Date: 2016 06 24
Docket: S-I-CV-2007-000247

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

Settlement Application

Heard at Yellowknife, NT, on June 6th, 2016.

Reasons filed: June 24th, 2016

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE R. S. VEALE

Counsel for James Douglas Anderson and Samuel Anderson:	Keith M. Landy, Samuel S. Marr and David Fogel
Counsel for Bell Mobility Inc.:	Robert J.C. Deane and Brad W. Dixon

Anderson v. *Bell Mobility Inc.,* 2016 NWTSC 41

Date: 2016 06 24
Docket: S-I-CV-2007-000247

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

REASONS FOR JUDGMENT
(Settlement Application)

INTRODUCTION

[1] This is an application by James and Samuel Anderson, the representative plaintiffs in this court action, for approval of the Settlement Agreement with Bell Mobility Inc. dated April 27, 2016 in the amount of $1,016,336.57 (the "Settlement Funds").

[2] This court found Bell Mobility liable for charging 911 fees of $0.75 a month without providing the 911 live operator service to residents of the Northwest Territories, Nunavut and Yukon, excluding Whitehorse. That decision was

confirmed in the Northwest Territories Court of Appeal with leave being denied to the Supreme Court of Canada.

[3] A trial for assessment of damages was set for June 6-10, 2016 but has been converted to this application for approval of the Settlement Agreement. Counsel for the plaintiffs also seek approval for class counsel's fees in the amount of $406,534.63 plus GST, and $88,875.75 for disbursements for a total of $515,737.11. Counsel also seeks approval for $5,000 to be paid to James and Samuel Anderson for their efforts and diligence as representative plaintiffs in bringing this matter forward in 2007 and pursuing it to the Settlement Agreement.

[4] To expedite the payout to the class members, I approved the Settlement Agreement Order sought, at the hearing on June 6, 2016 with some additional obligation for Bell Mobility. These are my reasons for judgment.

THE SETTLEMENT AGREEMENT

[5] This court action was filed on November 29, 2007. The delay in bringing this action to a conclusion can be attributed to a vigorous defence by Bell Mobility.

[6] The trial for assessment of damages was resolved by the Settlement Agreement for $1,016,336.57, comprised of $800,000 in damages, prejudgment interest of $163,160.35 and costs of $53,176.22.

[7] Bell Mobility calculated the total amount of 911 fees charged to class members for the period October 1, 2004 to September 30, 2015 to be $706,407.00. Bell Mobility stopped charging a 911 fee for new post-paid rate plans on November 20, 2009 although fees continued to be charged depending on the rate plan for those subscribers who did not change their rate plan. Class counsel retained four experts to assist in reviewing the Bell Mobility calculations and negotiate the Settlement Agreement. Class counsel, in consultation with the representative plaintiffs confirmed that the calculations of Bell Mobility were correct.

[8] The key terms, among others, of the Settlement Agreement are:

(a) Bell Mobility shall pay $1,016,336.57.

(b) Class counsel's fees of $406,534.63 plus applicable taxes and disbursements approved by the court will be paid out of the Settlement Funds.

(c) A stipend of $5,000 will be paid to James and Samuel Anderson for services as representative plaintiffs.

(d) The fees and expenses of providing notice to the class and administering the payment of Settlement Funds shall be paid by Bell Mobility.

(e) The Settlement Benefits will be administered and paid out by Bell Mobility as follows:

(i) Counsel fees and the representative plaintiffs stipend will be paid within 30 business days, following court approval;

(ii) Within 90 days of the court approval order, Bell Mobility shall calculate the ratio by dividing the net settlement amount (after deduction of class counsel fees and disbursements and representation plaintiff's stipend) by the settlement amount (the "Ratio").

(iii) Within 90 days of the Settlement Approval Order, the Defendant shall issue a credit against active subscriber accounts of Settlement Class Members to refund the 911 fees charged by the Defendants to those accounts from October 1, 2004 to September 30, 2015, as adjusted by the Ratio.

(iv) The Defendants shall cease to charge 911 fees on active subscriber accounts of Settlement Class Members with rate plans pre-dating November 20, 2009 and that otherwise specify such charges or, if such 911 fees continue to be charged, shall issue a credit against each such active subscriber account in the amount of the 911 fee so charged, for so long as the Settlement Class Members remain resident in Northwest Territories, Nunavut or Yukon (excluding Whitehorse).

(v) Within 90 days for inactive subscriber accounts class members, Bell Mobility shall issue and mail at its

expense a refund cheque adjusted by the Ratio to the last known address of class members;

(vi) To the extent that refund cheques issued and mailed are not deliverable, are returned to sender or are not negotiated within six months of issuance, any remaining portion of the refund amounts shall not revert to Bell Mobility's use and benefit but instead shall be paid as a *cy-pres* payment to the benefit of Settlement Class members, to the Stanton Territorial Health Authority.

(f) The Notice of Settlement Approval shall be posted on the website of class counsel, www.thetorontolawyers.ca, within 10 days of the pronouncement of the Settlement Approval Order and shall remain on the website until at least 180 days after the pronouncement of the Settlement Approval Order.

(g) Bell Mobility shall send the Notice of Settlement Approval to active and inactive subscriber accounts as set out in the Settlement Agreement.

(h) Effective on the date of the Settlement Approval Order, Bell Mobility shall be released of all claims (except those arising under the Settlement Agreement or Settlement Agreement Approval Order) and the class action shall be dismissed with prejudice and without costs as against Bell Mobility.

(i) Class counsel and defence counsel may apply to the Court for directions on the implementation and administration of the Settlement Agreement.

[9] No written notices of objection have been received by class counsel. No person wishing to object appeared at the hearing.

CLASS ACTION SETTLEMENT LAW

[10] The primary obligation of the court in this proceeding is to objectively assess whether the Settlement Agreement is fair and reasonable and in the best interests of the members of the class as a whole. See *Dabbs v Sun Life Assurance Co. of Canada*, [1998] 40 O.R. (3d) 429 (Gen Div), *Nunes v. Air Transat A.T. Inc.*,

[2005] O.J. No. 2527 (S.C.), and *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643.

[11] Cullity J. in *Osmun*, set out a useful summary of principles that were adopted by Strathy J., as he then was, at para. 31:

(a) To approve a settlement, the court must find that it is fair, reasonable, and in the best interests of the class;

(b) The resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;

(c) There is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;

(d) To reject the terms of a settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;

(e) A court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give and take. Settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when considered in light of the risks and obligations associated with continued litigation;

(f) It is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or simply rubber-stamp a proposed settlement; and

(g) The burden of satisfying the court that a settlement should be approved is on the party seeking approval.

[12] I also add the principles enunciated by Sharpe J., as he then was, in *Dabbs*, cited above, as follows:

(a) The presence of arm's-length bargaining and the absence of collusion;

(b) The proposed settlement terms and conditions;

(c) The number of objectors and nature of objections;

(d) The amount and nature of discovery, evidence or investigation;

(e) The likelihood of recovery or likelihood of success;

(f) The recommendations and experience of counsel;

(g) The future expense and likely duration of litigation;

(h) Information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiations;

(i) The recommendation of neutral parties, if any; and

(j) The degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

[13] Strathy J. made the following statement about the acceptance or rejection of proposed settlements at para. 34 of *Osmun*:

> The court cannot modify the terms of a proposed settlement. The court can only approve or reject the settlement. In deciding whether to reject a settlement, the court should consider whether doing so could de-rail the settlement negotiations. There is no obligation on parties to resume discussions and it may be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort. This result would be contrary to the widely-held view that the resolution of complex litigation through settlement is encouraged by the courts and favoured by public policy: *Semple v. Canada (Attorney General)*, 2006 MBQB 285, 40 C.P.C. (6th) 314 at para. 26; *Ontario New Home*

> *Warranty Program v. Chevron Chemical Co.*, [1999] O.J. No. 2245], at paras. 69, 70.

[14] While I do not disagree with the general tenor of the principle set out by Strathy J., there should also be jurisdiction for the court to approve a settlement with conditions. This conditional approval, in effect, is a rejection if the parties are not prepared to meet the conditions. This approval was effectively employed by Winkler J., as he then was, in *Baxter v. Canada*, 83 O.R. (3rd) 481 (S.C.), the Indian Residential School case against Canada, at para. 85:

> In conclusion, subject to the correction of the deficiencies noted above, I would certify the action as a class proceeding as proposed and approve the settlement as being "fair, reasonable and in the best interests of the class as a whole". The changes that the court requires to the settlement are neither material nor substantial in the context of its scope and complexity. It would serve the interests of the proposed class to have these issues dealt with in an expeditious manner and to that end, I am prepared to grant the parties a reasonable period, not to exceed 60 days from the date of these reasons, to complete the required changes. I will make myself available on short notice to deal with any issues that may arise.

[15] As stated in *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (S.C.) at para. 19 and cited with approval in *Baxter*, cited above, in uncontested settlement proposals, all parties and their counsel have a positive obligation to provide full and frank disclosure of all material information to the court.

[16] In *Baxter v. Canada*, Winkler J. also expressed concern about the independent assessment process (the process to adjudicate individual claims of abuse) and its administration by Canada. Winkler J. stated at para. 47:

> The principles engaged on this motion for settlement approval are twofold. First, the settlement must be fair, reasonable [page498] and in the best interests of the class as a whole. Secondly, the court must make its decision on a fully informed basis, bearing in mind that the court has an obligation to oversee the settlement until all of the benefits have been distributed to the class members.

[17] The second principle, the supervisory obligation of the court to oversee the distribution of benefits, is engaged in this settlement proposal.

THE SETTLEMENT AGREEMENT

[18] The concern I expressed at the hearing is that there was no provision for court supervision of the payment of the benefits which on an individual claimant basis are probably quite nominal and perhaps, at a maximum, less than $100 per class member. I do not take issue with the fact that Bell Mobility will distribute the settlement amount as it has control and knowledge of the active and inactive subscribers and the ability to pay out appropriately.

[19] However, the Settlement Agreement makes no provision for reporting on the exact amount paid out to active and inactive subscribers, nor the final amount to be paid out to Stanton Territorial Health Authority where the take-up by inactive subscribers does not take place. I have therefore ordered, with Bell Mobility's agreement, that the following information be provided to the Court on or before April 6, 2017:

> Bell Mobility shall deliver to Class Counsel and file with this Court on or before April 6, 2017 an Affidavit reporting on (a) the number of active subscriber accounts of Settlement Class Members credited and the total amount credited pursuant to para. 3.1(d)(ii) of the Settlement Agreement, (b) the number of inactive subscriber accounts of Settlement Class Members for which refund cheques were issued and mailed to the last known address of each Settlement Class Member and the total amount of refund cheques issued (the Refund Amount) pursuant to para. 3.1(d)(iv) of the Settlement Agreement, and (c) the total amount, if any, paid or to be paid to Stanton Territorial Health Authority pursuant to para. 3(d)(v) of the Settlement Agreement.

[20] In general, the proposed Settlement Agreement has been negotiated by arm's-length counsel and the structure of the settlement is appropriate. I expressed concern that there would be no one pursuing the taking up of the inactive subscribers pay-out as the cheques would be sent to old addresses. My concern is that many of these cheques may never reach the intended recipient. I am satisfied by submissions of counsel that there has been a great deal of publicity in addition the published notices of hearing that should reach inactive subscribers. I am

advised that some inactive subscribers have already advised counsel of their new addresses. While Stanton Territorial Health Authority is no doubt a worthy cause it is secondary to the interests of the class members and the take up of inactive subscribers.

[21] I also take into account that there were no written objections to the Settlement Agreement filed or orally raised at the hearing.

[22] I am further satisfied that the quantum of the Settlement Amount has been well canvassed and assessed by class counsel. This has been a vigorously litigated case, not a quick settlement, and I accept the recommendations of experienced class counsel.

[23] I am also satisfied that James and Samuel Anderson have been involved plaintiff representatives as they have been present at every step of the process before this court. Their journey has been a long one for a case that they might have expected to be resolved at a much earlier date.

CLASS COUNSEL FEES

[24] The retainer agreement between class counsel and the Andersons had a standard recovery of 33% plus costs recovered from the defendant. This is reasonable given that the quantum of damages was not likely to be in the millions because of the small amount per subscriber from a 911 service charge of $0.75 per month.

[25] The retainer agreement also provides for a fee of 40% should the case go to the Court of Appeal. I find this to be reasonable and well-earned in this case, given the vigorous defence and proceedings before the Northwest Territories Court of Appeal.

[26] I am satisfied that the fees of $406,534.63 plus GST and disbursements is reasonable. The additional amount of court costs recovered from Bell Mobility in the amount of $426,661.50, of which approximately $288,000 was for fees with approximately $125,000 for disbursements, does not bring the compensation of class counsel to the level of unbilled time expended. In other words, there is no windfall of any sort for class counsel. Thus, I find the fees, disbursements and costs recovered by class counsel to be reasonable and well deserved.

[27] Counsel for Bell Mobility took no position on fees between class counsel and the representative plaintiffs.

SUMMARY

[28] To summarize, I approve the Settlement Agreement, Class Counsel fees and disbursements, and the stipend for James and Samuel Anderson.

R.S. Veale
Deputy Judge

Dated at Yellowknife, NT
this day of June, 2016

Counsel for Plaintiffs: Keith M. Landy, Samuel S. Marr and David Fogel

Counsel for Defendant: Robert J.C. Deanne and Brad W. Dixon

Docket: S-I-CV-2007-000247

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

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE R.S.VEALE
