

AN ADMINISTRATIVE LAW CASE STUDY ON UTILITY REGULATION

Presented by

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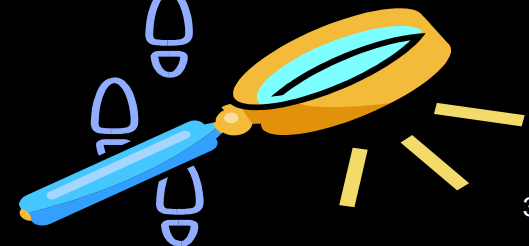
*Cable & Wireless (Barbados) Limited
v. Fair Trading Commission High
Court Suit No. 1970 of 2003*



Objectives of Presentation

This presentation will provide:

- a comprehensive overview of the two main issues in the case, as well as;
- some of the administrative law principles that arose therein.



What is Administrative Law?

- Administrative Law is part of the branch of law commonly referred to as public law; and may be defined as law which regulates the relationship between the citizen and the state involving the exercise of state power.



The Case Background

- Cable & Wireless (Barbados) Limited submitted a rate adjustment application to the Fair Trading Commission.
- This application was brought pursuant to the Utilities Regulation Act.
- The Commission convened a rate hearing.
- Parties were advised that the Utilities Regulation (Procedural) Rules would govern the conduct of the entire rate hearing.

- Several documents were submitted with claims for confidentiality.



- The Commission determined that the Applicant should adhere to Rule 13 of the UR (Procedural) Rules.

Rule 13 of UR (Procedural Rules)

- Sets out the criteria to be used when seeking to have documents treated confidentially.
- Requires the Commission to convene a hearing to determine whether documents should continue to be treated confidentially or whether they should be wholly or in part placed on the public record.

- A sole Commissioner was appointed to preside over the confidentiality hearing.
- The Commissioner advised the parties that the UR (Procedural) Rules would govern the proceeding.



The Applicant expressed dissatisfaction at the Commission's determination and instituted proceedings in the High Court seeking judicial review on the grounds that:

- The Commission exceeded its jurisdiction in that, under both the Fair Trading Commission Act and the Utilities Regulation Act a minimum of 3 Commissioners is required to sit, hear and determine utility regulation matters; and

- The Commission erred in law in holding that the UR (Procedural) Rules should solely govern the confidentiality hearing to the exclusion of the Telecommunications (Confidentiality) Regulations

Judicial Review

- Judicial review may be defined as the jurisdiction of the superior courts to review law, decisions, acts and omissions of public authorities in order to ensure that they act within their given powers.

Issue 1. Whether a sole Commissioner could preside over the confidentiality hearing.

➤ Fair Trading Commission Act, Utilities Regulation Act vs. UR (Procedural) Rules

➤ Excess of jurisdiction- Doctrine of *ultra vires*

Doctrine of *Ultra Vires*

- Acting beyond one's power or authority.

Fair Trading Commission

- UR (Procedural) Rules;
- Sole Commissioner;
- Procedural Conference;
- Rule 35(2), a member may preside over a procedural conference.

Applicant

- FTC Act and UR Act
- Panel of at least 3 Commissioners;
- Confidentiality Hearing

What the Court decided

- The provisions of the Fair Trading Commission Act and Utilities Regulation Act are clear and unambiguous in that at a minimum 3 Commissioners should sit to determine any proceeding.
- The Commission had erred in law by advising that a sole Commissioner should preside over the confidentiality hearing.



Issue 2. Did the Commission err in law in directing that the UR (Procedural) Rules should govern the proceedings?

- Telecommunications (Confidentiality) Regulations vs. UR (Procedural) Rules

- Error of law



Error of law

- A tribunal may be required in deciding a matter to take into account, or rule on a question of law or a particular statute and may err in in doing so, or may misinterpret that rule of law or statute.

UR (Procedural) Rules

- Made by the Commission and approved by the Minister of Commerce, Consumer Affairs and Business Development;
- Apply to all proceedings of the Commission under the FTC Act and UR Act
- Sets out specific criteria and process to be adopted when determining confidentiality of documents.
- Burden of proof on applicant to show why documents are confidential

Telecom (Confidentiality) Reg.

- Made by Minister of Energy and Public Utilities.
- Regulations prescribing treatment of confidential information relative to applications for licenses.
- Burden of proof shifts to party seeking disclosure of the information.

What the Court decided

- The Commission was correct in deciding that the UR (Procedural) Rules would govern the hearing.
- The Telecommunications (Confidentiality) Regulations do not apply to claims for confidentiality filed in a proceeding before the Commission.



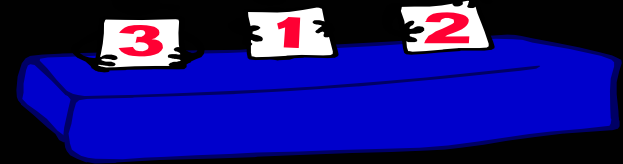
What happened next

- The Applicant was not satisfied with the High Court's ruling on this second issue and appealed to the Court of Appeal. The judges in the Court of Appeal however agreed with the reasoning of the High Court judge and the appeal was dismissed.



What this case has taught us

- In any proceeding the Commission must have a quorum of at least 3 Commissioners.



- The Acts should not be read in isolation, but should be read conjunctively.

The Way forward



- Be cautious when entrusted with several pieces of legislation which are interlinked.
- Ensure that your decisions are judicious and grounded in law.
- Where legislation is not clear, no safer avenue than the Courts.
- Always look for ways to improve overall legal framework.

Thank you.