Anderson **v**. *Bell Mobility Inc.*, 2014 NWTSC 20

Date: 2014 03 17
Docket: S-1-CV 2007000247

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JAMES DOUGLAS ANDERSON and SAMUEL ANDERSON
on behalf of themselves, and all other members of a class
having a claim against Bell Mobility Inc.

Plaintiffs

AND

BELL MOBILITY INC.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Keith Landy and David Fogel	Counsel for James Douglas Anderson and Samuel Anderson
Robert Deane and Brad Dixon	Counsel for Bell Mobility Inc.

REASONS FOR JUDGMENT
(Costs of Liability Trial)

INTRODUCTION

[1] Counsel for the Andersons seek costs against Bell Mobility based upon their success in the liability trial of this class action.

[2] The Andersons first seek an award calculated on an hourly rate. I previously rejected their argument for this type of calculation in the certification costs

decision, cited at *Anderson v. Bell Mobility Inc.*, 2011 NWTSC 28, and my views have not changed.

[3] Accordingly, the issue to resolve is whether the Andersons are entitled to basic or enhanced costs under the tariff of costs in Schedule A of the *Rules of Court*.

BACKGROUND

[4] This is a class action based upon Rule 62, the common interest rule, rather than a class action statute. The general principles to be followed are set out in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, (*Western Canadian Shopping*).

[5] As a result of the certification decision, the following certified common issues proceeded to a 4-day liability trial in March 2013:

1. Do the service agreements between the class members and Bell Mobility expressly require Bell Mobility to provide 911 live operator service to class members?

2. Do the service agreements of Bell Mobility have an implied term based on custom or usage or as the legal incidents of a particular class or kind of contract, to provide 911 live operator service?

3. Did Bell Mobility provide 911 live operator service to class members?

4. Did Bell Mobility breach the contracts with the class members?

5. Has Bell Mobility been unjustly enriched for no juristic reason, or has there been a failure of consideration?

6. Is Bell Mobility liable to the class members on the basis of waiver of tort?

7. Was the conduct of the Defendant such that they ought to pay to the class punitive or exemplary damages, and if so, the quantum of such damages?

[6] The decision was rendered on May 17, 2013 (*Anderson v. Bell Mobility Inc.*, 2013 NWTSC 25). As indicated, the Andersons were largely successful and are entitled to costs.

[7] If costs are awarded under Column 6 of Schedule A, they amount to $33,435. If they are awarded on an enhanced costs basis of 6 times the column 6 tariff, the costs are $273,410. Schedule A was updated on November 1, 2012. On a solicitor-client basis, counsel for the Andersons say that the costs would be $653,442.50.

[8] This class action was commenced in 2007. It has been complex and protracted. Prior to the trial even commencing, counsel for Bell Mobility challenged the Statement of Claim as not disclosing a reasonable cause of action. After losing this application at first instance, they also lost in the Court of Appeal. Bell Mobility subsequently challenged the Plaintiffs' Reply and succeeded in the Court of Appeal.

[9] Counsel for the Andersons say they have spent over 1,300 hours prosecuting this matter to trial, excluding the certification proceeding for which costs have already been awarded.

[10] Document production includes approximately 190 documents consisting of 2,760 pages. Preparation for discovery included numerous affidavits and previous transcripts. The actual examinations lasted just over one day.

[11] There have been ten case management conferences and an attempted mediation. The trial took only four days owing to an excellent Agreed Statement of Facts filed by counsel. The preparation for the liability trial was significant because of the numerous and complex certified common issues set out above. Counsel for the Andersons tendered lengthy submissions on the law on the common issues, the qualification of an expert witness and a closing argument, the last item being requested by the court.

[12] Presenting evidence on the seven common issues required counsel for the Andersons to:

a. review approximately 1,000 pages of transcript;
b. review over 130 answers to undertakings, refusals, and advisements given by the Defendant;
c. prepare the opening statement;
d. prepare the draft closing statements;
e. review over 200 pages of documentary discovery;

f. prepare the trial exhibits;
g. research seven common issues, including the applicable legal authorities about breach of contract, unjust enrichment, waiver of tort, and punitive damages;
h. prepare agreed statement of facts;
i. exchange voluminous correspondence with opposing counsel;
j. prepare witnesses;
k. review expert reports;
l. prepare certificate of readiness;
m. prepare books of authorities;
n. prepare notices to admit facts;
o. prepare an agreed statement of facts;
p. prepare witness summaries;
q. review the matter since its inception in 2007.

ANALYSIS

[13] I will address the issue of court costs in class actions on the basis of policy considerations and then consider the appropriate level of enhancement of the basic tariff, if any.

[14] The *Rules of Court* provide the court with the following powers:

1. The Court has the discretion to award costs to the parties (643(1));
2. The Court may deal with costs at any stage of an action (643(3));
3. Unless otherwise ordered, the costs shall not exceed the relevant amounts set out in Schedule A (648(1)).

[15] It is clear from the *Rules* that the court has the discretion to exceed the tariff in appropriate circumstances.

[16] There are numerous precedents for enhancing costs in long and complex trials. See e.g. *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.*, 1999 ABQB 801, where Mason J. distinguished complex and protracted litigation from "common stream" litigation (para. 27). He also expressed the view that an award of costs should approach the 50% mark of indemnification (para. 30).

[17] This practice of enhancing costs in complex cases well established in the NWT in cases like *Fullowka v. Royal Oak Ventures Inc.*, 2005 NWTSC 60 and 2008 NWTCA 9. While *Fullowka* was exceptional as it involved 88 days of trial and an enhancement of eight times, it is also established that intense preparation for a two-day hearing can as well attract enhanced costs: *LSI Logic Corp. of*

Canada Inc. v. Logani, 2001 ABQB 968, at para. 9; *5142 NWT Ltd. v. Hay River (Town)*, 2008 NWTSC 31; *Diavik Diamond Mines Ltd. v. Northwest Territories (Director of Human Rights)*, 2007 NWTSC 83.

[18] I granted enhanced costs in the certification motion in this case, cited above at para. 51:

> In the case at bar, I am of the view that enhanced costs are appropriate. In the certification hearing, the common issues were quite complex and argued vigorously. This is a case where individual claims for $9 per year will never proceed except by way of a certified class action. It is appropriate in a contested certification application to use costs as an instrument of policy to ensure that the principle of access to justice is given meaning. I conclude from the past practice of this court and the circumstances of this case that an award of three times column 6, or $22,246.95 is the appropriate award of costs to the Andersons against Bell Mobility. The total award of costs including disbursements of $17,903.28 is therefore $40,150.23, payable in any event of the cause.

[19] The modern approach to costs set out in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, is to treat costs "as an instrument of policy" (paras. 22 – 26) which includes a consideration of access to justice (paras. 27 – 30).

[20] As stated in *Western Canadian Shopping*, the policy reasons for permitting class actions are numerous. Shared litigation costs is one advantage of allowing such proceedings:

> [28] Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: see Branch, supra, at para. 3.40; Eizenga, Peerless and Wright, supra, at para.

1.7; Bankier, supra, at pp. 231-32; Ontario Law Reform Commission, supra, at pp. 119-22.

[21] I do not agree that this class action case has become a conventional civil trial. The risks of trial and the complexity of the common issues place class actions in a league of their own, and this case is no exception.

[22] The policy instrument approach to costs has also been recognized in *Ayrton v. PRL Financial (Alta.) Ltd*., 2006 ABCA 88, at para. 36, and *Pauli v. ACE INA Insurance Co.*, 2004 ABCA 253, both of which endorse a purposive treatment of class action costs in keeping with the objectives of judicial economy, access to justice and behaviour modification as set out in *Western Canadian Shopping*.

[23] The *Pauli* case is particularly helpful as it addresses a number of policy issues that are relevant to this court action. In *Pauli*, the Alberta Court of Appeal made a no costs order in a case where the appellants' case was dismissed on the merits. These policy reasons are relevant to the case at bar in concluding that an enhancement is warranted. Specifically:

a) There is a discretion to depart from the normal rule that costs follow the event where a case is one of public interest. In the case at bar, the public interest is significant as the users of cellphones across the north are affected.
b) This case involves a novel point of law in that the Bell Mobility service agreements provide for the 911 fee without an express agreement to provide a 911 service.
c) The case is very much a test case as it would compensate all Northerners who have been paying a 911 service fee without receiving the 911 service. It is also a test case for the interpretation of a plain language consumer contract that is provided on a take it or leave it basis.
d) There is a significant access to justice issue as the amount of recovery on an individual basis is less than $10.00 and the issues can only be litigated on a class action basis.

[24] In the same manner, the criteria set out in the 1989 Ontario Law Reform Commission's Report on the Law of Standing (para. 24 of Pauli) apply as follows:

a) The class action involves important issues that extend beyond the interests of the parties involved;
b) The proceeding is not justified on the basis of pecuniary interest;

c) The issue has not been determined by a court in a proceeding against Bell Mobility;
d) Bell Mobility clearly has a superior capacity to bear the costs of litigation;
e) The plaintiffs have not engaged in vexatious, frivolous or abusive conduct.

[25] In this case, access to justice is a primary consideration, given the complexity of the litigation and the small individual recovery. Behaviour modification is also a factor, as I found that Bell Mobility has charged a 911 fee without providing a 911 service.

[26] Bell Mobility suggests that a three times enhancement of the basic tariff, as was awarded at the certification stage, would again be adequate, if the court considers a multiplier appropriate. However, that costs decision was based upon affidavit evidence and submissions were limited to the common issues to be certified.

[27] The liability hearing was on a different level of complexity, requiring production of documents, examination for discovery, witness preparation and trial preparation. A party cannot ever hope to recoup the costs of a liability trial except on a solicitor-client basis which is not under consideration. Nevertheless, given the high risks of trial and the importance of the policy goals of access to justice and behaviour modification, I conclude that an enhancement or multiplier of six times is appropriate. In my view this addresses both the indemnification and policy issues underlying the award of costs in this case. I also consider the public importance of this case, as its effects will be felt across the three northern territories.

[28] I therefore award costs in the amount of $273,410, as calculated by counsel for the Andersons. In doing so, I reject Bell Mobility's claim that Column 5 is the correct basis to calculate costs as it applies to amounts in dispute between $500,000 and $1,500,000 rather than Column 6 which is for claims over $1,500,000.

[29] It must be remembered that this was a liability hearing, with the issue of damages left to a later date. It is not appropriate to limit the cost recovery of the class based upon evidence that has yet to be heard. I am satisfied that counsel for the Andersons considers the quantum of damages to be in excess of 1,500,000.00.

[30] Further, it would be unfair, given all the policy considerations in play, to arbitrarily reduce costs without hearing the evidence.

[31] I also consider the fact that counsel and the court decided to conduct a liability hearing for judicial and client economy, without contemplating a sacrifice of costs before the damages were calculated precisely. In awarding costs to the Andersons, their expectation of damages should be accepted.

[32] Bell Mobility also claims that the plaintiffs' disbursements should not include the sum of $16,950 paid to its expert witness, Mr. Grant, for the reason that I concluded that his report was "not helpful" (para. 63). By the same token, Bell Mobility's expert, Mr. Kellett, had more technical 911 knowledge and experience but I found his opinion to be "marginal value" (para. 66).

[33] Both experts were tendered to establish the trade custom or trade usage of the term "911 service" and whether its use in the contract implied a live operator would be provided.

[34] I adopt the test set out in *Goodzeck v. Bassett Petroleum Distributors Ltd.*, 2007 NWTSC 42, at para. 6:

> The issue is whether the amount claimed by the Plaintiff constitutes "proper and reasonable expenses" within the meaning of Rule 641. The question is not whether the expert's testimony was determinative in the case, but rather, whether the expense was reasonable and proper in light of the circumstances which existed at the time it was incurred. The matter must be viewed through the eyes of the party who retained the expert in light of the problem facing it when the expenditure was made. *Petrogas Processing Ltd* v. *Westcoast Transmission Company Limited* 73 Alta. L.R. (2d) 246, at p. 259.

[35] I conclude that it was a reasonable disbursement to retain an expert to establish custom or trade usage of this term. The fact that Mr. Grant's report was not ultimately accepted is not relevant.

DISPOSITION

[36] I have concluded for purposes of indemnification and a variety of policy grounds that the Andersons' costs should be assessed on an enhanced basis of six times the Column 6 amount of Schedule A in the *Rules of Court*. I award costs in

the amount of $273,410 and disbursements in the amount of $65,136.96 to be paid by Bell Mobility in 30 days.

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VEALE J.

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HONOURABLE JUSTICE R.S. VEALE
