

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV190 of 2023

BETWEEN:

BELIZE TELEMEDIA LIMITED

Claimant

and

PUBLIC UTILITIES COMMISSION

Defendant

Appearances:

Mr. Fred Lumor SC and Mr. Kileru Awich for the Claimant
Mr. Douglas Mendes SC and Mr. Jose M. Alpuche for the Defendant

2023 July 18:

November 06.

JUDGMENT

[1] **ALEXANDER, J:** This is Belize Telemedia Limited's ("BTL") application for judicial review of the decision of the Public Utilities Commission ("PUC") made on 29th December 2022 to grant to BTL a fresh Individual Licence instead of renewing the expired Licence held in BTL's name ("the impugned decision"). BTL seeks:

1. A Declaration that the impugned decision is contrary to sections 15 and 19 of the Belize Telecommunications Act, Cap. 229 ("the Act");
2. A Declaration that the impugned decision is ultra vires sections 15 and 19 of the Act and the Telecommunications (Licensing Classification, Authorisation and Fee Structure) Regulations 2002 (S.I. No. 110 of 2002)

as amended by S.I. No.163 of 2022 (“the Regulations”) and therefore unlawful, null and void;

3. A Declaration that the PUC wrongfully and unlawfully took the impugned decision to "grant" instead of "renewing" the Individual Licence of the claimant in less favourable conditions than the expired Licence in breach of the rules of fairness and the legitimate expectation of BTL.
4. An Order of Certiorari to remove the impugned decision into the High Court for the purposes of being quashed.

[2] I find wholly against BTL’s application and dismiss it. I have set out my reasons below.

Background

[3] The PUC is the body vested with the statutory authority to deal with all telecommunication licensing and other services in Belize. With effect from 30th December 2002, the PUC, in pursuance of its powers in section 15 of the Act, granted a Licence to provide telecommunication services in Belize to Belize Telecommunications Limited. I shall refer to this Licence as ‘the 2002 Licence’. However, with the coming into force of the Telecommunications Undertaking (Belize Telecommunications Limited Operations) Vesting Act No. 10 of 2007 (which transferred to and vested the interest of Belize Telecommunications Limited in BTL), the PUC claimed that it issued BTL with a new licence to enter into force on 5th June 2007. A copy of this 2007 licence was produced into evidence by PUC.

[4] BTL indicates that it did not apply for a new licence in 2007 and has no record of being issued with same. BTL contends that a new licence was in any event unnecessary since the Vesting Act expressly states that the transfer, vesting and change of name shall not invalidate the terms of any licence granted to Belize Telecommunications Limited. It appears from their submissions that both parties have proceeded as if the licence in issue is the 2002 Licence. This court will also proceed on this assumption. In any event, the terms of both the 2002 and 2007 versions are identical and raise the same points of law by the time this dispute arose in 2022.

[5] Clause 3 of Part 1 of the 2002 Licence states that:

...unless revoked in accordance with the provisions of Condition 27 [the Licence] shall continue in force for a period of Fifteen Years, expiring on December 29, 2017, (the "Renewal Date") and thereafter for consecutive periods of five years (each an "Extension") unless either the PUC or the Licensee serves upon the other not less than one year's written notice (indicating an intention to terminate the Licence) expiring upon as appropriate the Renewal Date or the last day of any Extension.

[6] The initial term of the Licence expired on 29th December 2017. In accordance with clause 3 of Part 1 of the Licence, the term rolled over automatically for a further period of five years expiring on 29th December 2022. I shall refer to this clause 3 as 'the clause 3 rollover provision'.

[7] By letter dated 12th December 2022, BTL wrote to the PUC notifying that the 2002 Licence was set to expire on 29th December 2022 and would automatically renew for a consecutive five-year period in accordance with the terms. On 22nd December 2022, the PUC responded, advising that it was in receipt of legal advice which stated that the clause 3 rollover provision in the Licence is not in consonance with section 15(7) of the Act to which all licences are subject. Consequently, the grant of licences for periods in excess of fifteen years is *ultra vires* the Act and beyond the PUC's powers. The PUC, guided by this advice, was of the view that the 2002 Licence could not automatically rollover for any period beyond fifteen years.

[8] In the letter, the PUC invited BTL's comments on the following proposals:

1. *To issue BTL a new licence to come into force on December 30, 2022. The licence would be similar with all terms and conditions remaining the same, save and except that the expiry date is to be set to December 29, 2023. This ensures that BTL will have continuity of its licence beyond the expiry date of December 29, 2022.*
2. *To initiate a consultative process leading to the updating of the licence conditions to update dangling conditions that may no longer be relevant to the current environment, conditions imposed such as reference public payphone services, and others that are sure to surface during the consultative process. The PUC is of the opinion that a two-year period, commencing January 2023,*

suffices for meaningful engagement with all interested parties leading to a revamped, relevant and adequate licence.

[9] The PUC received no response from BTL and proceeded to issue a new licence for a period of two years. This new licence was issued under cover of a letter dated 29th December 2022 to BTL. I shall refer to this new licence as ‘the new 2022 Licence’.

[10] Having obtained leave on 30th May 2023, BTL filed an application for judicial review of the impugned decision to grant the new 2022 Licence on the following grounds:

- i. The impugned decision of PUC to ‘grant’ instead of to renew the 2002 Licence is unlawful, null and void.
- ii. The impugned decision is illegal, unreasonable, irrational and cannot be justified under any reasonable circumstances.
- iii. The PUC in Part I condition 3 of the expired Individual Licence issued to BTL in 2002 and which came into force on 30 December, 2002 for a period of fifteen (15) years agreed either -
 - (a) to renew the licence, and/or
 - (b) extend the licence for consecutive periods of five (5) years.
- iv. The PUC on or about 29th November 2017 extended the 2002 Individual Licence of BTL for a period of five (5) years which period expired on 29th December 2022.
- v. BTL is now aware, based upon legal advice, that the PUC has no statutory authority or power to grant an extension of an expired Individual Licence.
- vi. BTL has legitimate expectation based on the statutes and regulations of the PUC and the past dealings between the PUC, as regulator, and BTL, as licensee, that the PUC would act in accordance with the law and renew the licence of BTL by adopting a fair procedure or the rules of fairness.
- vii. In deciding to grant a new licence to BTL, the PUC did not give any notice or sufficient notice to BTL, and did not give BTL a fair opportunity to make representations to the PUC and be heard prior to the grant of the said new licence issued for a period of two (2) years.
- viii. The PUC on 22nd December 2022 decided to issue to BTL a new licence to come into force on 30th December 2022 for only two (2) years

without first complying with the requirements of sections 15 and 19 of the Act and the rules of fairness.

- ix. The condition or term of two (2) years the PUC sought to impose as the duration of the 2022 Licence is less favourable than the previous licence or licences issued to BTL.
- x. BTL did not make any application to the PUC for the grant of a new licence and could not have made a request for a new licence except a request for a renewal of an existing Individual Licence.
- xi. The PUC in making the said decision failed to comply with -
 - a) Regulations 5 and 8 of the Telecommunications (Licensing classification, Authorisation and Fee Structure) Regulations 2002 (S.I. No. 110 of 2002) as amended by the Telecommunications (Licensing Classification, Authorisation and Fee Structure) (Amendment No. 2) Regulations 2022 (S.L. No. 163 of 2022) which came into force on 13th December 2022.
 - b) The conditions in Part I Section 3 of the 2002 Licence issued by the PUC to BTL.
- xii. The PUC has no jurisdiction, authority or power to grant a new Individual Licence to an existing licensee under its enabling statutes and regulations.
- xiii. The Individual Licence granted to BTL stated to come into force on 30th December 2022 is therefore illegal, unlawful, null and void. The said "new licence" is a decision taken outside the scope of the authority of the PUC.

[11] In response to BTL's application, the PUC filed the first affidavit of Abraham Teck dated 26th June 2023. Mr. Teck is the director of Regulated Services at the PUC and at paragraph 10, the affiant admitted:

'...that the relevant notice periods in the Belize Telecommunications Act or the Regulations were not followed prior to issuing the Claimant's current licence. The process however, should have been initiated by the Claimant applying for a licence. **If the notice periods were to be complied with, the Claimant's licence would have expired and the Claimant would have been unable to operate lawfully.**' [Emphasis added.]

The Legislative Framework

[12] The dispute in this case surrounds the PUC's statutory powers in respect of telecommunications licensing so it is convenient, at this stage, to set out in detail the provisions of the governing legislation.

[13] Sections 15 and 16 of the Act deal with the grant of licences:

15.–(1) Subject to the provisions of this Act, no person shall provide any telecommunication service except under and in accordance with a telecommunication service licence issued by the PUC to that person under this Part.

- (2) A licence shall be required in order to enable a person to -*
- (a) operate a telecommunication network, whether aeronautical, terrestrial or maritime fixed, mobile or satellite based;*
 - (b) provide telecommunication services that offer real time voice or data services;*
 - (c) operate any system that uses scarce resources such as the radio frequency spectrum, numbering or public rights of way in order to provide telecommunication or broadcasting service to the public.*

(3) A licence shall confer on the licensee the privileges and subject him to the obligations provided in this Act or specified in the licence.

(4) A person who wishes to land or operate submarine cables for the purpose of connecting to a telecommunications network within the territorial waters of Belize under Maritime Areas Act, Cap. 11, shall first obtain a licence from the Minister in accordance with any regulations made by the Minister in that behalf under this Act, and the Minister is hereby authorised to make such regulations.

(5) An application for a licence shall be made in the prescribed manner and shall be accompanied by such fee, if any, as may be prescribed; and within fourteen days after the making of such an application, the applicant shall publish a notice of the application in the prescribed manner.

(6) The PUC shall license such private and public telecommunications service providers as market conditions warrant.

*(7) The duration of the licence shall be for such period **not exceeding fifteen years** as may be determined by the PUC and specified in the licence.*

(8) The PUC shall make or establish regulations and procedures that govern the granting of licences. [Emphasis added.]

16. In granting a licence, the PUC may among other relevant factors, have regard to -

- (a) the public interest and the likelihood of unfair practices;
- (b) any element of national interest, policy or security;
- (c) the technical and electromagnetic compatibility of the application with any other licensed service;
- (d) the extent of technical feasibility and economic reasonableness, and the promotion of universal access throughout Belize; and
- (e) any agreement between Belize or the PUC with any national or international organization relating to telecommunications.

[14] Regulation 5 of the Regulations (as amended) on Individual Licence states:

5. (1) An application for a licence under this Part shall be made in writing in such form and in such manner, and shall contain such information and particulars and shall be accompanied by such details as may from time to time be specified by the PUC.

(2) An application for a licence under this section shall be accompanied by a non-refundable fee as contained in the Schedule to these Regulations.

(3) Within fourteen days after making an application, the applicant shall **publish a notice of the application in two local newspapers with national circulation**.

(4) Upon receipt of the application for an Individual Licence, the PUC shall review the application and notify the applicant within fourteen days of any further information required to process that application.

(5) Before granting an Individual Licence, the PUC shall give notice-

- (a) stating that it proposes to grant an Individual Licence;
- (b) stating the reasons why it proposes to grant the Individual Licence; and
- (c) **specifying the time** (not being less than fourteen days from the date of publication of the notice) **within which representations or objections with respect to the proposed licence may be made;** and shall consider any representations or objections which are duly made and not withdrawn.

(6) A notice under paragraph (4) above shall be given by publishing same in such manner as the PUC considers appropriate for bringing it to the attention of persons likely to be affected by the grant of the licence.

(7) *In deciding whether to approve an Individual Licence, the PUC shall take the following into account:*

- (a) *the matters set out in the application;*
- (b) *any submission received during the process of consultation as set out in paragraph (5) above;*
- (c) *criteria for granting a licence as set out in section 16 of the Act;*
- (d) *other relevant matters.*

(8) *The PUC shall notify the applicant in writing of its decision within ninety days of receipt of the application.*

(9) *Where the PUC decides to grant an Individual Licence it shall issue the licence in conformity with the provisions of the Act and upon payment of the prescribed fees.*

(10) *Where an application is refused, the PUC shall notify the applicant in writing giving reasons for its refusal... [Emphasis added.]*

[15] Section 19 governs the renewal of licences:

19.–(1) *The PUC shall make or establish regulations and procedures that govern the transfer, revocation and modification of licences.*

(2) *Any person who wishes to transfer, renew, modify or vary the terms of a licensee for the operation of a telecommunications network or service issued subject to section 15 of this Act **shall make a written application to the PUC in the prescribed form.***

(3) *On receipt of an application referred to in subsection (2), the PUC -*

- (a) ***shall give public notice of the application in two newspapers and invite any interested person who wishes to object to the application to do so in writing within fourteen days;***
- (b) *shall require the applicant to furnish any additional information that it considers relevant in respect of any installation, apparatus or premises relating to the application.*

(4) *Upon receipt of an application referred to in sub-section (2), the PUC shall, and having regard to section 16 of this Act, determine whether to issue, transfer, renew or vary the terms of the licence.*

...

(12) *The PUC may suspend, vary or revoke, or deny the renewal of a licence or authorisation where –*

- (a) *the licensee contravenes this Act or any other law;*

- (b) *the licensee fails to comply with the terms and conditions specified in the licence;*
- (c) *the licensee fails to pay the requisite fees for the licence, its renewal or any other money owed to the PUC;*
- (d) *it is necessary for reasons of national security or in the public interest;*
- (e) *the licensee fails to comply with an order, bylaw, notice, direction or any associated regulations by the PUC;*
- (f) *the signals in respect of the equipment issued to the licensee interferes with the service of another telecommunications service provider;*
- (g) *the PUC determines the presence of anti-competitive practices.*

(13) Before a licence or authorisation may be suspended, revoked or not renewed, the PUC shall give written notice of its intention to do so and lay out its purpose for such action and provide the licensee with an opportunity to-

- (a) make representation and support his view;*
- (b) correct any breach of the terms and conditions of the licence or any interferences caused to other licence holders. [Emphasis added.]*

BTL's Case

[16] Mr. Lumor states that the PUC has no power in law to extend the 2002 Licence for any period greater than 15 years. He submits that the Act and Regulations create a *lex specialis* or special regime for the grant, renewal, variation and revocation of licences by the PUC. The *lex specialis* cannot be circumvented and/or disregarded by the PUC, as regulator. The mandatory provisions of the Act and Regulations (quoted at paragraphs 13-15 above), which govern the grant of licences, were not followed. Therefore, the PUC had no power to issue the new 2022 Licence.

[17] In his oral submissions, Mr. Lumor argues that while it would be unlawful to extend a fifteen-year licence, the PUC has the power to renew an expired licence for periods of fifteen years or less in accordance with the procedure in section 19 of the Act and the terms of the 2002 Licence. In effect, he draws a distinction between an 'extension' and a 'renewal' with the former being a continuation of the initial 15-year term (in breach of the Act and so unlawful) and the latter being in the nature of a

recommencement of the licence term for periods of 5 years at a time (which does not offend the statutory embargo on terms in excess of 15 years). Therefore, the 2002 Licence is not void for want of compliance with the Act. In this way, he submitted, BTL is an existing licensee and it is possible for the PUC to *renew* the 2002 Licence, as opposed to granting one afresh and this is what it should have done. While this was the proper course to take, the PUC did not engage the process for a renewal as prescribed by the Act and so any renewal in those circumstances would result in a further breach of the Act. In any event, Mr. Lumor submits that when the PUC purported to grant the new 2022 Licence that was in effect a refusal to renew. Section 19 of the Act sets out the grounds on which a renewal may be refused. However, the PUC did not act in accordance with that section when it refused to renew BTL's licence, so the impugned decision was illegal.

[18] According to Mr. Lumor, the 2002 Licence confers a property right on BTL within the meaning of sections 3(d) and 17(1) of the Belize Constitution and the PUC's continued refusal to renew that 2002 Licence constitutes a breach of BTL's constitutional rights. He states that the new 2022 licence is illegal, null and void and in breach of BTL's legitimate expectation that the PUC would act in accordance with the Constitution, the Act, the Regulations, and the clause 3 rollover provision.

[19] Mr. Lumor submits that in the round, the impugned decision of the PUC to grant the new 2022 Licence is wrong in law and blatantly at odds with the provisions of the Act and Regulations. Where the defect is as obvious as it is in this case, the court should not hesitate to grant certiorari and quash the impugned decision. He contends that this result will not mean that BTL will be bereft of a licence since on the authority of **Minister of Energy and Energy Affairs v Maharaj**,¹ BTL remains a *de facto* licensee of the PUC and entitled to operate in Belize.

¹ [2020] UKPC 13.

PUC's Case

[20] According to Mr. Mendes, the 2002 Licence was issued in breach of section 15(7) of the Act in that it provided for a term in excess of fifteen years, through the rollover clause 3 provision. Clause 3 allowed for extensions of the 2002 Licence by *ad infinitum* five-year renewals. This was in breach of section 15 of the Act. By the year 2022, no amendment or modification could rescue the 2002 Licence from being unlawful. Indeed any further extension in accordance with its terms would itself be a further breach of the law and beyond the PUC's powers.

[21] With respect to renewing the 2002 Licence, Mr. Mendes submits that the PUC could not lawfully renew the 2002 Licence for two reasons. First, it cannot renew without an application being made in accordance with the procedure established by the Act and the Regulations. The statutory procedure included a process by which notice of the intention to grant a licence is given to members of the public, with a view to receiving their representations and/or objections. To renew the 2002 Licence without following this statutory procedure would further breach the fifteen year limitation on licences provided for in section 15(7) of the Act and, at the same time, circumvent the procedure established by law for the grant of licences. He is *ad idem* with Mr. Lumor in this outcome. The second reason is that the 2002 Licence was itself unlawful.

[22] Additionally, Mr. Mendes concedes that the requirements for the grant of licences provided for in the Regulations were not followed when the PUC granted the new 2022 Licence. However, he submits that this procedural defect does not invalidate the PUC's decision. Mr. Mendes relies on the case of **R v Soneji**² for the proposition that where a decision is made in circumstances where the mandatory provisions of the statute is not complied with, it does not follow that the decision is automatically invalidated. Thus, he urges the court, in the exercise of its discretion, to not grant the relief sought in BTL's fixed date claim form.

² [2006] 1 AC 340; [2005] 3 WLR 303 [Soneji].

Issues

[23] The issues for determination are:

1. Whether the only lawful course open to the PUC in the circumstances was to renew the 2002 Licence?
2. Is BTL a *de facto* licensee?
3. Whether the grant of the new 2022 Licence is invalidated by the PUC's failure to comply with the procedural requirements in the Act and Regulations?

Analysis

The question of a renewal

[24] While there is no dispute between the parties that a renewal could not be granted because an application was not made pursuant to section 19(1) of the Act and the procedure for renewal was not engaged, it remains Mr. Lumor's case that the only lawful course of action open to the PUC is to 'renew' the 2002 Licence. Section 19(2) requires that any person who wishes to renew the terms of a licence for the operation of a telecommunications network or service, issued subject to section 15 of the Act, shall make a written application to the PUC in the prescribed form. This section presupposes that the licence to be *renewed* complies with section 15 since only a licence '*issued subject to section 15*' is capable of renewal. For a licence to be subject to section 15, it must not be at odds with the terms of that section.

[25] 'Renewal' is not defined in the Act so in accordance with the usual principles of statutory interpretation, the first step is to have regard to its literal meaning. According to the Oxford Dictionary,³ the definition of 'renewal' is to 'begin again after an interruption' or 'extend the period of validity of a licence etc.' This definition makes trifling Mr. Lumor's attempt at a distinction between renewal and extension.

³ Stevenson, A. (Angus) (2010) Oxford Dictionary of English, New York: Oxford UP.

[26] Section 15(7) provides that 'the duration of the licence shall be for such a period not exceeding fifteen years.' Any licence for a period in excess of fifteen years is not valid for want of compliance with section 15(7). The 2002 Licence provided for an initial fifteen-year term followed by a process of automatic renewals to continue indefinitely unless either the PUC or the BTL gave at least one year's notice to the contrary. This is a clear circumvention of section 15(7). That was not a licence that the PUC had the power to issue. The 2002 Licence was not issued '*subject to section 15*' and was not valid in the first place. In my judgment also, the expiry of the 2002 Licence was not a mere interruption in the BTL's authorization to operate. It was an unlawfully issued licence and unenforceable.

[27] Since the 2002 Licence is unlawful for being for a term in excess of fifteen years, the conditions whereby the PUC agreed to renewals after the initial fifteen-year period is also unlawful and cannot be performed. Similarly, the provisions in the 2002 Licence allowing for amendments and modifications to be made require a valid licence to be in force. There was no valid licence in force and no property right (constitutional or otherwise) vests in the holder of the invalid licence. The provisions in the invalid licence (i.e. the 2002 Licence) that speak to the ability to amend or make changes are themselves invalid and unenforceable. Consequently, Mr. Lumor's submission that the 2002 Licence could be modified is unsustainable.

[28] Even if the 2002 Licence was valid and the *intra vires* initial fifteen-year period could be severed from the balance of the term clause, the 2002 Licence ceased being valid in 2017 when the fifteen-year period ran out since it no longer complied with section 15. There was nothing valid to extend. The 2002 Licence cannot be renewed. A fresh licence was then required.

De facto licensee?

[29] Mr. Lumor's submission that BTL is a *de facto* licensee is also misplaced. He relies on the case of **Maharaj v Minister of Energy and Energy Affairs**.⁴ In **Maharaj**, the

⁴ [2020] UKPC 13 [Maharaj].

appellants were owners and operators of certain petrol service stations in south Trinidad. These stations were operated under annual retail licences issued by the Minister. In 2010, the Minister decided that the terms and conditions of retail marketing licences needed to be reviewed. From that time, the Minister ceased to issue new licence documents. However, service station operators, including the appellants, continued to pay their annual licence fees to the Minister. The Minister issued receipts acknowledging the payments, continued to carry out inspections and allowed the operators to continue trading as before. After the alleged discovery of certain infractions at the service stations, the Minister suspended their operations. The appellants sought judicial review of the decision of the Minister contending that the suspension of operations was tantamount to the suspension of the retail licence and that the Minister had no power so to do. At the trial, the Minister took the position that the appellants were not licence holders and, therefore, they had no right to operate the service stations.

[30] The Board agreed with the local courts that at the time the appellants' service stations were closed by the Minister, they were to be regarded as having *de facto* retail licences. By accepting licence fees paid by the appellants, the Minister created a legitimate expectation on their part that they would be treated as licensees on the same terms as before for each period for which they tendered payments of the licence fee and such payments were accepted. The legitimate expectation was reinforced by the manner in which the Minister proceeded when he closed their service stations, by purporting to suspend their licences and sending notices of non-compliance, which referred to the Act.

[31] Those facts are not this case. Whereas in **Maharaj**, the licences issued prior to 2012 were lawful, I have found that the 2002 Licence in the proceedings before me was unlawful, having been issued for a term in excess of which the PUC had the power to grant a licence. In this case, the conduct of the PUC was to notify BTL that the 2002 Licence was unlawful and could not be renewed/extended and to invite an application. The PUC then issued the new 2022 Licence. There was no course of

conduct as in **Maharaj**, where fees were collected and the gas station operators treated as if they held valid licences. Finally, in **Maharaj**, the non-issue of licences after 2012 was a voluntary decision of the Minister, but in the instant case the 2002 Licence was invalidated by operation of law.

[32] Consequently, BTL could not have been under any legitimate expectation of the benefit of an unlawful licence – an expectation which is a prerequisite for the creation of ‘*de facto*’ licences. The well-known principle of law is that a claimant, in this case BTL, cannot derive a legitimate expectation from a public authority to do something that is contrary to law. As Judge J put it in **R v Board of Inland Revenue ex. parte MFK Underwriting Agencies Ltd**⁵ ‘no legitimate expectation could arise from an ultra vires relaxation of the relevant statute by the body responsible for enforcing it.’ The promise to renew in the 2002 Licence is plainly contrary to the Act. The PUC’s conduct in issuing the 2002 Licence and in taking no action to prevent the 2002 Licence from purportedly rolling over between 2017 and 2022 is immaterial since it does not remove the illegality which stains the 2002 Licence. In my judgment, unlike the appellants in **Maharaj**, BTL is not a *de facto* licensee.

Validity of the new 2022 Licence

[33] This case presents an interesting conundrum. I have found that the 2002 Licence cannot be renewed and that BTL is not a *de facto* licensee by virtue of any legitimate expectation of the performance of the 2002 Licence. The PUC concedes that it issued the new 2022 Licence without following the procedural requirements of the Act and the Regulations. There is no dispute that as the regulator, the PUC is vested with the power to issue, renew, modify and vary licences, which must be done within the confines of the legislative regime. The PUC erred in not following the procedural requirements. The question for determination becomes, therefore, whether the decision to issue the new 2022 Licence is invalidated by the PUC’s failure to comply with the procedure for the issue of Licences. The correct approach when dealing

⁵ [1990] 1 ALL ER 91,114.

with this is found in the cases, which suggest that it is ultimately a question of statutory construction.

[34] Traditionally, the law drew a distinction between mandatory and directory requirements where if the requirement was mandatory, a failure to comply with it invalidated the act in question but if the requirement was merely directory, the act was not invalidated. These distinctions have since fallen out of fashion and the law has since moved on to a more flexible analysis. The modern approach is outlined by Lord Steyn in **Soneji**. After reviewing the authorities which included not only English cases but the Privy Council decision from Trinidad and Tobago of **Charles v Judicial and Legal Service Commission**⁶ (described as of some importance) and decisions of the Supreme Court of Canada, New Zealand and the Australian High Court, Lord Steyn at paragraph 23 confirmed that:

‘... the rigid mandatory and directory distinction and its many artificial refinements have outlived their usefulness. Instead, as held in Attorney General’s Reference (No 3 of 1999), **the emphasis ought to be on the consequences of non-compliance and posing the question whether Parliament can fairly be taken to have intended invalidity**. That is how I would approach what is ultimately a question of statutory construction.’ [Emphasis added].

[35] This approach was followed by the Privy Council in **The Central Tenders Board v White**⁷:

‘23. In R v Soneji [2006] 1 AC 340 Lord Steyn examined the development of this branch of the law, not only in the United Kingdom but in other common law countries including Australia, Canada and New Zealand. He cited with approval, at para 22, the statement of Evans JA in Society Promoting Environmental Conservation v Canada (Attorney-General) (2003) 228 DLR (4th) 693, 710 that:

“the more serious the public inconvenience and injustice likely to be caused by invalidating the resulting administrative action, including the frustration of the purposes of the legislation, public expense and hardship to third parties, the less likely it is that a court will conclude

⁶ [2002] UKPC 34.

⁷ [2015] UKPC 39.

that legislative intent is best implemented by a declaration of invalidity.”

[36] In **Mariette Warrington v Dominica Broadcasting Corporation**,⁸ the CCJ confirmed this state of the law. At paragraph 39, Barrow JCCJ lauded the ‘good sense of the modern approach’ which he had set out at paragraph 38:

[38] The observation was also made that courts have always accepted that it is unlikely that it was the purpose of the legislation that an act done in breach of a statutory provision should be invalid, if public inconvenience would be a result of the invalidity of the act. This is consistent with the observation of Brennan CJ in the Project Blue Sky case that “If there has been non-compliance with a provision which does not affect the ambit or exercise of the power, the purported exercise is valid.” More recently, the New Zealand Supreme Court stated in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* “the correct modern approach to procedural requirements is for the courts to focus not on literal classification but rather on what should be the legal consequence of non-compliance with a statutory or regulatory provision.”

[37] In my judgment, this is the approach applicable in Belize. The court’s role is to assess the consequences of the non-compliance and then determine whether Parliament can fairly be taken to have intended invalidity. The latter question will involve an analysis of the consequences of invalidating the administrative action. It is an exercise in the degree and seriousness of non-compliance set in the context of the place of the procedural requirement in the overall scheme of the Act and Regulations. A broad, pragmatic and functional inquiry is required and may not always follow a strict mathematical formula. See **Society Promoting Environmental Conservation v Canada (Attorney-General)**.⁹

[38] It is from this perspective that I approach the matter. Section 15(1) of the Act prohibits anyone from providing a telecommunications service except in accordance with a service licence issued by the PUC to that person. Subsection 5 requires an application for a licence to be made in the prescribed manner and for a fee to be paid. Regulation 5 stipulates that the application be in writing and contain such

⁸ [2018] CCJ 31 (AJ).

⁹ (2003) 228 DLR (4th) 693; [2003] 4 CF 959 at paragraph 38.

information and particulars as required by the PUC. Within 14 days of applying, the applicant must publish the application in two local newspapers of national circulation. Before the licence is granted, the PUC must give notice stating why it proposes to grant the licence and invite and consider all representations duly given in a process of consultation. When this is completed, the PUC must then decide whether to approve an individual licence by taking account of the matters set out in the application, any submissions received during the consultation period, the criteria in section 16 of the Act and any other relevant matter.

[39] Section 15(1) of the Act vests the PUC with the power to issue a telecommunication service licence. By sections 15(8) and 56, the PUC is required to make or establish regulations and procedures that govern the granting of licences. I do not understand the latter sections as being debilitating of the power in section 15(1) to grant licences. Instead, it envisages a procedural scheme to regulate the exercise of the power to grant. No doubt the aim is to ensure standardization of applications and the process for the treatment of the same. There is no controversy that when Parliament required the promulgation of the Regulations, it intended that the PUC and all applicants comply with those provisions. The enquiry must then concentrate on the consequences of non-compliance with this statutory regime.

[40] No application was made for a new licence and the publication and consultation exercises were not completed. The procedural failings are not in dispute. It is significant, however, that nowhere in the Act or the Regulations it is stated that no licence may ever be granted except by way of application. The PUC always has the power to issue licences. The question is whether the licence issued is one contemplated by the Act. To assist the PUC in fulfilling this design, Parliament set up the statutory programme for the issue of licences in the Act and Regulations as discussed above.

[41] The purpose of the application and consequent consultative exercise is to allow for public participation in the licencing process and to give the PUC insights into matters of which it may not ordinarily have been aware. Such insights include but are not

limited to the public's opinion of the applicant's business practices. In my judgment, the public is denied the opportunity to participate, and the PUC does not enjoy the benefit of public input when the regulatory scheme is not complied with. These are the main consequences of non-compliance. The consultative exercise thus aids the PUC in discharging its public functions whilst simultaneously affording transparency in the performance of its responsibilities.

[42] In the circumstances of this case, BTL is no stranger to the telecommunications landscape of Belize, having operated here since 2002 so it is not a situation where a new entrant is being unleashed onto the market unbeknownst to the public. In fact, it emerged in submissions that BTL is a major, if not the major and most prominent, telecommunications provider in the country. It is against that background that the grant of the new 2022 Licence must be considered. Because the 2002 Licence did not comply with the Act, the result was that BTL (which is responsible for a significant portion of Belize's ability to communicate effectively) was operating without an individual licence in plain contravention of section 15(1) and (2) of the Act. The issuance of the new 2022 Licence by the PUC was its way to ensure continuity of service from BTL, while the full gamut of the licensing process plays out. It is an interim solution to allow the public to still have the statutory opportunity to make representations or objections, which the PUC is required to consider. It is not a cure of the statutory deficiencies but a plaster in the public interest, which allows BTL to operate lawfully in fulfilling its contractual obligations. If the new 2022 Licence is invalidated, it can have significant consequences on the economic, security, social, health, and political well-being of Belize.

[43] There is no evidence presented to me that the PUC has a history of flouting the requirements of the Act and Regulations save for the misunderstanding of the prohibition on granting a licence for more than fifteen years, which was a mistake of law. Indeed, there is at least one other service provider whose licence was allegedly similarly tainted so there can be no argument that BTL was targeted for disadvantage. It must also be noted that BTL itself accepted the 2002 Licence without recognizing its conflict with the Act, so the error was not only the fault of the

PUC. I do not accept Mr. Lumor's argument that the PUC was the regulator so must take sole ownership of the error, and not the licensee, BTL. In my judgment, BTL is under the same overarching duty as the PUC to comply with the Act. Further, Parliament would never have intended the outcome of a procedural error (committed by both parties) to be total invalidity, whereby both would be prevented from discharging their functions to the public. In any event, as soon as the PUC received advice of the error in the 2002 Licence and its consequences in law, the PUC sought to embark on a course of conduct to bring the licensees (BTL and at least one other service provider) into conformity with the Act.

[44] The PUC proposes to remedy the defective procedure as soon as possible and is on record as having invited BTL to make an application so that a fresh long-term licence may be issued in accordance with the law. In fact, the evidence is that the PUC has every intention of granting a long-term licence. The affiant in the affidavit dated 26th June, 2023 stated that the PUC, 'fully intends to issue to the Claimant a long-term licence after the two-year consultative process and, as such, none of the Claimant's long-term contracts will be affected.' The new 2022 Licence is only intended to be a temporary measure to allow for regularization or bringing its procedures into compliance with the Act. Neither is there any evidence that the PUC's conduct in this case, to grant a licence without engaging the procedural steps set out in the Act and Regulations, will become its normal practice. Indeed, if that is the case, such conduct is liable to be restrained by the court's exercise of its supervisory jurisdiction to prevent abuses of power on the appropriate application.

[45] Additionally, there is no prejudice to BTL with the grant of the new 2022 Licence in the way it was done since the alternative would be a cessation of operations as there would be no licence in force. See section 15(2) of the Act. Conversely, the public inconvenience and hardship that would result if the new 2022 Licence is invalidated is likely to be significant with repercussions *inter alia* in national security, the ability to communicate with emergency services and social communications. When held in the balance, the public interest must weigh strongly as against invalidation of the PUC's actions.

[46] In the premises, an objective appraisal of the intent of Parliament points against the invalidation of the new 2022 Licence and I so hold. I will dismiss the application and order the parties to bear their own costs.

Disposition

[47] It is ordered that:

1. The application for judicial review is dismissed.
2. Each party is to bear its own costs.

Martha Lynette Alexander
High Court Judge