JUDICIAL REVIEW AND THE REGULATORY PROCESS – FOR BETTER OR WORSE

By Judith Smith[1]

Utility regulators will find that despite creating legislative and regulatory frameworks to facilitate competition and expeditious yet inclusive decision-making, they will be faced with applications for judicial review. The regulatory framework is structured to be responsive to a commercial and technologically dynamic environment. The recent experience of the Public Utilities Commission in the Bahamas in two cases indicates that the general law may not compliment the regulatory framework. Despite including a section in its Telecommunications Act, 1999 ("the Telecoms Act") thought to limit challenges to the regulator's decision, it would seem, the Court has decided to run the full gamut in telecommunications matters. The paper will present arguments why judicial constraint in these matters is reasonable, followed by the general principle of law of not denying access to justice and conclude with a recommendation to marry these two processes.

PARLIAMENT'S INTENTION

The PUC became operational in March 2000 with the enactment of the Public Utilities Commission Act, 1993 (amended in 1999). The Telecoms Act, which was also came into operation in March 2000, gave the PUC the authority to regulate telecommunications in

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the Bahamas. The government, in compliance with section 5(1)(a) of the Telecoms Act, prepared a sector policy which set out the government's vision of telecommunications in the Bahamas. One of the aims of the legislature was to introduce competition in the telecommunications sector. The monopoly public switched telephone company is a government corporation that is horizontally and vertically integrated in all aspects of telecommunications. Cable Bahamas Limited, a publicly traded company, is another significant company in the Bahamian telecommunications market providing internet service over its facilities developed principally for cable television.

The provision which seeks to constrain judicial involvement is section 7(1) of the Telecoms Act which provides –

7(1) – All decisions of the Commission made in the exercise of its functions and powers under this Act, shall be final, other than a decision –

(a) on a point of law and questions of law;

(b) to refuse to grant an individual licence

(c) that a licensee is Dominant;

(d) to modify a licence in accordance with section 12(4)(d);

(e) to revoke an individual licence; or

(f) *to impose a fine.*

There is a strong inference from this section that challenges to the regulator's actions were being limited. The commercial and economic environment and international experience in the telecommunications environment would certainly support the plausibility of this objective.

Introduction of Competition

The PUC embarked on the further introduction of competition in network facilities in September 2001 by requesting interested persons to submit tenders for the award of a licence to establish a fixed wireless system and provide telecommunications services. The Licence was envisioned to provide competition in voice and data markets. The tender

outlined the areas of particular interest and the points to be allocated to each particular area. The deadline for submissions was set as December 14, 2001. Tenders were received from several parties. In February, 2002 the PUC after considering the tenders decided that the applicant – Systems Resources Group Limited was the most meritorious. This announcement prompted a challenge by Bahamas General Communications Limited (BGC) – *R v The Public Utilities Commission ex parte Bahamas General Communications Limited* (Supreme Court no. 678 of 2002).

In April 2002 BGC, by way of an ex parte application, obtained leave for judicial review and an order restraining the PUC from issuing the licence. Judicial review[2] is usually based on the grounds of illegality[3], irrationality[4] or procedural impropriety[5].

In June 2002, the matter was heard and a decision was given at the end of June 2002. The applicant's case was dismissed on the grounds that the applicants had misled the Court to obtain the leave. The judge did go on to consider the merits of the case and still held that there were no grounds on the evidence before him to rule that the decision satisfied any of the grounds of irrationality, illegality or procedural impropriety[6].

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[2] Principles as stated in *Council of Civil Service Union v Minister of the Civil Service* (1985) AC 374

[3] This includes exceeding jurisdiction, acting outside of powers, frustrating legislative purpose, error of law. Also see www.elexica.com : *Challenging Decision-makers: Judicial Review Proceedings* – November 1999.

[4] This includes an act or decision which is so unreasonable as to be bordering on the absurd, bad faith, improper motive, abuse of power, improper delegation; fettering of discretion of the decision maker, for example by imposing a policy decision rather than considering the merits and legality of each individual decision.

[5] For example, contravention of procedural rules set down by Act or Regulation.

[6] The matter was appealed and was dismissed by the Court of Appeal in March 2003.

ANALYSIS

The fact that the applicant was able to mount his legal challenge by way of judicial review raises the scope and intent of section 7 of the Telecoms Act. As mentioned earlier section 7 was thought to be a provision to limit the opportunities for litigation. According to the 2000 census, the Bahamas has a population of approximately 303,000 persons with a concentration of 69% on the island New Providence. The margins of profitability are fairly tight and can be easily eroded by delay. The effect of the challenged mounted by BGC, notwithstanding that it was dealt with expeditiously, caused a 3 month delay. In the meantime the commercial and legislative landscape on which the licence was predicated changed significantly. Although the licence was eventually issued, the commercial environment had changed so much that the awardee had to revisit its business plan. The litigation caused a time delay which had commercially strategic as well as direct and indirect financial consequences. In the telecommunications environment, litigation, can pose a barrier to entry. In an article Interconnection Regulation in Mexico[7], the authors cite what is called *'Legal Play'*.

> *Legal play refers to the use of lawsuits as a mechanism to create delays in actions that negatively affect a target firm. Legal play is possible because of the lengthy period needed for the legal system to sort out facts and reach a verdict. Normal delays in the legal system can reward legal play.*

Thus, it was important that challenges to the regulator's decision be limited.

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[7] Martha A. García-Murillo and James B. Pick, ***Interconnection Regulation in Mexico.*** http://courses.si.umich.edu/tprc/papers/2002/58/ppr_Mar_Mexico_telecom_regulation6_after_GITM_for_TPRC_7.pdf

On the other hand, it can be argued that judicial review is permitted pursuant to section 7(1)(a) which allows an appeal on a point of law and questions of law. This is further bolstered by section 7(2) of the Telecoms Act:-

> *Any person aggrieved by a decision referred to in subsection (1) may appeal to the court on a point of law, on the ground that the decision was unreasonable in the light of information available to the Commission at the time it made its decision or on the ground that it was unreasonable for the Commission to make a decision without ascertaining further information.*

The section has the flavour of one of the grounds of judicial review mentioned earlier; irrationality. This argument is unassailable in relation to section 7(1) (b) – (f) because the matters referred to are commissions or overt acts of the decision maker. However in relation to section 7(1)(a) "a point of law or a question of law", it seems difficult to reconcile the Commission making a decision on a point or question of law and it being unreasonable in the light of information available, or without ascertaining further information. It is submitted that when the Commission makes a decision on a point or question of law it is manifested in an action e.g. the refusal of the licence, or an instruction to interconnect. It is further suggested that if the decision does not come within the points in section 7 (1) (b – f) then it ought not be appealable. Therefore, as an example, the instruction to interconnect cannot be forestalled by way of legal action. Otherwise, an incumbent can easily frustrate the entry and success of a new entrant or smaller operator, an unsuccessful bidder can disrupt the situation for the successful bidder or a licensee can prevent the regulator from policing the market. **In R v Public**

Utilities Commission ex parte Cable Bahamas Limited (Supreme Court of the Bahamas no. 428 of 2002), the Commission sought to exercise its powers provided under Section 34 of the Act to issue instructions to a licensee in relation to the type of network it was allowed to operate and the services it was allowed to provide. The licensee obtained leave ex parte to review the Commission's conduct and obtained an injunction preventing the Commission from moving further. The Commission was successful in having the application dismissed but it took approximately five months (the order and leave having been granted in March 2002 and the decision being rendered in August, 2002[8]). In giving his ruling Davis J stated at page 40: -

> *I venture to say that if every intermediate step taken in the course of administrative action were to be made justiciable by judicial review it would devalue this very important redress and could prompt a volume of litigation beyond that which the administration of justice can bear according to the capacity of any given jurisdiction. It should be borne in mind that this relief was carefully crafted and nurtured by judicial engineering and activism over the past half a century. It should not now be placed in danger of falling to reactionary forces which might seek to undo its valuable achievements.*

The BGC case and the Cable Bahamas case show that speedy decisions are a prerequisite for the sector and only limited challenges to the decision of the regulator should be permitted.

[8] The matter is currently under appeal, however no restraining order is in place.

The proposition that the right to challenge the decision of the regulator should be circumscribed may seem alarming. The proposition suggests that the Regulator can arbitrarily make decisions on certain issues with impunity, e.g. interconnection issues, provision of information, decisions relating to change of control of a licensee. Furthermore the proposition is contrary to general legal principles that public law actions can be challenged by way of judicial review and allowing access to justice. Hence the process of Judicial Review and the Regulatory Process seemed to be joined for better or worse.

THE UNION

In the English case of O'Reilly v Mackman[9], Diplock L, in discussing Order 53 and the requirement for full and frank discussion said: *"The application for leave, which was ex parte but could be, and in practice often was, adjourned in order to enable the proposed respondent to be represented …"*. If an adjournment in these instances is made a requirement it may provide a symbiosis for the Regulator and the process of Judicial Review.

In the 2 cases (BGC and Cable Bahamas) that have involved the Commission both applicants received leave ex parte. There was no adjournment for the respondent to be heard prior to the decision of the Court to review the conduct of the Commission. Different judges, whose legal experience had been honed in different jurisdictions, heard the cases. The Court conducted a full review of the Commission's decision. In the BGC case, the order granting the leave and the injunction was discharged on the basis that ex parte application did not contain full and frank disclosure. In the Cable Bahamas case,

[9] (1982) 3 All ER 1124 at 1130

the Commission took out a summons seeking to have the Order for judicial review discharged. The Court agreed to discharge the order on the grounds that the case for judicial review had been made prematurely by the applicant (the Commission had not yet made a decision) and *"…on the fact of this case it is a most inappropriate course of action. As already indicated, the affidavits contain opposing opinions on the key issue. On the face of the record and the state of the expert evidence, it is well nigh impossible for the court to decide which side is to be preferred".*[10] The Court in the Cable Bahamas case was indicating that the private law action was more appropriate as it would allow for cross-examinations and other forms of evidential scrutiny. There is a possibility that these delays and expenses could have been avoided if an adjournment had been taken to allow the other side to be present before granting the Order that the Court would review the matter.

CONCLUSION

In the Cable Bahamas case arguments were submitted regarding the scope of section 7. The ruling did not discuss the section and thus, as the law stands, it appears section 7 does not limit challenges to the regulator's decision. It would seem that the English Courts have allowed aggrieved parties to choose public law actions or private law actions[11]. The English precedent will have to be evaluated on the stage of development of their telecommunications sector, resources and code of conduct of the profession. In the Bahamian context, it seems that in the interest of competition, the Regulator must impress on the Court the need to adopt the practice of requiring adjournments to allow

[10] Principle in *R v Derbyshire Council ex parte Nobl*e 1990 1CR 808 applied
[11] *Mercury Communications Limited v Director General of Telecommunications* 1 (1996) W.L.R. 48 - 60

the respondent to appear on these ex parte applications before deciding whether to order judicial review. The proposal can avoid wasting of judicial time and resources as well as commercial and economic hardship. The telecommunications sector is commercially and technologically dynamic. These considerations have to be overlaid with the universal norm that access to justice should not be denied. If limiting challenges to the regulator's decision offends the universal norm, then it is imperative that representation at an early stage is allowed. Judicial review and the regulatory process seem to be joined for better or worse.

THE END