THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2010 SKCA 32 Date: 20100315

Between: Docket: 1521

Telus Corporation, Telus Mobility, B.C. Tel, Telus Communications (B.C.) Inc., Clearnet Communications Inc., and Alberta Government Telephones (AGT) ("Telus")

(Defendants) Prospective Appellants

- and -

Mark Frey, Trudy Betthel, et al

(Plaintiffs) Prospective Respondents

Before:
Smith J.A.

Counsel:
Gordon Kuski, Q.C. for the Prospective Appellants
E.F.A. Merchant, Q.C., Casey Churko, Nicholas Robinson, Kent E. Thomson, F. William Johnson, Jeff Grubb, Robert Leurer, Q.C. and Kathryn Podrebarac for the Prospective Respondents

Appeal:
From: QBG 1611/2004, J.C. of Regina
Heard: February 24, 2010
Disposition: Leave granted
Written Reasons: March 15, 2010
By: The Honourable Madam Justice Smith

SMITH J.A.

[1] This fiat addresses nine applications for leave to appeal, all arising out of decisions of Gerein J. in relation to an application by the proposed respondents, Mark Frey, et al, for certification as a class action of a claim advanced against numerous providers of cellular or wireless voice services operating across Canada. The claim relates to allegedly improperly imposed "system access fees" charged to their customers by the named defendants over a period of approximately 20 years.

General Background

[2] Certification of the proposed action was initially denied by the certification judge in a fiat dated July 18, 2006 (2006 SKQB 328), on the basis that, although all the other criteria of s. 6 [now s. 6(1)] of *The Class Actions Act*, S.S. 2007, c. C-12.01 had been met, the plaintiffs had failed to satisfy the requirements of s. 6(e), as all of the proposed representative plaintiffs were found to be unsuitable and the proposed litigation plan was inadequate. The plaintiffs were given leave to renew their application to further address these deficiencies. In this fiat, Gerein J. held that a number of proposed causes of action were not supported by the pleadings. These included breach of contract, breach of duty to inform, deceit, misrepresentation and negligence, collusion and conspiracy, breach of fiduciary obligation, and breach of competition and consumer protection legislation. However, he concluded that the pleadings did disclose a cause of action for unjust enrichment in that, if the facts as

pleaded were accepted as true, it was open to a court to find that the defendants had unlawfully obtained monies from the plaintiffs and must account for it.

[3] In this initial fiat [2006 SKQB 328], Gerein J. also found that the application established an identifiable class, described as follows:

> All residents of Canada who have purchased wireless services from any of the defendants since April 1, 1987 and paid a fee variously described as a (sic) "system access fees", "system administration fees", "license administration fees" or "system license administration fees." [at para. 56]

This was modified pursuant to what was then s. 8(2) of the *Act* to divide the class into resident and non-resident subclasses. Under the then-operative provisions of the *Act*, the resident subclass would be certified on an opt-out basis if the action was certified, but the non-resident subclass would be certified on an opt-in basis.

[4] Further, based on the single cause of action found, the claim was found to support these common issues:

> (1) whether the defendants wrongfully collected from the plaintiffs certain fees variously described as "system access fees", "system administration fees", "license administration fees" or "system license administration fees" and must now account for those fees; and
>
> (2) what is the amount of the loss sustained based on the fees collected if an accounting is to be made. [at para. 65]

[5] And, finally, a class proceeding was found to be the preferable procedure for the resolution of the common issues identified.

[6] Approximately eleven months later, the plaintiffs renewed their application for certification, putting forward new proposed representative plaintiffs and a new litigation plan. By fiat dated September 17, 2007 [2007 SKQB 328] Gerein J. determined that the s. 6(e) deficiencies had been met and ordered that the action be certified. Colin Chatfield, a resident of Saskatchewan, was designated as the sole representative plaintiff.

[7] On April 1, 2008 amendments to the *Act* were proclaimed into force, permitting certification of a national class on an opt-out basis. The plaintiffs then moved to amend the certification order to make it a national class action on an opt-out basis. By fiat dated May 7, 2009 [2009 SKQB 165] Gerein J. dismissed this application, holding the application involved a retroactive application of the amendments to the *Act*, which, being substantive and not merely procedural in nature, could not, on proper interpretation, be applied retroactively.

[8] Of the nine applications before me, six are brought by individual defendants or groups of defendants, as I will set out below, seeking leave to appeal the certification order dated February 13, 2008 and issued April 24, 2008 in accordance with the fiats of Gerein J. dated July 18, 2006 and September 17, 2007. These applications are as follows:

1. Court File 1519: Proposed Appellants Microcell Communications Inc., Microcell Solutions Inc., Fido Solutions Inc., Rogers Inc. and Rogers Wireless Inc. (Hereafter, “the Rogers Group”).

2. Court File 1521: Proposed Appellants Telus Corporation, Telus Mobility, B.C. Tel, Telus Communications (B.C.) Inc., Clearnet Communications Inc. and Alberta Government Telephones (AGT) (Hereafter, "the Telus Group").
3. Court File 1522: Proposed Appellant: Bell Aliant Regional Communications, Limited Partnership (Hereafter, "Bell Aliant").
4. Court File 1523: Proposed Appellant: Bell Mobility Inc. (Hereafter, "Bell Mobility").
5. Court File 1524: Proposed Appellant: MTS Allstream Inc. (formerly MTS Communications Inc., Hereafter, "MTS").
6. Court File 1525: Proposed Appellants: Saskatchewan Telecommunications and Saskatchewan Telecommunications Holding Corporation (collectively, "SaskTel").

[9] Two of the defendants have also brought separate additional applications for leave to appeal. Bell Mobility seeks leave to appeal one aspect of an order of Gerein J. dated February 20, 2008, subsequent to the certification order, holding that Saskatchewan is the proper forum for a class action against Bell Mobility (Court file 1598). Bell Aliant seeks leave to appeal another aspect of the same order, which ordered that the Court of Queen's Bench for Saskatchewan has jurisdiction *simpliciter* over Aliant Telecom Inc., a predecessor of Bell Aliant, in this action (Court file 1599).

[10] Finally, the plaintiffs in the original action seek leave to appeal in relation to three matters (Court file 1773): (i) another aspect of the order of

Gerein J. of February 20, 2008, which dealt with an application brought by RWI, Fido and Telus pursuant to s. 8(1) of *The Arbitration Act, 1992*, S.S. 1992, c. A-24.1, amending the certification order to exclude from the certified class any customer bound by an arbitration clause with any of those defendants; (ii) the May 7, 2009 order, which dismissed the plaintiffs' application to amend the certification order to certify the action for a national non-resident class on an opt-out basis; and (iii) another aspect of the May 7, 2009 order wherein Gerein J. denied the plaintiffs' application to add Bell Canada, BCE and entities related to a contemplated merger of BCE as parties to the action.

[11] Although the plaintiffs filed a notice of motion indicating on Court file 1773 that they intended to apply for leave to appeal the above noted orders, no further material was filed on this application and, in particular, no draft notice of appeal was filed, setting out the grounds of the proposed appeal, as is required by the Rules. Nonetheless, the parties had agreed, in July, 2009, that this application would be heard together with the defendants' various applications for leave to appeal. The plaintiffs unsuccessfully sought very late in the day to adjourn their application, but the adjournment was denied and argument on this application was heard.

[12] In addition to the merits of the various applications for leave to appeal, the Court was also asked to address a preliminary objection to an affidavit filed by the proposed Respondents in relation to the six applications for leave

to appeal the certification order. Before turning to the applications for leave to appeal, I intend to address that matter.

[13] The affidavit filed raises a number of problems, but I am content to deal with the issue on the basis that, taking the proffered evidence at its highest, it is not relevant to the issue before me. Essentially, if the affidavit is relevant and probative at all, it relates to the ultimate merits of the claim the plaintiffs seek to assert in the class action at issue. However, the question before me is not the potential merit or merits of that claim, a consideration not to be decided on the certification application, but, rather, as I will indicate below, the merits of the proposed appeals for which leave is sought. This is an entirely different matter and the affidavit does not speak to it. Accordingly, the proffered affidavit is not admissible for the purposes of these applications. Given this determination, it is not necessary for me to address the more general argument advanced by the Rogers Group, in particular, that evidence as to the merits of the order from which leave to appeal is sought is never admissible on an application for leave to appeal, and I make no comment on that general proposition.

Analysis

General Principles

[14] It is now well established that, on applications for leave to appeal pursuant to s. 39(3) of *The Class Actions Act*, the test to be applied is that of merit and importance, as set out by this Court in *Rothmans, Benson & Hedges*

Inc. v. Saskatchewan, 2002 SKCA 119, 227 Sask. R. 121, where Cameron J.A. wrote as follows:

> 6 The power to grant leave has been taken to be a discretionary power exercisable upon a set of criteria which, on balance, must be shown by the applicant to weigh decisively in favour of leave being granted: *Steier v. University Hospital*, [1988] 4 W.W.R. 303 (Sask. C.A., *per* Tallis J.A. in chambers). The governing criteria may be reduced to two-each of which features a subset of considerations-provided it be understood that they constitute conventional considerations rather than fixed rules, that they are case sensitive, and that their point by point reduction is not exhaustive. Generally, leave is granted or withheld on considerations of merit and importance, as follows:
>
> First: Is the proposed appeal of sufficient merit to warrant the attention of the Court of Appeal?
> *
> Is it *prima facie* frivolous or vexations?
> *
> Is it *prima facie* destined to fail in any event, having regard to the nature of the issue and the scope of the right of appeal, for instance, or the nature of the adjudicative framework, such as that pertaining to the exercise of discretionary power?
> *
> Is it apt to unduly delay the proceedings or be overcome by them and rendered moot?
> *
> Is it apt to add unduly or disproportionately to the cost of the proceedings?
> Second: Is the proposed appeal of sufficient importance to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal?
> *
> does the decision bear heavily and potentially prejudicially upon the course or outcome of the particular proceedings?
> *
> does it raise a new or controversial or unusual issue of practice?
> *
> does it raise a new or uncertain or unsettled point of law?
> *
> does it transcend the particular in its implications?

[15] In relation to the question of merit, I note also the comments of Jackson J.A. in relation to an application for leave to appeal a certification order in *Wuttunee v. Merck Frosst Canada Ltd.*, 2008 SKCA 79, with which I agree, that, as the right to appeal in the *Act* is not limited to a question of law alone it is not necessary for the chambers judge, on this application, to pass on all the proposed grounds of appeal or to state a question to be decided on appeal. Further, particularly where leave to appeal is granted, it is preferable in these reasons to say no more than is necessary as to the merits of the proposed appeal.

[16] With these considerations in mind, I turn to the various applications before me.

The six applications for leave to appeal the certification order

[17] Without going into detail in relation to the individual arguments raised on these six applications, the proposed appellants raise a number of potential grounds for appeal. While findings in relation to all five of the criteria for certification are challenged, I will address only three.

[18] Generally, all of the proposed appellants take the position that Gerein J. erred in finding that the pleadings disclosed a reasonable cause of action in unjust enrichment, having found that the pleadings were insufficient to support causes of action in breach of contract, misrepresentation, breach of fiduciary duty, conspiracy and statutory entitlement, for no other allegation of unlawfulness or injustice remained in relation to the payments at issue.

Some of the defendants also argue that this cause of action is necessarily defeated by or inconsistent with the plaintiffs' pleading that the payments were collected pursuant to contracts, which would constitute a "juristic reason" for the alleged enrichment.

[19] All of the proposed appellants take the position that Gerein J. erred in finding common issues, arguing, generally, that the class certified is so large and the scope of the order so sweeping that the circumstances necessarily vary among the different carriers and their customers, over time, and even, to the extent that the respondent appears to rely, generally, on allegations of oral misrepresentation as to the nature of the impugned fees, from customer to customer even in relation to a single carrier.

[20] Finally, most of the proposed appellants wish to challenge the legitimacy of certifying an action with only one proposed resident representative plaintiff who does not and cannot have a cause of action as against the out of province carriers. These proposed appellants wish to argue that it is necessary to have a representative plaintiff who has a cause of action against each named defendant.

[21] In my view, these issues meet the test of merit and importance. They are not *prima facie* frivolous or vexatious or destined to fail in any event in light of the scope of the right to appeal. Nor are they apt to unduly delay or add to the cost of the proceedings in light of the history of these proceedings to date. In relation to importance, it is clear, in my view, that the success of the appeal is of great importance to the proposed appellants in these proceedings, and

that the result will bear heavily on the outcome. The issue of the need for a representative plaintiff for each defendant raises a new issue of practice, undecided in this Province. A decision in relation to the viability of the cause of action in unjust enrichment could address so far unsettled issues of law.

[22] Leave to appeal the certification order is granted.

The applications of Bell Mobility in relation to forum non conveniens and of Bell Aliant in relation to jurisdiction simpliciter.

[23] These challenges are based, generally, on allegations that these prospective appellants did not do business in Saskatchewan, and their customer base was not in the Province. Bell Mobility argues that Gerein J. erred in failing to consider the issue of *forum non conveniens* prior to or as part of the motion for certification. In fact, the issue was considered after the certification decision had been made and relied on the fact of the certification decision as a reason to dismiss Bell Mobility's application. Second, Bell Mobility argues that Gerein J. erred in failing to consider the normal factors for determining this issue, namely: that Bell Mobility does not do business, has no offices or assets in, no ability to provide wireless services in and does no sales promotion in Saskatchewan. Bell Mobility says that its only connection to the Province is that a tiny percentage of its customers received bills in Saskatchewan for services provided outside the Province.

[24] Bell Aliant argues that it was not ordinarily resident in Saskatchewan and that there is no real and substantial connection between Saskatchewan and the facts alleged which ground the proceedings against it.

[25] In my view, both of these issues meet the requirements of merit and importance. This case is unusual in that it seeks to combine in one action claims of different groups of consumers against distinct defendants, many of which are, collectively, not resident or operating in Saskatchewan. For this reason, these issues merit consideration by this Court.

[26] Leave to appeal is granted in relation to these applications.

The plaintiffs' application for leave to appeal

[27] The plaintiffs' application for leave to appeal the dismissal of their application to amend the certification order to an order in relation to a national class on an opt-out basis in accordance with the amendments to the *Act* must be granted. I acknowledge the deficiency of the material filed in relation to this application in that no draft notice of appeal was filed. However, in this case, the order of Gerein J. clearly raises an issue of law, for it was based entirely on his interpretation of the new amendments, and the ground of appeal is therefore clearly apparent. This matter is not, in my view, frivolous or vexatious or bound to fail in light of the appellate standard of review. Nor will it unduly increase the costs of or unduly delay the proceedings. In fact, counsel made it clear that he was seeking leave only in the case that the defendants were granted leave to appeal. In addition, the issue is of importance both in relation to these proceedings and in relation to the general proposition of law relied upon.

[28] Leave to appeal is granted in relation to this issue. However, the appellants are to file a formal notice of appeal setting out the grounds of appeal within ten days of the date of this fiat, in accordance with the Rules.

[29] Leave cannot be granted in relation to the other two orders sought to be appealed. On the issue of the order of Gerein J. not to allow the action to proceed in the face of arbitration clauses, in relation to certain customers of the Telus Group or the Rogers Group, the application cannot pass the test of merit. First, the application for leave to appeal was not brought on a timely basis and application to extend the time to appeal was made only on an informal basis during the hearing of the appeal. More significantly, this order was made pursuant to s. 8 of *The Arbitration Act, 1992, supra* and that *Act* specifically provides in s. 8(6) that there is no appeal from the court's decision pursuant to that section. The proposed appeal is therefore destined to fail in any event.

[30] In relation to the appeal from the refusal of Gerein J. to add Bell Canada, BCE and entities related to the contemplated merger of BCE as parties, it is my view that the proposed appellants' failure to file the required material indicating its proposed grounds of appeal is itself fatal to this application.

[31] The history of this matter is instructive. On February 21, 2005, BCE Inc. and Bell Canada applied to have all causes of action in this matter struck as against them on the grounds that they did not, at the relevant time, carry on business as a wireless or cellular communications service provider. Bell

Mobility Cellular Inc. argued that it was amalgamated with Bell Mobility in February 2002 and was therefore a non-existent corporation. By fiat released July 18, 2006, Gerein J. struck the claim against these three parties and this decision was not appealed.

[32] Subsequently, at the same time that they sought to amend the certification order to a national class action on an opt-out basis (after the April 1, 2008 amendments to the Act), the plaintiffs also sought to add BCE Inc., and Bell Canada as well as two entities, BCE Amalco and 6533458 Canada Inc., related to a contemplated takeover of BCE.

[33] In his decision of May 7, 2009, Gerein J. dismissed this application on a number of grounds. He found that the last two entities were improper because the BCE merger never occurred and these two entities never came into existence. With regard to Bell Canada and BCE Inc., he refused the plaintiffs' submission that they effectively controlled and dominated Bell Mobility, finding there were no grounds to pierce the corporate veil in the circumstances. Moreover, and most significantly, he found that it was not open to him to revisit his earlier decision to strike these parties.

[34] I am unable to conclude on the material before me that there is even *prima facie* merit to the proposed appeal. Accordingly, the application for leave to appeal this aspect of the order of Gerein J. is denied.

Conclusion

[35] Leave to appeal is granted in relation to the proposed appeal against the certification order in files 1519, 1521, 1522, 1523, 1524, and 1525. Leave is granted to Bell Mobility on file 1598 to appeal the refusal of Gerein J. to find that Saskatchewan is *forum non conveniens* in relation to the claim against Bell Mobility. Leave is also granted to Bell Aliant on file 1599 in relation to the order that Saskatchewan has *jurisdiction simpliciter* in relation to Bell Alliant. Leave is granted to Frey et al in relation to the application for leave to appeal the denial of their application for an amendment to the certification order pursuant to the amendments to the *Act* in relation to certification of a national class action on an opt-out basis. Leave is denied in relation to the other two proposed appeals by these parties.

[36] The parties have asked that these appeals be consolidated. That does not seem to be necessary in the circumstances of this case, but an order will go that all the appeals will be heard together.

[37] There will be no order as to costs.

DATED at the City of Regina, in the Province of Saskatchewan, this 15th day of March, A.D. 2010.

"Smith J.A."

SMITH J.A.