC 2016-295.

[45] Telecom Order CRTC 95-316 and Telecom Decision CRTC 98-8 address the matter of information notices that a caller should receive when engaging in a collect call from a payphone. Telecom Order CRTC 2015-546 concerns the notification of rates for non-cash calls, including collect calls. Telecom Regulatory Policy CRTC 2016-295 concerns consumer safeguards for payphone service providers. The Plaintiffs allege that Bell and Ontario breached the orders of the CRTC, which are consumer protection measures aimed at mandating that rates are disclosed to consumers enabling them to make an informed decision about their long-distance collect calls.

[46] Section 72(3) of the *Telecommunications Act* excludes from the statutory cause of action made available by s. 72(1) an action "in relation to a rate charged by a Canadian carrier". The Defendants rely on s. 72(3) to exclude the Plaintiffs' statutory cause of action, but the Plaintiffs submit that their proposed class action is not "in relation to a rate charged by a Canadian carrier."

[47] For present purposes, it is not necessary to describe Ms. Fareau's use of the OTMS collect call system while she was incarcerated in Ontario correctional facilities or the use made by Adam Capay in communicating with his father, the Plaintiff Ransome Capay. All that needs to be said is that it was expensive for them to make necessary communications.

2. The Offender Telephone Management System ("OTMS") and the Contract between Ontario and Bell Canada

[48] In September 2012, Ontario's Ministry of Community Safety and Correctional Services issued a Request for Proposal ("RFP") to telecommunications companies to provide uniform telephone services at Ontario's correctional facilities in accordance with the OTMS. The RFP included a draft agreement and specified that the contractor would be required to pay a commission that could be not less than 25% of gross revenues. The RFP directed bidders to provide a calling rate with fixed calling rates. The bidder was required to comply with the OTMS requirements.

[49] The defendant Bell is a national telecommunications service provider established by an Act of Parliament. It responded to Ontario's RFP.

[50] Bell had long recognized that telecommunications from correctional facilities raised unique issues for a service provider. For example, payphones may be used to harass or intimidate victims, witnesses, lawyers, and judges, and to further criminal conspiracies. Bell developed specific software for correctional facilities to, for example, limit the duration of calls and block calls to specified numbers. Working on a project with Correctional Services Canada, as early as 1996, Bell obtained an exception to its General Tariff issued by the CRTC in respect to payphones. The exception which was approved by the CRTC was designed to address inmate services. General Tariff Item 292 in Bell's approved General Tariff is specific to "inmate services" and addresses the rates that can be charged and specific additional controls on calls. Item 292 states:

> *Item 292. INMATE SERVICE*
>
> (a) Inmate service provides public telephone service to correctional or penal institutions for the use of inmates. It is provided at the request of the institution and is subject to the availability of suitable facilities.
>
> (b) Inmate service allows the institution to control and monitor an inmate's telephone privileges. This control may include blocking access to certain telephone numbers or services, limiting the length of calls, restricting calls to specified periods of the day or specific days of the week and recording calls.
>
> (c) Inmate service calls are rated in the same manner as calls originating from other public telephones except that payment options may be limited based on the requirements of the institution, technological limitations and Company collection policies.

[51] In November 2012, Bell responded to Ontario's RFP for inmate services with a bid. In its bid, Bell represented to Ontario that its telephone services would be at an identical call rate and connection fees as are experienced by Bell's residential customers.

[52] Bell's bid was accepted, and in 2013, Bell entered into the OTMS Agreement.

[53] The OTMS Agreement does not specify the rates to be charged for collect calls. Rather, with respect to calling rates it states as follows:

> *4.08 Calling Rates*
>
> Subject to this Section 4.08 and to Section 3.05(a), the Supplier shall establish the calling rates for local and long distance calls from all telephones. The Supplier shall ensure that the local and long distance rates and connection fees for all telephones are no higher than the published residential rates established by the Incumbent Local Exchange Carrier (ILEC) applicable to a comparable call connected and billed by the Supplier placed outside the Facility within the local community of the applicable Facility. In accordance with Section 3.02(a)(5) and upon the Ministry's request during the Term of the Contract, the Supplier shall provide written documentation satisfactory to the Ministry, in its sole discretion, to demonstrate compliance with this Section 4.08.

[54] The Plaintiffs plead that in entering into the service contract with Bell, Ontario breached its fiduciary duty to the class members by: (a) failing to ascertain that Bell complied with its obligations and did not extract unconscionable telephone rates from the Class Members; (b) placing its own interest ahead of that of the prisoners by profiting from the unlawful commissions and trying to extract the maximum amount in commissions to the detriment of the

prisoners and their loved ones; and (c) failing to provide the prisoners with a meaningful and affordable means of communication with the outside world, their families, support network, legal defence, which Ontario knew would support prisoner rehabilitation and eventual reintegration into the community.

[55] The Plaintiffs plead that the Defendants have been unjustly enriched as a result of the Class Member's payment of the collect call charges and the commissions.

[56] The Plaintiffs plead that the commissions extracted by Ontario from its contract with Bell are *ultra vires* the *Constitution Act, 1867* as indirect taxes. Alternatively, if the commissions are a direct tax, the Plaintiffs plead that the commissions are unlawful taxation having been imposed through a contract instead of through clear legislative taxation language from the Ontario Legislature.

F. The Cause of Action Criterion

[57] After this section of my Reasons for Decision, where I discuss the cause of action criterion for certification of a class action, I shall explain why it is plain and obvious that the Plaintiffs do not have legally viable causes of action: (a) for the recovery of an *ultra vires* tax contrary to the *Constitution Act, 1867*; and (b) for a statutory cause of action pursuant to s. 72(1) of the *Telecommunications Act*.

[58] The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test from Rule 21 of the *Rules of Civil Procedure* for disclosing a cause of action from *Hunt v. Carey Canada*,[9] is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*. To satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect, or it is plain and obvious that it could not succeed.[10]

[59] The failure to establish a cause of action usually arises in one of two ways: (1) the allegations in the statement of claim do not plead all the elements necessary for a recognized cause of action; or (2) the allegations in the statement of claim do not come within a recognized cause of action.[11]

[60] Matters of law that are not fully settled should not be disposed of on a motion to strike an action for not disclosing a reasonable cause of action,[12] and the court's power to strike a claim is exercised only in the clearest cases.[13] The law must be allowed to evolve, and the novelty of a claim will not militate against a plaintiff.[14] However, a novel claim must have some elements of

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[9] [1990] 2 S.C.R. 959.
[10] *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 at para. 19 (S.C.J.), leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at p. 679 (C.A.), leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476.
[11] *2106701 Ontario Inc. (c.o.b. Novajet) v. 2288450 Ontario Ltd.*, 2016 ONSC 2673 at para. 42; *Aristocrat Restaurants Ltd. v. Ontario*, [2004] O.J. No. 5164 (S.C.J.); *Dawson v. Rexcraft Storage & Warehouse Inc.*, [1998] O.J. No. 3240 at para. 10 (C.A.).
[12] *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).
[13] *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).
[14] *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (C.A.), leave to appeal to the S.C.C. refused (1982), 35 O.R. (2d) 64n.

a cause of action recognized in law and be a reasonably logical and arguable extension of established law.[15]

[61] In *R. v. Imperial Tobacco Canada Ltd*.,[16] the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success.

[62] In *Atlantic Lottery Corp. Inc. v. Babstock*,[17] the Supreme Court stated that the test applicable on a motion to strike is a high standard that calls on courts to read the claim as generously as possible because cases should, if possible, be disposed of on their merits based on the concrete evidence presented before judges at trial. That said, in *Atlantic Lottery Corp. Inc. v. Babstock*,[18] in order to promote timely and affordable access to justice, the Supreme Court encouraged lower courts where possible to resolve legal disputes promptly rather than referring them to a full trial.

[63] Documents referred to in a pleading are incorporated by reference into the pleading, and on a motion to determine whether the plaintiff has pleaded a legally viable cause of action, the court is entitled to consider any documents specifically referred to and relied on in a pleading.[19]

[64] On a pleadings motion, the court accepts the pleaded allegations of material fact as proven, unless they are patently ridiculous or incapable of proof.[20] Bare allegations and conclusory legal statements based on assumption or speculation are not material facts; they are incapable of proof and, therefore, they are not assumed to be true for the purposes of a pleadings motion.[21] In making findings of fact and in applying the law to those facts the court is not obliged to accept as necessarily true allegations of fact that are rhetorical conclusions or that are

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[15] *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.) at para. 20; *Silver v. DDJ Canadian High Yield Fund*, [2006] O.J. No. 2503 (S.C.J.).
[16] 2011 SCC 42 at paras. 17-25.
[17] 2020 SCC 19 at para. 87–88.
[18] 2020 SCC 19 at para. 18.
[19] *Jordan v. CIBC Mortgages Inc*., 2019 ONSC 1178 at paras. 72, 115; *Das v. George Weston Limited*, 2018 ONCA 1053 at paras. 31, 71, 74 and 78; *Kalra v. Mercedes Benz Canada Inc*., 2017 ONSC 3795 at para. 24; *McCreight v. Canada (Attorney General)*, 2013 ONCA 483 at para. 32; *Tender Choice Foods Inc. v. Versacold Logistics Canada Inc.*, 2013 ONSC 80 at para. 31, aff'd 2013 ONCA 474; *Weninger Farms Ltd. v. Canada (Minister of National Revenue)*, 2012 ONSC 4544 at paras. 11-12; *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744 at paras. 160-162, aff'd 2013 ONSC 1169 (Div. Ct.); *Re*Collections Inc. v. Toronto-Dominion Bank*, 2010 ONSC 6560; *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (C.A.), leave to appeal dismissed, [1999] SCCA No. 460; *Corktown Films Inc. v. Ontario*, [1996] O.J. No. 3886 (Gen. Div.); *Montreal Trust Co. of Canada v. Toronto-Dominion Bank*, [1992] O.J. No. 1274 (Gen. Div.).
[20] *Ladas v. Apple Inc*., 2014 BCSC 1821 at para 59; *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642 at para 12, aff'd aff'd 2013 ONCA 657, leave to appeal ref'd [2013] S.C.C.A. No. 498; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 22; *Stephen v. HMTQ*, 2008 BCSC 1656 at paras 48-49; *Folland v. Ontario* (2003), 64 OR (3d) 89 (C.A.); *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (CA); *Canadian Pacific International Freight Services Ltd. v. Starber International Inc.* (1992), 44 C.P.R. (3d) 17 at para. 9 (Ont. Gen. Div.); *Canada v. Operation Dismantle Inc*., [1985] 1 S.C.R. 441; *A-G. Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.
[21] *Price v. Smith & Wesson Corp.*, 2021 ONSC 1114 at para 51; *Das v. George Weston Ltd.*, 2017 ONSC 4129 at paras. 14–29, aff'd 2018 ONCA 1053, leave to appeal refused [2019] S.C.C.A. No. 69; *Grenon v. Canada (Revenue Agency)*, 2016 ABQB 260 at para. 32; *.Deluca v. Canada (Attorney General)*, 2016 ONSC 3865; *Losier v. Mackay, Mackay & Peters Ltd.*, [2009] O.J. No. 3463 at paras. 39–40 (S.C.J.), aff'd 2010 ONCA 613, leave to appeal refused [2010] S.C.C.A. No. 438; *Merchant Law Group v. Canada (Revenue Agency)*, 2010 FCA 184 at para. 34.

inconsistent with the documents incorporated by reference.[22]

[65] The case law establishes that issues that are novel, complex, and important should normally be decided on a full factual record after trial.[23] However, novelty by itself is not a reason to allow a cause of action to proceed to trial and a novel claim must also be arguable, have some elements of a cause of action recognized in law, be a reasonable and arguable incremental extension of established law and have a reasonable prospect of success.[24] In *Atlantic Lottery Corp. Inc. v. Babstock*,[25] the majority of the Supreme Court stated:

> [A] claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, including novel claims, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present "no legal justification for a protracted and expensive trial". If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. [citation omitted]

[66] In the Ontario Court of Appeal's decision in *Darmar Farms Inc. v. Syngenta Canada Inc.*,[26] Justice Zarnett stated:

> 51. The fact that a claim is novel is not a sufficient reason to strike it. But the fact that a claim is novel is also not a sufficient reason to allow it to proceed; a novel claim must also be arguable. There must be a reasonable prospect that the claim will succeed.

[67] In developing the common law, courts are restrained to making incremental changes and leaving substantive change and radical development to the legislature or Parliament.[27] In *R. v. Cuerrier*,[28] Justice McLachlin, as she then was, stated: "This Court has established a rule for when it will effect changes to the common law. It will do so only where those changes are incremental developments of existing principle and where the consequences of the change are contained and predictable."

G. The Plaintiffs' Unlawful Tax Cause of Action

[68] In this part of my Reasons for Decision, I will analyze the Plaintiffs' cause of action based on the allegation that Ontario has levied an *ultra vires* tax contrary to the *Constitution Act, 1867*. The purpose of this cause of action is to recover the commissions paid by Bell to Ontario pursuant to the OTMS Agreement. I shall explain why it is plain and obvious that the Plaintiffs do not have a legally viable cause of action. In this section, I shall first describe the relevant law about *ultra vires* taxes. Second, I shall explain why, in my opinion, it is plain and obvious that the Plaintiffs do not have a cause of action against Ontario for the recovery of *ultra vires* taxes.

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[22] *Das v. George Weston Limited*, 2017 ONSC 4129 at paras. 27, 79-80, aff'd 2018 ONCA 1053.
[23] *Sells v. Manulife Securities Inc.*, 2014 ONSC 715; *Leek v. Vaidyanathan*, [2011] O.J. No. 200 at para. 3 (C.A.); *PDC 3 Limited Partnership v. Bregman + Hamann Architects*, [2001] O.J. No. 422 paras. 7–12 (C.A.).
[24] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 19; *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789 at para. 51; *Das v. George Weston Ltd.*, 2017 ONSC 4129 aff'd 2018 ONCA 1053, leave to appeal refused [2019] S.C.C.A. No. 69.
[25] 2020 SCC 19 at para. 19.
[26] 2019 ONCA 789 at para. 51.
[27] *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 at para. 43; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 at pp. 436–39, 461–62; *Watkins v. Olafson*, [1989] 2 S.C.R. 750.
[28] [1998] 2 S.C.R. 371 at para. 43.

1. The Law of *Ultra Vires* Taxes

[69] Under the *Constitution Act, 1867*, taxes may be direct taxes or indirect taxes.[29] "Direct taxes" are demanded from the very persons whom the government intended should pay it. Examples of direct taxes are: income tax, death duties, property taxes, municipal realty taxes, and flat fees for licences and government services.[30] Indirect taxes are demanded from persons whom the government intended and expected would be indemnified by another person.[31] Examples of indirect taxes are customs duties, excise duties, succession duties, sales taxes on consumer goods, and fees on services.

[70] For a levy to be characterized as a tax to raise revenue for general purposes, it must: (a) be enforceable by law; (b) be imposed by the authority of Parliament or a Legislature; (c) be charged by a public body; (d) be intended for a public purpose; and (e) be unconnected to a regulatory scheme.[32]

[71] Pursuant to s. 91(3) of the *Constitution Act, 1867*, the Federal Government has the legislative authority to raise money by any mode or system of taxation, *i.e.*, by direct and indirect taxation. Subject to the exceptions next described, pursuant to s. 91(2) of the *Constitution Act, 1867,* a Provincial Government has the power only to levy direct taxation, and provinces cannot raise revenue by indirect taxation.[33]

[72] There are four exceptions where a Provincial Government can raise revenues by any means and is not limited to direct taxation.

[73] First, pursuant to s. 92A(4) of the *Constitution Act, 1867,* a Provincial Government has constitutional authority to make laws in relation to the raising of money by any mode or system of taxation in respect of, among other things, natural resources and facilities in the province for the generation of electrical energy and the production therefrom.

[74] Second, pursuant to s. 92(9) of the *Constitution Act, 1867,* a Provincial Government has constitutional authority to raise revenue by business licences and other licences for provincial, local, or municipal purposes. For the provinces, charging fees is authorized by s. 92(9) of the *Constitution Act, 1867*, which empowers a province to legislate with respect to: "Shop, Saloon,

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[29] *Ontario Home Builders' Association v. York Region Board of Education,* [1996] 2 S.C.R. 929; *Minister of Finance of New Brunswick v. Simpsons-Sears Ltd*., [1982] 1 S.C.R. 144; *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545; *Cairns Construction Ltd. v. Government of Saskatchewan*, [1960] S.C.R. 619; *Canadian Pacific Railway Co. v. Attorney General for Saskatchewan*, [1952] 2 S.C.R. 231; *Atlantic Smoke Shops, Ltd. v. Conlon*, [1943] A.C. 550 (P.C.); *City of Halifax v. Estate of J. P. Fairbanks* [1928] A.C. 117 (P.C.), rev'g [1926] S.C.R. 349; *Brewers and Maltsters' Association of Ontario v. Attorney-General for Ontario*, [1897] A.C. 231 (P.C.).

[30] *Bank of Toronto v. Lambe*, (1887), 12 A.C. 575 (P.C.).

[31] *Re. Eurig Estate*, [1998] 2 S.C.R. 565 at paras. 25-27; *Allard Contractors Ltd. v. Coquitlam (District)* [1993] 4 S.C.R. 371; (1887), 12 A.C. 575 (P.C.); John Stuart Mill, *Principles of Political Economy* (1884), Book V, ch. II. (New York: D. Appelton, 1884).

[32] *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7 at para. 22-24; *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134

[33] *Re. Eurig Estate*, [1998] 2 S.C.R. 565 at para. 24; *Allard Contractors Ltd. v. Coquitlam (District)* [1993] 4 S.C.R. 371 at p. 394; *British Columbia v. Esquimalt and Nanaimo Railway Co*., [1950] A.C. 87 (P.C.); *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Ltd*., [1933] A.C. 168 (P.C.); *British Columbia v. Canadian Pacific Railway Co.*, [1927] A.C. 934; *Attorney-General for Quebec v. Reed* (1884), 10 App. Cas. 141. (P.C.).

Tavern, Auctioneer, and other Licences in order to raise Revenue for Provincial, Local, or Municipal Purposes."[34]

[75] Third, and this exception is related to the second, a province can charge user fees and proprietary charges and enter into contracts with respect to its property and assets and these charges are not taxes.[35] In *620 Connaught Ltd. v. Canada (Attorney General)*,[36] the Supreme Court recognized that proprietary charges for goods and services supplied in a commercial context are distinct from either regulatory charges or taxes and may be determined by market forces. The authorities establish that contractual payments made to a government authority are a private law matter and not a public law matter of taxation because taxes are imposed by a government without the taxpayer's consent, while contracts are a matter of a voluntary agreement between the parties to the contract.[37] Thus, contractual payments do not satisfy the indicia of a tax of being an imposed obligation.

[76] Fourth, pursuant to a provincial head of power under s. 92 of the *Constitution Act, 1867*, such as s. 92(13) (property and civil rights in the province) or s. 92(16) (matters of a merely local or private nature in the province), a Provincial Government can charge levies to finance or to constitute a regulatory scheme. [38]

[77] To determine whether a government charge or levy is lawful, *infra vires*, under the *Constitution Act, 1867*, or unlawful, *ultra vires*, it is necessary to characterize, which is to say, to identify whether the charge is a: (a) tax; (b) user fee or proprietary charge; or (c) regulatory charge.

[78] To determine the characterization of the government charge, it is necessary to determine its fundamental nature, its "pith and substance." Taxes, user fees, and regulatory charges are different legal concepts, and the task for the court is to identify what is the pith and substance of the government levy be it: (a) a tax to raise revenue for general purposes; (b) a licence or user fee or proprietary charge for government goods or services; or (c) a regulatory charge as a constituent element of a regulatory scheme.[39]

[79] The pith and substance of a government levy is its dominant, primary and most important characteristic as distinguished from its incidental features.[40] When determining the pith and substance of a levy, it is important to keep in mind, the context within which the charge is made and the purpose of the charge.[41] If the pith and substance of the levy is the raising of revenue for

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[34] *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7

[35] *Toronto Distillery Company Ltd. v. Ontario (Alcohol and Gaming Commission)*, 2016 ONCA 960, aff'g 2016 ONSC 2202; *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7.

[36] 2008 SCC 7 at para. 49.

[37] *Unfiltered Brewing Inc. v. Nova Scotia Liquor Corp.* 2019 NSCA 10; *Steam Whistle Brewing Inc. v. Alberta Gaming and Liquor Commission*, 2018 ABQB 476; *Toronto Distillery Company Ltd. v Ontario* 2016 ONCA 960, aff'g 2016 ONSC 2202; *QCTV Ltd. v. Edmonton (City)*, 1983 48 A.R. 255 (Q.B.), aff'd 1984 ABCA 311; *Abernethy-Lougheed Logging Co. (Trustee of) v British Columbia*, [1938] 2 D.L.R. 790 (B.C.S.C.) rev'd but aff'd on this point at paras. 54-55 526 (B.C.C.A.); *Lynch v. The Canada Northwest Land Company* (1891), 19 S.C.R. 204 at p. 208.

[38] *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7.

[39] *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7 at para. 17; *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134 at para. 30.

[40] *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7 at para. 16-17.

[41] *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929 at para. 43.

general government purposes then the levy is a tax,[42] but if the levy is a user charge or a charge for regulatory purposes or necessarily incidental to a regulatory scheme, then the levy is not in pith and substance taxation.[43]

[80] As the discussion that follows will reveal, it is plain and obvious that the contract between Bell and Ontario is not a tax at all; it is a proprietary charge. It is, therefore, not necessary to analyze whether the OTMS Agreement is an indirect tax or a direct tax. And it is not necessary to analyze whether the OTMS Agreement might be an *infra vires* licence or user fee or an *infra vires* regulatory charge.

2. Analysis and Discussion

[81] As noted above in *620 Connaught Ltd. v. Canada (Attorney General)*,[44] the Supreme Court recognized that proprietary charges for goods and services supplied in a commercial context are distinct from either regulatory charges or taxes and may be determined by market forces. The commission charged by Ontario in its OTMS Agreement with Bell is not a tax at all; it is a proprietary charge.

[82] Ms. Fareau's and Mr. Capay's case is analogous to *Toronto Distillery Company Ltd. v. Ontario*,[45] where the court applied *620 Connaught Ltd. v. Canada (Attorney General)*.

[83] In *Toronto Distillery Company Ltd. v. Ontario*, Toronto Distillery, a liquor manufacturer, had a contract to supply spirits to the Liquor Control Board of Ontario ("LCBO") in which the LCBO, a Crown agency, had the power to set markup and commission rates on the spirits that Toronto Distillery then sold as the LCBO's agent. The LCBO received a 13% commission. Toronto Distillery brought an application for a declaration that the LCBO's markup was an *ultra vires* tax. In a judgment upheld by the Court of Appeal, Justice Akhtar concluded that the LCBO was the owner and commercial supplier of the spirits. The Court of Appeal agreed that the markup was a proprietary charge and not a tax. At paragraph 8 of its affirming decision, the Court of Appeal stated:

> 8. Furthermore, we agree with the application judge's alternate conclusion that the markup is not a tax because the appellant agreed to it in its contract. It is well-established that obligations under a contract arise from the voluntary agreement of the parties, while the obligation to pay a tax does not. Under the contract, the LCBO owns the spirits in the appellant's store. As owner of the goods, the LCBO must have the right to determine the prices for which they are sold, including the markup. It follows that the markup is not an exercise of the government's public authority but of its private law rights.

[84] The authorities establish that contractual payments made to a government authority are a private law matter and not a public law matter of taxation because taxes are imposed by a government without the taxpayer's consent while contracts are a matter of a voluntary agreement between the parties to the contract.[46] Thus, contractual payments do not satisfy the indicia of a

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[42] *Westbank First Nation v. British Columbia Hydro and Power Authority* [1999] 3 S.C.R. 134.
[43] *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7; *Reference respecting the Agricultural Products Marketing Act, R.S.C. 1970, s. A-7* [1978] 2 S.C.R. 1198.
[44] 2008 SCC 7 at para. 49.
[45] 2016 ONCA 960, aff'g 2016 ONSC 2202.
[46] *Unfiltered Brewing Inc. v. Nova Scotia Liquor Corp*. 2019 NSCA 10; *Steam Whistle Brewing Inc. v. Alberta Gaming and Liquor Commission*, 2018 ABQB 476; *Toronto Distillery Company Ltd. v Ontario* 2016 ONCA 960, aff'g 2016 ONSC 2202; *QCTV Ltd. v. Edmonton (City)*, 1983 48 A.R. 255 (Q.B.), aff'd 1984 ABCA 311;

tax of being an imposed obligation.

[85] I, therefore, conclude that in the immediate case, it is plain and obvious that the Plaintiffs do not have a cause of action based on *ultra vires* taxes.

H. The Plaintiffs' Statutory Cause of Action

[86] The Plaintiffs allege that Bell and Ontario breached the *Telecommunications Act* or decisions made under the Act. They allege that Bell and Ontario did not provide notice of the rates for collect calls contrary to CRTC decisions made under s. 24 of the Act, which states:

> 24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.

[87] The Plaintiffs alleged that Bell and Ontario breached: (a) Telecom Order CRTC 95-316; (b) Telecom Decision CRTC 98-8; (c) Telecom Regulatory Policy CRTC 2015-546; and (d) Telecom Regulatory Policy CRTC 2016-295. They alleged that these CRTC decisions require Bell to "make detailed information available to consumers and callers regarding the amounts charged by or on behalf of Bell with respect to payphone calls", that Bell did not do so, and that Ontario authorized, consented to, or participated in Bell's omission.

[88] Section 72(1) of the *Telecommunications Act* provides a statutory cause of action for acts or omissions contrary to the Act or a decision made under the Act. Section 72(1) states:

> 72 (1) Subject to any limitation of liability imposed in accordance with this or any other Act, a person who has sustained loss or damage as a result of any act or omission that is contrary to this Act or any special Act or a decision or regulation made under either of them may, in a court of competent jurisdiction, sue for and recover an amount equal to the loss or damage from any person who engaged in, directed, authorized, consented to or participated in the act or omission.

[89] However, s. 72(3) of the *Telecommunications Act* provides an exception to the statutory right of action in s. 72(1). Under s. 72(3), there is no statutory right of action for an action for breach of contract, or an action for damages in relation to a rate. Section 72(3) states:

> *Exception*
>
> 72(3) Nothing in subsection (1) or (2) applies to any action for breach of a contract to provide telecommunications services or any action for damages in relation to a rate charged by a Canadian carrier.

[90] In the immediate case, I agree with the Defendants' argument that the Plaintiffs' action about their alleged respective failures to give notice of the rates of the collect calls is "in relation to a rate" and accordingly the Plaintiffs' statutory cause of action for breaches of the Act is caught by the exception found in s. 72(3) of the *Telecommunications Act*, and they should take their grievances to the CRTC.

[91] While I cautioned in *Nelson v. Telus Communications Inc. (Part 2)*,[47] that s. 72(3) should not be given an under-inclusive or an over-inclusive interpretation, the case law establishes that

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Abernethy-Lougheed Logging Co. (Trustee of) v British Columbia, [1938] 2 D.L.R. 790 (B.C.S.C.) rev'd but aff'd on this point at paras. 54-55 526 (B.C.C.A.).; *Lynch v. The Canada Northwest Land Company* (1891), 19 S.C.R. 204 at p. 208.

[47] 2021 ONSC 23, aff'd 2021 ONCA 751.

the exception in s. 72(3) of the *Telecommunications Act* has been given an expensive operation because what is "in relation to a rate" has been given a broad interpretation.[48] Courts have applied s. 72(3) to stay or dismiss proceedings that pleaded causes of action based on negligence, breach of fiduciary duty, unlawful interference with economic relations, and unjust enrichment.[49]

[92] It is painfully plainly obvious that all of the Plaintiffs' causes of action are in relation to rates. In the Statement of Claim, the Plaintiffs seek $152 million for loss and damage from unconscionable rates. Should the action be certified, the Plaintiffs plan to call expert evidence to quantify the Class Members' damages based on what the court would determine are reasonable calling rates for prisoners of Ontario correctional institutions. The orders and directives of the CRTC alleged to be breached are in whole or in part in relation to rates. The pith and substance of all of the Plaintiffs' causes of action is that prisoners in Ontario's correctional facilities entered into unconscionable contracts with Bell because of unconscionable rates. The prisoners complain that had no notice of the unconscionable rates before or during the initiating of the collect call. They allege that when they placed collect calls from the prisons, they had no choice but to pay the unconscionable rates, which rates are variously described as "excessive", "exorbitant" and "astronomical". The Plaintiffs cannot back away from the circumstance that the pith and substance, heart and soul, and letter and spirit of their proposed class action is rates.

[93] It is plain and obvious that the Plaintiffs do not have a statutory cause of action under s.72(1) of the *Telecommunications Act* because of the exemption set out in s. 72(3) of the Act.

I. The Defendants' Jurisdiction Motion

[94] The Plaintiffs advance the following causes of action against Bell and Ontario respectively: (a) breach of the *Telecommunications Act* pursuant to a statutory cause of action; and (b) unjust enrichment. The Plaintiffs advance the following causes of action only against Bell: (c) breach of consumer protection legislation; and (d) unconscionable contracts. The Plaintiffs advance the following causes of action only against Ontario: (e) breach of fiduciary duty; and (f) imposition of an *ultra vires* tax. For the reasons set out above, the statutory cause of action and the action based on an *ultra vires* tax have been struck. By cross-motions, the Defendants ask that the balance of the Plaintiffs' actions be stayed because the CRTC is the tribunal that ought to determine the Plaintiffs' grievances.

[95] As described above, the CRTC has an expansive jurisdiction to regulate the telecommunications industry in Canada. Included within its jurisdiction is the setting of rates for telephone calls of various sorts including collect calls. The CRTC sets rates or it may exercise a discretion to forgo setting the rates when it is satisfied that there is a competitive marketplace adequate for the task. The CRTC has the jurisdiction to impose terms and conditions on the delivery of telecommunications services.

[96] Excepting the non-viable actions for *ultra vires* taxes, discussed above, and the statutory cause of action pursuant to s. 72(1) of the *Telecommunications Act*, discussed above, the pith and substance of all the Plaintiffs' causes of action are in the wheelhouse of the CRTC's broad jurisdiction to resolve disputes and its broad remedial authority. Determining the reasonableness

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[48] *Sprint Canada Inc. v Bell Canada*, [1997] O.J. No. 4772 (Gen. Div.); *British Columbia Telephone v. Shaw Cable Systems*, [1995] 2 SCR 739; *Slattery (Trustee of) v. Slattery*, [1993] 3 S.C.R. 430.
[49] *Sprint Canada Inc. v Bell Canada*, [1997] O.J. No. 4772 (Gen. Div.).

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

[97] In cases such as: *Nelson v. Telus Communications Inc. (Part 2)*,[50] *Iris Technologies Inc., et al. v. Telus Communications Company*,[51] *Bazos v. Bell Media Inc.*,[52] *Penney v. Bell Canada*;[53] *MTS Allstream Inc. v. Telus Communications Company*;[54] *Allarco Entertainment 2008 Inc. v. Rogers Communications Inc.*,[55] *Shaw Cablesystems (SMB) Ltd. v. MTS Communications Inc.*,[56] *B & W Entertainment Inc. v. Telus Communications Inc.*;[57] *934691 Ontario Inc. v. Bell Canada*;[58] and *Mahar v. Rogers Cablesystems Ltd.*,[59] courts have recognized that where the adjudication of a dispute would require a consideration of the legislative scheme administered by the CRTC, then the court ought not to exercise any jurisdiction to hear the matter even where some of the relief being sought may not precisely be available from the CRTC.

[98] In *Mahar v. Rogers Cablesystems Ltd.*,[60] Justice Sharpe stated at paragraphs 16-17 and 35:

> 16. I express no opinion as to the merit or lack thereof in the substantive claim of the applicant. It is, however, clear that the regulations under the *Broadcasting Act* and the interpretation of those regulations, are not only a central substantive component of the applicant's case, but indeed the focus of the relief that the applicant seeks. To decide this case would require a detailed consideration and interpretation of those regulations. That exercise would require consideration of how those regulations operate in the overall framework of the scheme established by the Act and by the Regulations as that scheme is administered by the CRTC.
>
> 17. I have concluded that given the nature of the claim and relief sought, this court does not have jurisdiction to dispose of the application and alternatively, that even if the court does have jurisdiction, it would not be an appropriate exercise of the discretion of the court to proceed with this matter with a view to granting declaratory relief. […]

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

[100] I, therefore, conclude it would not be an appropriate exercise of this court's jurisdiction to proceed with the Plaintiffs' remaining causes of action and those actions should be permanently stayed.

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[50] 2021 ONSC 23, aff'd 2021 ONCA 751.
[51] 2019 ONSC 2502.
[52] 2018 ONSC 6146.
[53] 2010 ONSC 2801.
[54] 2009 ABCA 372.
[55] [2009] O.J. No. 5252 (S.C.J.).
[56] 2006 MBCA 29.
[57] [2005] O.J. No. 4564 (S.C.J.).
[58] [2002] O.J. No. 3211 (C.A.), leave to appeal to the S.C.C. ref'd [2002] S.C.C.A. No. 421.
[59] (1995), 25 O.R. 9 (3d) 690 (Gen. Div.).
[60] (1995), 25 O.R. 9 (3d) 690 (Gen. Div.).

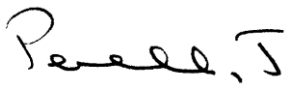
J. Certification Motion

[101] In so far as the Plaintiffs' certification motion is concerned, I have determined that the Plaintiffs do not satisfy the cause of action criterion with respect to the cause of action for *ultra vires* taxes and the statutory cause of action pursuant to s. 72 (1) of the *Telecommunications Act*. I make no other determinations. The Plaintiffs' proposed class action is permanently stayed.

K. Conclusion

[102] For the above reasons, I dismiss the Plaintiffs' action against Ontario for unlawful taxes and its statutory cause of action pursuant to s. 72(1) of the *Telecommunications Act* and I permanently stay the balance of the Plaintiffs' causes of action.

[103] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Defendants' submissions within twenty days of the release of these reasons for decision, followed by the Plaintiffs' submissions within a further twenty days.



Perell, J.

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COURT FILE NO.: CV-20-00635778-00CP
DATE: 20220426

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

VANESSA FAREAU and RANSOME CAPAY

Plaintiffs

- and -

BELL CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

REASONS FOR DECISION

PERELL J.

Released: April 26, 2022