

FEDERAL COURT OF APPEAL

BETWEEN

**CONSUMERS' ASSOCIATION OF CANADA and NATIONAL ANTI-POVERTY
ORGANIZATION**

Appellants

- and -

**CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION**

Respondent

- and -

**BELL ALIANT REGIONAL COMMUNICATIONS, LIMITED PARTNERSHIP, BELL
CANADA, ARCH DISABILITY LAW CENTRE, CANADIAN ASSOCIATION OF THE
DEAF, MTS ALLSTREAM INC., SASKATCHEWAN TELECOMMUNICATIONS,
TÉLÉBEC, SOCIÉTÉ EN COMMANDITE, TELUS COMMUNICATIONS INC. AND
TELUS COMMUNICATIONS (QUÉBEC) INC.**

Respondents

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Ottawa.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, **WITHIN 10 DAYS** of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

November 21, 2006

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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of the Canadian Radio-television and Telecommunications Commission (the “CRTC” or the “Commission”) titled *Disposition of Funds in the Deferral Accounts*, Telecom Decision 2006-9, dated February 16, 2006 (the “Deferral Accounts Decision” or “Decision 2006-9”) by which the CRTC:

- (a) determined that the funds collected in the deferral accounts maintained by the respondent Incumbent Local Exchange Carriers (the “ILECs”) should be used to fund programs and services in their own local exchange areas. The funds were to be spent by the ILECs for two purposes: the expansion of uneconomic ILEC broadband initiatives and a minimum of 5% of the funds for improvements to accessibility of telecommunications for persons with disabilities.
- (b) rejected the payment of rebates to the subscribers that had paid the local rates that had caused the monies in the deferral accounts to accumulate.

THE APPELLANT ASKS that this appeal be allowed and that an order be granted:

- (a) quashing the order of the Commission that provided directions for the clearing the balances in the ILECs’ deferral accounts;
- (b) directing that the Commission clear the balances in a manner that would result in the refund or rebate of the monies accumulated in the ILECs deferral accounts to the ILEC subscribers who paid the rates that provided those monies;
- (c) awarding the Appellants their costs of this appeal;
- (d) such further and other relief as counsel may request and this Honourable Court deems appropriate.

THE GROUNDS OF APPEAL are as follows:

The Appellants

1. The Consumers Association of Canada and the National Anti-Poverty Organization, referred to collectively herein as the “Consumer Groups”, were interested parties before the CRTC in the proceedings that culminated in the Deferral Accounts Decision.

Just and Reasonable Rates

2. The Commission set rates for residential local exchange service offered by the respondents, the Incumbent Local Exchange Carriers (“ILECs”): Aliant Telecom Inc. [now Bell Aliant Regional Communications, Limited Partnership]; Bell Canada; MTS Allstream Inc.; Saskatchewan Telecommunications; Télébec, Société en commandite; Telus Communications Inc. and Telus Communications (Quebec) Inc. for a four year period commencing in 2002, that were in excess of an amount that was just and reasonable in accordance with s. 27 of the *Telecommunications Act* (“Act”). The Commission decided to charge the excess amount in residential local service telephone rates to benefit the competitors to the respondent ILECs. The Commission ordered the excess portion of rates, above the just and reasonable level, be collected by the respondent ILECs, and deposited into a deferral account maintained by each ILEC.

3. In the Deferral Accounts Decision, the Commission purported to clear the balances remaining in the deferral accounts effective May 31, 2006. The Commission did not order the return of the monies therein to subscribers, but ordered the ILECs to expend the funds on uneconomic broadband service to rural and remote subscribers, and improvements to disabled access to telecommunications facilities.

4. The Commission erred in law or exceeded its jurisdiction, in assessing a portion of rates in excess of the just and reasonable standard established by statute, and then failing to credit the

subscribers of residential local exchange service who contributed the excess portion of rates when the balances of the deferral account were cleared.

Deferral Accounts

5. The Commission lacked the statutory authority to order the establishment of deferral accounts by the respondent ILECs for the purpose of the deposit of rates in excess of the just and reasonable level arising in the manner described above.

6. As the Commission lacked the authority to establish such accounts, it also had no authority to clear the balances in accordance with the proposals approved by the Commission in the Deferral Accounts Decision.

Impermissible Allocation of Costs in Rates

7. The Commission determination in the Deferral Accounts Decision that, in effect, residential local exchange subscribers of the respondent ILECs should exclusively fund uneconomic broadband expansion and additional telecommunication access for the disabled, was an impermissible use of its statutory rate-making powers pursuant to s. 27 of the Act.

8. The making of just and reasonable rates requires that subscribers pay rates that reflect a reasonable allocation of the costs that are necessary to serve them. The CRTC determination that one set of customers, residential subscribers of local exchange services, should fund the initiatives chosen by the Commission in the Deferral Accounts Decision, was an error in law and made in excess of the Commission's jurisdiction.

The Commission Applied the Wrong Test to Benefiting Residential Subscribers

9. In the Deferral Accounts Decision, to clear the deferral accounts monies, the Commission applied a test to determine which proposal would be approved for use of the funds remaining in

the deferral accounts. The test applied by the Commission was to determine which proposal would “provide longer-term and more permanent benefits” to residential subscribers.

10. The Commission concluded that rural Internet broadband connectivity and improved accessibility to telecommunications for persons with disabilities would “provide longer-term and more permanent benefits”.

11. The Commission, in applying such a test, misdirected itself. The Commission failed to explain the justification for a test preferring a “longer-term and more permanent benefit” to a small number of business and residential subscribers that were substantially different from the subscriber base that contributed the funds, rather than a simple rebate to all residential telephone subscribers.

The Commission Wrongly Concluded that Subscriber Rebates Were Not Practical

12. In dismissing customer rebates as a disposition of the deferral accounts funds in its Deferral Accounts Decision, the Commission cited administrative ‘complexity’ and cost.

13. The Commission’s conclusion “that the cost of attempting to locate those residential subscribers who were customers during the current price cap period but are no longer customers would likely outweigh any benefits that might be derived from such an exercise” was not based upon evidence as to the cost of attempting to contact these customers, or whether those costs would in any way “outweigh” the benefits of returning over \$650 million to subscribers.

14. The Commission failed to consider its own precedent of ordering rebates and also failed to consider the numerous precedents of customer rebates ordered by boards and tribunals regulating tribunals across North America.

15. The Commission’s statements regarding both cost and complexity, therefore, are not based upon the evidence and constitute an error of law.

Unjust Enrichment and Constructive Trust

16. The Deferral Accounts Decision deprived subscribers of residential local exchange service of their right to recover the excess portion of rates that the Commission had ordered to be collected and deposited in the deferral accounts by the ILECs without legal authority. The Deferral Accounts Decision also unjustly enriched the ILECs by enabling the contribution of subscriber funds from local telephone service rates to the credit of the operation of broadband services by the ILECs in rural and remote areas.

17. In the circumstances, the deferral account funds are subject to a constructive trust in favour of residential local exchange subscribers who contributed the funds. The carrying out of the Deferral Accounts Decision to expend these monies, instead of their return to the contributing subscribers, will deplete the monies subject to the constructive trust.

Fiduciary Duty and Trust

18. The Commission became a fiduciary to subscribers of residential local exchange service in the context of the Deferral Accounts Decision. The Commission had scope for, and in Decision 2006-9 exercised, its discretion and power over the deferral accounts. The Commission unilaterally exercised that power or discretion so as to affect the residential subscribers' legal or practical interests in the payment of just and reasonable rates and the right to a rebate of monies paid in excess of those just and reasonable rates. Residential subscribers are peculiarly vulnerable to or at the mercy of the Commission, as a result of the discretion or power to decide the disposition of the deferral accounts.

19. Where by statute, agreement, or unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.

20. The Commission was under an obligation to act for the benefit of residential subscribers in setting just and reasonable rates. The creation of the deferral accounts with above-normal

rates, coupled with the discretion of the Commission to expend that surplus, created a fiduciary relationship between the Commission and the ratepayers, with regard to the deferral accounts.

21. Residential subscribers paid local service rates to the ILECs on the understanding that such rates were approved as just and reasonable by the Commission. To the extent that the Commission increased rates allowed the excess portion of rates to fund the deferral accounts, it created a trust in favour of residential subscribers.

Illegal Tax

22. The establishment and clearance of the Deferral Accounts in the aforesaid manner amounts to the levying of an illegal tax on the subscribers of residential local exchange service provided by the respondent ILECs.

23. The Commission has no power to tax within its rate-setting functions under section 27 of the *Telecommunications Act*. However, the Commission levied and collected rates from these subscribers in excess of the amounts properly assessed, in order to fund collateral public purposes.

November 21, 2006

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