TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2006-00899

IN THE MATTER OF THE JUDICIAL REVIEW ACT 2000

AND

IN THE MATTER OF THE TELECOMMUNICATIONS ACT 2001

AND

IN THE MATTER OF AN APPLICATION BY TELECOMMUNICATIONS SERVICES OF TRINIDAD AND TOBAGO LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE DECISION OF RORY MACMILLAN, SHAHID HUSSAIN AND RONALD RAMKISSOON SITTING AS MEMBERS OF AN ARBITRATION PANEL APPOINTED BY THE TELECOMMUNICATIONS AUTHORITY OF TRINIDAD AND TOBAGO MADE MARCH 21, 2006 THAT THE PANEL HAS POWER TO GRANT AND TO HEAR AND DETERMINE AN APPLICATION FOR INTERIM INTERCONNECTION RATES

BETWEEN

TELECOMMUNICATIONS SERVICES OF TRINIDAD AND TOBAGO LIMITED

Claimant

AND

RORY MACMILLAN
SHAHID HUSSAIN
AND
RONALD RAMKISSOON

Respondents

AND

DIGICEL (TRINIDAD AND TOBAGO) LIMITED

Intervener

Before the Hon. Madam Justice C. Gobin
Appearances:
Mr. M. Daly SC with Ms. Indarsingh for the Applicant
Ms. D. Peake SC with Mr. R. Harnanan for the Respondent
Mr. C. Hamel-Smith SC with Mr. P. Rajkumar for the Intervener

JUDGMENT

Background

1. The Telecommunications Authority is a body established by the Telecommunications Act No. 4 of 2001 hereinafter called "the Act".

2. Section 82 of "the Act" provides inter alia for the establishment by the Authority of Dispute Resolution Process to deal with disputes arising thereunder.

3. On or about January 18, 2006, pursuant to Section 82 the Authority established and published its Dispute Resolution Procedures hereinafter called the DRP.

4. By Notice of Dispute republished on January 18, 2006 the intervener Digicel submitted a Notice of Dispute between itself and the Claimant TSTT before the Authority, activating the process of Dispute Resolution in accordance with the DRP.

5. By letter dated March 15, 2006 "the Panel" was appointed to resolve the dispute by arbitration.

6. By Notice dated 24th March 2006, Digicel gave notice to the Panel and TSTT of its intention to ask the Panel to set interim interconnection rates at its first hearing on 31st March 2006, pending final determination of the dispute.

7. By a letter dated 28th March 2006, TSTT gave the Panel and Digicel notice of its intention to object that the Panel had no jurisdiction to set and/or impose interim rates and on 31st March 2006, Counsel for TSTT and Digicel made submissions before the Panel on the jurisdiction issue.

8. On 31st March 2006, the Panel orally delivered its Decision that it did have jurisdiction to entertain Digicel's application and to set interim interconnection rates.

9. That decision is now challenged in this application on the ground of illegality.

The case for TSTT

10. TSTT contends that the Panel does not have the jurisdiction under the Act to make interim orders and in particular to fix interim interconnection rates. Very simply put, Mr. Daly's submission is that Parliament intended that the Authority should resolve disputes. The expression "to resolve disputes" connotes a final determination of the issues before the panel. The Telecommunications Authority is a creature of statute – its jurisdiction is defined and limited by the Act. The

Act does not grant a power to make interim orders. The Authority/Panel, cannot through the DRP extend its jurisdiction to make the interim orders sought by the Intervener. In support of this well settled proposition Mr. Daly relied on the case of **Trinidad Bakeries Ltd v NUGFW 1968 WIR**. Mr. Daly further submitted that the circumstances of this case do not give rise to any necessity to imply the power to make the order sought.

The Panel's Submissions

11. Mrs. Peake accepts the basic propositions of law as to jurisdiction of creatures of statute as submitted by Mr. Daly. She says that the issue of want of jurisdiction does not arise in these circumstances. She submits that upon a proper and purposive construction of all the relevant sections of the Act including the preamble, together with the concessions granted to TSTT and Digicel, as well as the DRP, the Panel does have the jurisdiction to make the order sought.

12. Mrs. Peake submits that the Act simply provides for the machinery for the resolution of disputes. In keeping with modern trends, it seeks to allow for procedural flexibility. It is deliberately drafted in the broadest terms. The well-defined jurisdiction clauses such as are to be found in statutes such as the then Industrial Stabilisation Act, the subject in **Trinidad Bakeries** are absent in this case. This is why **Trinidad Bakeries** is not of assistance in the instant application.

13. Mrs. Peake further submits that the absence of specific words granting the power to make interim orders for interconnection does not indicate a lack of jurisdiction. The jurisdiction is to be implied out of necessity so as to give effect to the intention of Parliament to resolve disputes especially in the area of interconnection. It is not disputed that interconnection is a vital aspect of the new regime.

14. I understand Mrs. Peake to submit further that the power to make urgent and interim orders regarding interconnection rates is one of the powers incidental to the power to resolve disputes within the Act.

Digicel

15. Mr. Hamel-Smith for Digicel agrees that this is essentially a matter of statutory construction. The jurisdiction to provide for the "resolution of disputes" which falls to the panel, he submits, is to be construed sufficiently widely even if I have to strain the ordinary meaning of the words so as to give effect to the intention of Parliament. That intention was to give the Authority a jurisdiction sufficiently wide to meet the objectives of the Act.

16. In Mr. Hamel-Smith's submission S 82 (1) confers on the Panel the substantive jurisdiction to resolve disputes. It is through this machinery that Parliament intended the resolution of disputes to be achieved. The "resolution of disputes" is not to be rigidly construed. It should allow for the exercise of any

power necessary at any stage of the process on the way to finding the solution to the dispute. Resolution of disputes does not mean final determination. By his reasoning it must of necessity include interim orders.

17. Mr. Hamel-Smith identified in detail, the sections of the Act which indicate the intention and goals of Parliament, as well as numerous functions of the Authority, which underscore the need for the application of principles of statutory interpretation that would produce the most generous result in terms of the breath of the jurisdiction of the Authority.

The issue

18. The issue in this case is ultimately one of statutory construction. The principles are well settled and the parties agree in essence that the resolution of the issue turns on how the principles should be applied.

19. Here it is perhaps convenient to recite some of the sections of the Act to which I will refer.

(i) Section 22. (3) - Every concession for a public telecommunications network, a public telecommunications service or a broadcasting service shall contain conditions regarding –

> ***(f) the submission to the Authority of disputes with other concessionaires, users and any person, where such disputes arise out of the concessionaire's exercise of his rights***

and obligations under the concession, subject to section 82.

(ii) Section 25 (2) - In respect of a concessionaire's obligations pursuant to subsection (1), the Authority shall require a concessionaire to –

> ***(h) submit to the Authority for prompt resolution, in accordance with such procedures as the Authority may adopt, any disputes that may arise between concessionaires relating to any aspect of interconnection, including the failure to conclude an agreement made pursuant to paragraph (e), or disputes as to price and any technical or other terms and condition for any element of interconnection;***
>
> ***(i) submit to any decision rendered by the Authority made pursuant to paragraph (h).***

(iii) Section 82 (1)

> **The Authority shall establish a dispute resolution process to be utilized in the event of a complaint or dispute arising between parties in respect of any matter to which section 18 (1) (m) or 25 (2)(h) applies, or where a negotiated settlement, as required under section 26, cannot be achieved, or in respect of any other matter that the Authority considers appropriate for dispute resolution**.

<u>Substantive Jurisdiction of the Authority/Panel</u>

20. I respectfully disagree with Mrs. Peake that the Act simply provides the machinery for resolution of disputes. I find that Sections 22 (3) (f), 25 (2) (h) and (i) and so much of Section 82 as enlarges the jurisdiction to include situations "where a negotiated settlement cannot be achieved or, in respect of any other

matter which the Authority considers appropriate for dispute resolution", are sections which define the substantive dispute resolution jurisdiction of the Authority. This Act has been unfelicitously drafted. The result is that one does need to sift through the subject matter to pinpoint these provisions as the ones which define the substantive jurisdiction of the Authority.

21. Further the statutory requirement for submission to the Authority by concessionaires for the "resolution of the disputes" and for submission to any decision rendered by the Authority, fortify my view that this is where the substantive jurisdiction of the Authority is to be found. Indeed the establishment of machinery for the resolution of disputes would be otiose in the absence of a substantive jurisdiction in the Authority.

22. As I have said before, this case turns on a matter of statutory interpretation. The basic and well-settled principles of the construction of statutes are accepted by the parties. The task of the Court is simply to apply these principles to determine whether in the exercise of its jurisdiction to resolve disputes, the Authority/Panel has the power to fix interim interconnection rates as sought by Digicel.

Applying the Principles

23. The obvious starting point is a recognition that the Act does not expressly confer a jurisdiction to make interim orders. The omission however is not

necessarily conclusive of Parliament's intention to exclude the jurisdiction. I must consider whether it arises by implication in one of several ways.

24. Mrs. Peake submitted that the language of the Act and in particular the use of so broad a term as to "resolution of disputes" is elliptical. She relies on the decision of their Lordships in the case of ***The Attorney General v Jobe (PC) 1AC p.689 @ p.702***, as authority for her submission that I should construe the jurisdiction as including the jurisdiction to make the order sought by necessary implication.

25. Two good examples of ellipses which justify drawing implications are to be found at Sections 18 and 25 (h) and (i) above. In these provisions, the subject matter clearly points to jurisdiction which has not been distinctly conferred. In other words the sections presuppose the existence of the substantive jurisdiction. These circumstances give rise to necessary implication.

26. In respect of interim rates however, there is nothing in the subject matter of the Act which gives rise to an inference that Parliament intended to confer that jurisdiction.

27. I go on to consider whether the jurisdiction to "resolve disputes" necessarily or properly implies a power to make the order sought. Mr. Daly for TSTT contends that it does not because the Act makes specific provisions for the

prompt resolution of disputes. The wide jurisdiction conferred on the Authority to provide the processes and to regulate them adequately addresses issues of urgency and hardship such as those raised by Digicel.

28. Here, the Panel and Digicel forcefully advance the purposive approach to construction. They urge that I should bear in mind the scheme of the Act, its objects and the intention of Parliament, all of which can be gleaned from the language of the Act in its entirety. Equally importantly, I should consider the historical background of Government's decision to move away from a monopoly provider of a utility service to an environment of fair economic competition and the public interest factor that is involved. Against this background they contend that the power to make the order sought is properly and necessarily implied, especially in situations of urgency as in the present case.

29. They argue that the statutory mandate to submit for prompt resolution of disputes is limited to interconnection disputes. There are many other situations contemplated by the Act, (which have been detailed in Mr. Hamel Smith's submissions) which could give rise to the need for urgent relief. If I were to rule that the Panel cannot fix interim rates because of lack of jurisdiction the panel would be rendered powerless to make any interim order in all of those other situations where to fail to do so could lead to hardship.

30. I accept that it is only in disputes related to interconnection that promptness is statutorily required. This appears to be consistent with a recognition that interconnection is a fundamental feature of the liberalization process. Not surprisingly therefore, and in order to achieve the objectives of the Act, the resolution of interconnection disputes is considered paramount. I do not accept that any of the other situations contemplated by the Act, under 18 (1) (m) or 22 (3) and S. 82 could so fundamentally interfere with achieving the objectives of the Act.

31. I am mindful of the modern approach to statutory construction and I bear in mind the objectives of the Act. But these do not permit me to ignore that Parliament in its wisdom anticipated and provided for the obvious need for promptness in resolving interconnection disputes. Indeed, it already appears from the DRP that the Authority seriously regards its mandate to resolve all disputes. The DRP attempts to provide for strict time frames and for the handing down of decisions within three months of a dispute being referred. The DRP does not appear to make a distinction between S 25 (e) and (h) disputes and any other. That extensions of time are provided for do not change the position that Parliament contemplated promptitude where it is most essential and its objectives are being realized. It is against this background that I will consider whether it is necessary to imply a power to grant interim orders in other disputes contemplated by S 18 (1) (m).

32. A comparison of the language of S 18 (p) and (q) of the Telecommunications Act No. 40 of 1991 and S 18 (m) of "the Act" demonstrates that the kind of dispute contemplated here is not new to the industry. What is more significant is that the Act limits the jurisdiction of the Authority to investigate complaints and to "facilitate relief" while the repealed provision granted the power it seems to me impliedly to resolve the complaints. The relevant provisions follow:

> S. 18 (p) (q) (the repealed Act) –
>
> ***"Subject to the provisions of this Act, the functions of the Authority are –***
>
> ***(p) to investigate complaints received from the public in respect of problems of harmful interference and report receipt of complaints and resolution of same pursuant to Section 63(3).***
>
> ***(q) to investigate complaints from consumers and other entities concerning all telecommunications services and related matters and report receipt of complaints and resolution of same pursuant to Section 63(3).***
>
> Section 18 of the Act –
>
> ***(1) (m) – investigate complaints by users, operators of telecommunications networks, providers of telecommunications and broadcasting services or other persons arising out of the operation of a public telecommunications network, or the provision of a telecommunications service or broadcasting service, in respect of rates, billings and services provided generally and to facilitate relief where necessary.***

33. I do not expect that the Panel and Digicel would argue that under the repealed provision there was any power in the Authority to make interim orders pursuant to S 18 (p) and (q).

34. The Act reflects a modern approach to the regulation of relationships including commercial relationships and towards what is commonly known as alternative dispute resolution. More common elements of this kind of regime include facilitation, negotiation, consultation and conciliation. This approach does not contemplate coercion or the intrusive enforcement of the will of the Authority. It aims at consensus between parties.

35. The comparison of the provisions above demonstrates very clearly the fundamental shift in ideology which Parliament introduced by the Act. Indeed all of this is not inconsistent with so much of the objective in the preamble as aims to establish a comprehensive and modern framework.

36. If it turns out that this new regime is not appropriate to deal with the real problems of liberalisation, that is not a matter for the construing judge. It is a matter for Parliament. The rules of statutory interpretation do not allow me in these circumstances to treat the bald objectives of the Act, or indeed the DRP as further power conferring provisions. I am guided by the judgment of the majority in the case of **Barrie Public Utilities v Canadian Cable Television Association** that to do so would be to make a mistake.

37. In granting the wide jurisdiction to resolve disputes consistently with this philosophy which Parliament espoused, it left the machinery of dispute resolution entirely to the Authority, subject to its requirement for promptness in interconnection disputes.

38. There are several methods of dispute resolution. So far the DRP embraces mediation and arbitration. The process of mediation does not contemplate the making of orders at all. If I were to hold that the power to resolve disputes by necessary implication included a power to make interim orders this would surely lead to an absurdity. The result would be that a mediation panel appointed by the Authority under the DRP would impliedly, by the Act, be given a power that the practice of mediation does not contemplate.

39. The mandate for flexibility does not outweigh the desirability for the Authority to establish Dispute Resolution Procedures that meet recognised international standards as well as inspire confidence in foreign as well as local investors.

40. A ruling that the jurisdiction to settle disputes also includes the power to make substantive interim orders would further restrict the use of the process of mediation and all its attendant advantages, unless parties can agree to interim terms. This would defeat the very flexibility which the Act seeks to promote.

Moreover, it would be entirely inconsistent with the approach to dispute resolution which underlies the Act. Indeed, given the fierceness of the commercial rivalry that ought to have been expected, one may well say with hindsight, that the Authority ought to have been given the power to effectively compel competing concessionaires to do all things necessary to achieve the objectives of the Act, but this is not what Parliament intended.

41. In the face of this legislative framework I am reluctant to imply any power which would have the effect of permitting the Authority to impose an order upon parties engaged in a dispute resolution process (save as provided by S 25 (2) (1)). This would be inconsistent with the spirit of the Act.

The Hong Kong case

42. This is a convenient point to deal with the authorities furnished by the Panel and TSTT. **PCCW HKT Telephone Ltd v Telecommunications Authority 2004 HKEC 799.** I accept Mr. Daly's submission that this decision turns on the particular statutory framework of the relevant Ordinance. The regime allowed the Authority specific power to direct licensees to take such action as it considered necessary and a statutory mandate was given to the Authority to secure interconnection.

43. I do not consider this case to be authority for the broad proposition advanced by Ms. Peake. The jurisdiction to make interim rates was implied in

that case against the background of the particular statutory provisions and in the circumstances of the case. In the context of the statutory framework and the philosophy of the Act, the case is distinguishable.

Encana

44. The case of ***En Cana Corp v Alberta (Energy and Utilities Board) [2004] A.J. No. 852; 2004 ABCA 259*** supports the approach to construction urged by the Panel and Digicel. It appears from the judgment of Hunt JA that the Board found it necessary to take "immediate action" because it anticipated the deleterious effect of "protracted omnibus hearings, a long series of shorter hearings or any combination thereof".

45. Institutional delay in the determination of the substantive dispute appears to have been one of the concerns identified, which favoured the construction allowing for the grant of interim relief. Reference was made in the judgment to previous applications which lasted as long as two years each. Given the subject matter in that case, the implication by necessity was entirely justifiable. In the instant case the statutory requirement for promptness in interconnection dispute resolution militates against the necessity for so liberal a construction.

46. The case of **PUC of Texas v Cities** comes out of the USA. It is of very limited assistance in our jurisdiction and I attach little weight to it.

47. Lastly, I must consider whether the power to make the order sought is ancillary to the power of the Authority/Panel to resolve disputes and here I think it convenient to note that the parties agree that not all decision makers are empowered to make interim orders.

48. On this aspect of the matter I have noted that very often statutes which confer jurisdiction on the High Court such as The Matrimonial Proceedings and Property Act Ch. 45:51 and on the Magistrates in the Family Law Act, expressly confer a jurisdiction to make interim awards. This must be so because the making of interim awards even when it is justifiable on the basis of need or hardship necessarily involves circumvention of the proper procedures which guarantee a fair hearing and a proper consideration of all the relevant evidence and matters which a tribunal acting properly is bound to take into account. It is perhaps for this reason that the power to make interim orders is not to be lightly inferred.

49. Interestingly, in the case of **Cdn. Radio-Television & Telecommunications Comm. v Bell Can. Et al** referred to in **Encana**, Gonthier J, in the course of his judgment recites the policy of the Telecommunication Commission on the granting of interim rate increases (the jurisdiction to fix interim rates was not disputed):

> ***"The Commission considers that, as a rule, general rate increases should only be granted following the full public process contemplated by Part III of its Telecommunications Rules of Procedure. In the absence of such a process, general rate increases should not in the Commission's view be granted, even***

> ***on an interim basis, except where special circumstances can be demonstrated. Such circumstances would include lengthy delays in dealing with an application that could result in a serious deterioration in the financial condition of an applicant absent a general interim increase."***

50. The specific reference to lengthy delays confirms my view that where both the Act and the DRP have frontally addressed the issue of delay in interconnection disputes there is no necessity to imply jurisdiction. I consider the policy of the commission regarding interim rate fixing to be instructive.

51. Mr. Hamel-Smith has confirmed that included in the Dispute pending before the Panel are aspects of basic costing and price fixing which would ultimately have a bearing on rates. Given the flexibility of the jurisdiction of the Authority to regulate procedure, there can be nothing to prevent the Panel from severing the hearing of different aspects of the subject of the dispute and prioritizing those requiring urgent attention. If the DRP does not at present provide for this (and I am not sure that it doesn't) then can it not be easily amended to do so, especially since there would be less requirement for formality to achieve this end.

52. If such an approach is available to the Panel when the issue can be even more urgently dealt with, can it really be said that the jurisdiction to make interim orders is so necessary that in its absence the Act would be unworkable, I think

not. I have not been persuaded that the power to make the order sought by Digicel is ancillary to the power of Authority/Panel to resolve disputes.

53. The inclusion of the statutory requirement for promptness does not make it unreasonable to infer that Parliament did not intend the Authority to be burdened and bogged down with substantive interim applications which could only adversely affect the prompt resolution of disputes. It may be that the former experience (common to all of us) of inordinate delays in formal court procedure which allowed for satellite litigation, has not been lost on Parliament.

54. Were I to construe the Authority's jurisdiction to include the jurisdiction to hear and determine interim applications including those which could substantially affect the financial position of the parties, I would be opening the way for the frustration of the objectives of the Act by encouraging a multiplicity of applications which could divert the attention, resources and valuable time of the Panel away from its primary statutory objective.

55. I therefore hold that the jurisdiction of the Authority to resolve disputes is limited to the resolution of the disputes, that is, a final resolution or such final agreement as may be arrived at the end of, or during the course of a dispute resolution process which puts an end to the dispute. There is no power to make substantive interim orders. More specifically, there is no jurisdiction to fix interim rates as claimed by Digicel.

56. Paragraph (1) of the Fixed Date Claim Form dated and filed 13th April 2006 is hereby amended with the consent of the Respondents and the Intervener. It is hereby declared that:-

(1) the Respondents have no power -

(a) to hear and determine any interlocutory application for interim interconnection rates.

(b) To set or impose interim interconnection rates on any such interlocutory application.

(2) That the decision of the Panel dated 21st March 2006 that it has jurisdiction to hear and determine an interlocutory application for interconnection rates is null and void and of no effect.

(3) An order of certiorari is granted quashing the decision of the Panel dated 21st March 2006.

(4) The Respondents and Intervener to pay to the Claimant the sum of $7,000.00 each being the prescribed cost of this suit.

Dated this 5th day of May, 2006

CAROL GOBIN

JUDGE