Anderson v. *Bell Mobility Inc.*, 2013 NWTSC 25

Date: 2013 05 17
Docket: SICV2007000247

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

INTRODUCTION

[1] This class action liability trial was heard in Yellowknife, NWT, on March 4, 5, 6 and 8, 2013. In the event that liability is found, there will be a further hearing to assess damages.

[2] The class is defined as:

(a) All persons who before April 13, 2010 were:

(i) Resident in the Northwest Territories, Yukon (excluding Whitehorse) or Nunavut;

(ii) Entered into an agreement with Bell Mobility Inc. to receive cellular phone services;

(iii) Were charged 911 emergency access fees; and

(iv) Have no live 911 operator where they reside.

[3] To place this trial in some context, I will give an example of what happens when you dial 911 on a Bell Mobility cellphone in Yellowknife. The 911 call is routed to a 10-digit number: 867-766-3331, which is answered by the following recorded message, which is repeated twice:

> There are no 911 services in this area. Please hang up and dial the emergency number for your area. Or hang up and dial zero to reach an operator.

[4] Dialling zero on a cellphone in Yellowknife does not connect to an operator, but rather a recorded message:

> In case of emergency, hang up and dial *911. For an operator assisted long distance call, please dial 0 plus the area code and number you wish to call.

[5] If the caller dials *911, the 911 recorded message is repeated.

[6] Outside of Yellowknife (and Whitehorse), a 911 cellphone call was, until recently, simply not completed. At some point between 2009 and February 2013 – Bell Mobility cannot say when exactly – 911 calls began to be routed to the same recorded message as in Yellowknife.

[7] The trial is to determine the following Certified Common Issues:

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?

[8] Bell Mobility agrees in common issue 3 that it did not provide live operator service to class members in the Territories.

[9] The overview of each party gives a shorthand explanation of their approach to the issues.

[10] Counsel for the Andersons states:

> Over several years, the Defendant Bell Mobility charged the Class Members for a non-existent service. The Defendant charged a monthly fee for 911 Emergency Service even though there was no 911 live operator emergency service ...

[11] Counsel for Bell Mobility states:

> The core question before the Court remains whether, in the Mobility Service Agreement, Bell Mobility agreed to, itself, provide a live 911 operator. It did not.

[12] I note that the Bell Mobility Service Agreements and some documents refer to "9-1-1" emergency service fees, but I will use the number 911 for consistency.

[13] Agreements like the Bell Mobility Service Agreements are often referred to as plain language contracts, standard form contracts or adhesion contracts. They are not negotiated contracts but rather "take it or leave it" contracts that a consumer either signs or not.

THE AGREED STATEMENT OF FACTS

[14] The Plaintiffs, James Douglas Anderson and Samuel Anderson, and the Defendant, Bell Mobility Inc., admit, for the purposes of the trial of the Plaintiffs' claim in this action, the following facts:

James and Samuel Anderson

1. The representative Plaintiff James Douglas Anderson ("James Anderson") has been a customer of Bell Mobility Inc. ("Bell Mobility") from August 30, 2005 to present. Bell Mobility account # 506021869 (the "James Anderson Account") has been in existence since August 30, 2005 and James Anderson has throughout been the primary contact on the file with liability for the account. The invoices for the James Anderson Account are currently in the name of Anderson Consulting but have historically been issued under various names including "Mr. James Douglas Anderson" and "Mr. Anderson Consulting".

2. Mobile number 867-445-6009 has been associated with the James Anderson Account from August 30, 2005 to present.

3. Mobile number 867-445-4005 has been associated with the James Anderson Account for the period from August 31, 2006 to September 9, 2010 and has been associated with account #515876579 for customer Samuel Anderson (the "Samuel Anderson Account") from on or about September 9, 2010 to present. Samuel Anderson has been the user of mobile phone number 867-445-4005 at all material times.

Bell Mobility Inc.'s Presence in the Territories

4. The shares of Northwestel Mobility Inc. ("NMI") were purchased from Northwestel Inc. effective January 1, 2003 in a transaction which closed on February 27, 2003. The Purchaser of the shares was Bell Mobility Holdings Inc.

5. At the time of the purchase of the shares of NMI by Bell Mobility Holdings Inc., NMI was not charging a 911 fee.

6. Bell Mobility commenced offering wireless services under the Bell Mobility brand in the Northwest Territories and Yukon on or about October 28, 2004, and in Nunavut in late 2006 or early 2007.

7. Following the launch of the Bell Mobility brand in the Northwest Territories and Yukon on or about October 28, 2004, and in Nunavut in late 2006 or early 2007, the decision of NMI wireless subscribers to transfer from NMI to Bell Mobility service was an individual decision made by each subscriber. Following the launch of the Bell Mobility brand in those areas, subscribers could remain with NMI if they so desired.

8. Bell Mobility Holdings Inc. transferred all of the shares of Northwestel Mobility Inc. to Northwestel Wireless Inc. on May 31, 2007. Ownership of the network assets was transferred by Northwestel Mobility Inc. to Bell Mobility Inc. on May 31, 2007.

911 Service

9. Bell Mobility processes and routes all 911 calls over its network and through the interconnection with the incumbent local exchange carrier (ILEC) as long as the call is placed in the area covered by Bell Mobility's networks using a cellular phone with compatible technology, without imposing any tolls or charges for airtime. This is done regardless of whether the caller has an active account with Bell Mobility that is in good standing and regardless of whether the caller is a subscriber of Bell Mobility or of another wireless service provider.

10. When an individual dials 911 in the Yellowknife area, the call is routed to a 10-digit number: 867-766-3331. This call routing was in place at the time Bell Mobility Holdings Inc. purchased the shares of NMI.

11. Calls made from the Yellowknife area and routed to the 10 digit number: 867-766-3331 are answered by the following recorded message, which is repeated twice:

> There are no 911 services in this area. Please hang up and dial the emergency number for your area. Or hang up and dial zero to reach an operator.

12. Bell Mobility does not provide any operator services when a wireless caller dials 0. This is the case throughout all areas of Canada on the Bell Mobility network.

13. In the Northwest Territories, Nunavut and Yukon (except Whitehorse), and in the Fort Nelson area of northern British Columbia, territorial, provincial or local authorities have not established a public safety answering point ("PSAP").

14. Bell Mobility provides 911 call routing services, if and as instructed by local authorities from time to time.

CRTC

15. The Canadian Radio-television Telecommunications Commission ("CRTC") has issued a forbearance order and does not regulate the rates Bell Mobility charges its customers.

Bell Mobility Service Agreements

16. The terms and conditions of wireless service are incorporated into and form part of the Mobility Service Agreements that govern the relationship between Bell Mobility and its customers.

17. The Mobility Service Agreement and Terms and Conditions of Service at Tabs 6 to 17 of the Joint Book of Documents were drafted by Bell Mobility.

911 Fees

18. Bell Mobility started charging 911 fees on some post-paid rate plans on March 1, 2001.

19. Bell Mobility stopped charging a 911 fee for new post-paid rate plans introduced on and after November 20, 2009.

20. After November 20, 2009, the applicability of a 911 fee depends on the rate plans for subscribers who have not changed rate plans after that date.

[15] The foregoing is the entire Agreed Statement of Facts admitted by the parties.

The Bell Mobility Service Agreement

[16] The Bell Mobility Service Agreement is a standard form contract. It was drafted by Bell Mobility and contains the following clause:

> These terms of service cannot be modified in any way by your Bell Mobility sales representative or agent …

[17] James Anderson's service agreement, dated August 30, 2005, provides among other things:

> **Our Agreement with you**
>
> … The Agreement is binding on you and us for each device that you connect to our network and for service we provide to you for your device.
>
> **Definitions**
>
> e 911 Services: Any emergency services that we are mandated to provide you.

[18] I note that there is no definition of 911 services. The evidence indicates that e 911 refers to enhanced 911, which gives the operator the identification of the caller and their location. It is not available to the class.

> ## What we'll provide you
>
> **Guaranteed airtime pricing**
>
> We will not increase your monthly access fees or your airtime rates for local out of bundles calls during the Term. Fees and charges for features or services, long Distance and Roaming charges, text messaging, mobile browsing and picture messaging charges, System Access Fee, 9-1-1 emergency service fees, connection charges, device leasing charges and late payment charges may increase during the Term at our discretion after giving you at least 30 days notice. Promotional offers may be available to you when you activate your services and during the Term and are offered at our discretion for limited periods of time.

Your obligations

Payments
Monthly service

Your monthly bill is payable upon receipt and if not paid within 30 days of the date indicted (sic) on the bill you will be charged interest on the balance owing at the late payment rate indicated on your bill. If you fail to pay your bill, or any interim payment, on time, we may suspend your service or end your Agreement and terminate your service. Your monthly charges will include your monthly access fee, all applicable taxes, and may include: local out of bundle minutes, fees and charges for features, Long Distance and Roaming charges; text messaging, mobile browser and picture messaging charges; System Access Fee, 9-1-1 emergency service fees, connection charges, device leasing charges, late payment charges and all applicable taxes. (my emphasis)

[19] Samuel Anderson's service agreement, dated August 24, 2007, provides, among other things:

Definitions

e911 Services: Any emergency services that we are mandated to provide you.

What we'll provide you

We will not increase your monthly access fees or your airtime rates … Fees and charges for features or services, … 911 emergency service fees … may increase during the Term at our discretion after giving you at least 30 days notice.

Your obligations

Your monthly charges will include: … 9-1-1 fees are recurring monthly charges.

[20] The Bell Mobility Service Agreements do not make any reference to the incumbent local exchange carrier (ILEC). Nor do the Bell Mobility Service Agreements make reference to public safety answering points (PSAPs) which are established by provincial, regional or local government authorities to provide operators to dispatch police, fire or ambulance personnel as appropriate.

[21] As indicated in the Agreed Statement of Facts, Bell Mobility does not provide any operator services to its cellphone customers but provides routing services if and as instructed by local authorities from time to time. Thus, a customer in Yellowknife dialling 911 received the recorded message set out above, but in other areas of the northern territories (except Whitehorse) a 911 call could not be completed. Some time after 2009, 911 calls in other areas of the northern territories were routed to the same recorded message as Yellowknife.

[22] It was a well-known fact that there was no 911 live operator emergency service in the areas of the class members in this class action. Indeed, apart from Whitehorse, all areas in the northern territories had no 911 live operator emergency service. Both James and Samuel Anderson signed their Service Agreements with this knowledge. However, James Anderson objected to the fact that he had to pay a 911 emergency service fee but he had no option but to sign the contract or not have a Bell Mobility cellphone. He had previously had an MNI Mobility cellphone contract in Inuvik, NWT, which did not charge a 911 emergency service fee.

911 Fee Charged

[23] Despite the fact that there was no 911 emergency service available, Bell Mobility charged a monthly 911 fee of 75 cents commencing on October 28, 2004 in the Yukon and Northwest Territories, and late 2006 or early 2007 in Nunavut.

[24] Bell Mobility stopped charging a separate 911 fee in a new rate plan introduced on November 20, 2009. The class action was commenced in November 2007. Bell Mobility denies there is any connection, but I find that it is reasonable to infer that the filing of the class action precipitated the decision to stop charging the 911 fee.

[25] In the service agreement introduced on November 20, 2009, there was also a wording change. Under "Definitions", "Service or Services" now includes "911 Services (provision of emergency call routing)."

[26] The evidence does not establish that there is no longer a 911 emergency service fee. In those plans pre-dating November 20, 2009, the separate fee would continue to be charged unless the customer signed up for the new rate plan.

[27] The witness presented by Bell Mobility on the subject of the 911 emergency service and fees charged was Nuno (Mike) Martins, a Vice-President for Bell Mobility, with 911 being one of the network areas within his area of responsibility.

[28] Mr. Martins was very precise in giving his evidence. The 911 fee was not charged by NMI before its shares were purchased in 2003. Bell Mobility's rate plan initially had an Extreme rate of $35 plus a separate 911 fee of 75 cents. Bell Mobility then introduced a rate plan called All-in-one Extreme of $35, which included a 911 live operator service access fee in the $35 fee. Mr. Martins could not say what portion, if any, of the $35 fee was allocated to the 911 fee as he was not part of the "pricing team". The Bell Mobility Service Agreements were standard form agreements for the entire country.

ISSUES

ISSUE 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?

[29] A good starting point for the consideration of what is an express term in a contract is the summary given by Professor Fridman in *The Law of Contract In Canada,* 6th ed. (Toronto: Carswell, 2011) at p. 433:

> A *term* is a provision of the contract which states or makes explicit an obligation or set of obligations imposed thereunder on one or more of the parties to the contract. An express *term*, therefore, is one which has been specifically mentioned, and agreed upon by the parties, and its form, character and content expressed in the oral or written exchanges between them at the time the contract was made.

[30] The rules of contract interpretation have been set out by the Supreme Court of Canada in *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at pages 899 – 902, and summarized in the text of Professor Denis Boivin, *Insurance Law* (Toronto: Irwin Law, 2004) at p. 191:

> First the words in the contract must be given their ordinary meaning, with the exception of expressions that have acquired a technical meaning within the industry. ... Second, the contract must be interpreted contextually,

> having regard to all sections of the agreement. Third, the objective of interpreting the contract is to give effect to the parties' true intentions. Hence, courts should avoid using a literal approach when the result would frustrate the reasonable expectations of either the insurer or the insured. Finally, any ambiguity must be resolved against the interests of the party that wrote the agreement – *contra proferentem*, in other words, ambiguities must be resolved in favour of the insured. (emphasis added)

[31] Professor Fridman puts the above rules of interpretation this way at p. 437:

> … The golden rule is that the literal meaning must be given to the language of the contract, unless this would result in absurdity. Words of ordinary use in a contract must be construed in their ordinary and natural sense. The paramount test of the meaning of words in a contract is the intention of the parties. That is to be determined in the operative sense by reference to the surrounding circumstances at the time of signing the contract. In other words, the context or factual matrix in which the contract exists. But the evidence of the commercial context surrounding the making of an agreement may be admitted only to show the purposes for which the various contractual provisions were included, not to vary the meaning of the words of a written contract.
>
> Side by side with this basic principle there have emerged some general principles of construction, according to which, where there is some question as to the meaning of the language used by the parties, such issue may be resolved. The principles, or canons of construction are rules formulated to aid a court in the interpretation of the intrinsic meaning of the language used by the parties in a written (or even an oral) contract. …
>
> …
>
> Underlying both the principles of construction and the admissibility of parol evidence is the notion of objectivity, that is, that what the parties have agreed

> should be understood in the way in which their language would appear to the ordinary reasonable man looking at it from the outside. … (emphasis added)

[32] In *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, the Alberta Court of Appeal set out a number of general principles on contract interpretation which I summarize as follows:

1. the determination of the factual matrix surrounding the contract is a matter of fact which may be influenced by legal concepts (para. 11);

2. once the exact terms and nature of the contract, and the surrounding facts, have been established, the interpretation of the words is a matter of law (para. 12);

3. neither party is entitled to provide evidence on what they think the contact means (para. 16) including calling a professor of law or English professor to prepare an expert report on the meaning of the terms of the contract (para. 17);

4. opinions of third parties about the commercial context after the contract was signed are inadmissible, except admissible evidence about the situation prior to and at the date of signing (para. 18);

5. there is a narrow exception for technical terms of art, which can be proven by extrinsic evidence (para. 19);

6. where the contract is ambiguous there is a limited ability to call evidence on the circumstances surrounding the formation of the contract and the commercial contract in which it was made (para. 20);

7. where the contract is clear, the parties' intention is to be derived primarily from the words they have used in the contract (para. 20);

[33] The *Dow Chemical* case was an appeal of a summary dismissal decision. The Court of Appeal dismissed the action as the factual context was clear and the case turned on the grammatical and ordinary interpretation of the words on the face of the contract, in the context of the agreement as a whole. In that case, the parties to the contract were large and sophisticated petrochemical companies.

[34] The objective nature of contract interpretation is highlighted by Iacobucci J. in *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at para. 54:

> ... The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.

Analysis

[35] The first question to address is whether the words "911 emergency service" mean 911 live operator service. Counsel for Bell Mobility concedes that there is no 911 live operator service in the northern territories with the exception of Whitehorse.

[36] It is my view that, objectively, across the nation, '911' is a shorthand term and an easy-to-remember number, that, when dialled on a telephone or cellphone, connects the caller with a live operator who will direct the call to a police, fire or hospital service.

[37] The interpretation that '911 emergency service' means 911 live operator service, satisfies the objectivity test referred to by Professor Fridman as "what the parties have agreed should be understood in the way in which their language would appear to the ordinary reasonable man [or woman] looking at it from the outside."

[38] The Bell Mobility Service Agreements do not define "911 emergency service" and there is no reference to call routing. It first appeared in the service agreement dated November 20, 2009, after the filing of the class action in November 2007.

[39] I also find that Bell Mobility effectively concedes that "911 emergency service" means 911 live operator service when it submits that access for the northern residents to 911 live operator service in the rest of Canada is valid consideration for the 911 fee.

[40] I conclude that "911 emergency service" means 911 live operator service.

[41] Although my view is that the term "911 emergency service" clearly means 911 live operator service, if I am in error, the *contra proferentem* rule would apply and support this interpretation of the clause. The *contra proferentem* rule means that any ambiguity in a term of a contract should be resolved against the author when the other parties did not participate in the drafting. See *McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada,* [1981] 2 S.C.R. 6, at p. 15.

Estey J. went on in his dissent to explain that the rule would come into play "providing the wording of the clause leads to more than one reasonable interpretation."

[42] The case at bar also meets the condition in *Ironside v. Smith*, 1998 ABCA 366, at para. 67, that the use of *contra proferentem* is contingent on an absence of meaningful negotiating ability or participation in negotiations.

[43] The *contra proferentem* rule has frequently been pronounced upon and applied in insurance and guarantee cases. See *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, at paras. 8 and 15 and *Somersall v. Friedman*, 2002 SCC 59, at paras. 47 – 48 and 64 – 65. Although these cases apply a restrictive interpretation in favour of the insured or the guarantor, it is important to note that the rule is applied when there is unequal bargaining power and a "take it or leave it" contract drafted by the insurance company or bank. Iacobucci J. said it this way in *Somersall*, at para. 47:

> The applicable principle of interpretation is that we interpret insurance contracts *contra proferentem*, or in favour of the insured. In *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551, 2000 SCC 24, at para. 70, in comments reaffirmed in *Derksen v. 539938 Ontario Ltd.*, [2001] 3 S.C.R. 398, 2001 SCC 72, the Court said :
>
> > Since insurance contracts are essentially adhesionary, the standard practice is to construe ambiguities against the insurer... . A corollary of this principle is that "coverage provisions should be construed broadly and exclusion clauses narrowly"... . Therefore one must always be alert to the unequal bargaining power at work in insurance contracts, and interpret such policies accordingly.
>
> See also *July v. Neal* (1986), 57 O.R. (2d) 129 (C.A.). There is little doubt that this is an adhesionary contract. The insurance industry was intimately involved in the development of the SEF 42 and subsequently the SEF 44, while the insured was simply presented with the standard endorsement on a "take it or leave it" basis.

[44] Perhaps it is time that the rule of *contra proferentem* be applied more broadly in plain language contracts for consumers who sign "take it or leave it" contracts in which they have absolutely no say. While it may be that plain language

contracts were introduced to relieve consumers of the complex legal jargon often referred to as "boilerplate", plain language contracts can be equally mystifying.

[45] The second interpretation issue to address is Bell Mobility's submission that even if "911 emergency service" means 911 live operator service, Bell Mobility, itself, did not agree to provide the service.

[46] The submission that Bell Mobility never agreed to provide "911 emergency service" is based upon the fact that Bell Mobility simply provides the call routing service to the ILEC or PSAP. That may have been Bell Mobility's subjective intention here but it cannot now change the wording of this contract. As stated in the *Eli Lilly* case, contractual intent is determined by reference to the words used in the service agreement not the subjective intent of Bell Mobility.

[47] Bell Mobility also argues that there is no express term in any of the service agreements in which Bell Mobility agreed to assume an obligation to provide any service. This may be a surprising assertion for a Bell Mobility customer who purchased a cellphone in a contract that said "What we'll provide you" followed by a list of services that includes "911 emergency service". However, a close reading of the Bell Mobility Service Agreement does indeed reveal that Bell Mobility has not expressly agreed to provide any service whatsoever. Rather, it has very cleverly drafted the service agreement to give the impression that it will provide a 911 emergency service under the heading "What we'll provide to you". In fact, the service agreement only discusses the fees it will charge for service and not that they will provide the service. In my initial view, to apply such a literal interpretation would completely frustrate the reasonable expectation of the customers that they would be provided with a 911 emergency service. The literal interpretation results in the absurdity that a Bell Mobility subscriber has signed a contract to pay a monthly invoice for a 911 emergency service fee that Bell Mobility has not agreed to provide.

[48] Part of the factual matrix however, is that the Andersons knew at the time of entering the contract that, with the exception of Whitehorse, there was no 911 live operator service in the Territories. James Anderson understood that there was no 911 service in Yellowknife. He also understood that he could not change the agreement to pay the 911 fee. It was either agree to pay the 911 fee or not have a cellphone, as Bell Mobility was the only local provider in 2005.

[49] This common understanding is supported by the evidence of Bell Mobility's witness, Mr. Leclerc, who grew up in Yellowknife between 1977 and 2005, that everyone knew there was no 911 service and that they had to call the separate

seven-digit emergency numbers. Mr. Leclerc also said that he instructed the sales representatives of NMI, Bell Mobility's predecessor, to advise customers that there was no 911 service. (It is also interesting to note that Mr. Leclerc used the term "911" throughout his evidence when referring 911 live operator service.)

[50] As a result, I conclude that Bell Mobility's only agreement was to provide a monthly bill that "may include ... 911 emergency service fees".

[51] However, the Bell Mobility Service Agreement begins with the wording "... The Agreement is binding on you and us for each device that you connect to our network and for service we provide to you for your device". I conclude that Bell Mobility did not provide a 911 live operator service and therefore, under the terms of its agreement cannot bill for "911 emergency service fees". In other words, the Andersons would only have been required to pay the 911 emergency service fee if they received a 911 live operator emergency service.

[52] As stated by Côté J. in *Bell Mobility Inc. v. Anderson*, 2009 NWTCA 3, at para. 6:

> ... It would be an unusual contract which let one party charge for doing nothing, and clear words would be needed.

[53] Bell Mobility made the further submission that the fee was for the access to a 911 live operator that the subscriber would have in other parts of Canada, where they do not reside. I do not agree. It was a reasonable expectation that 911 live operator service would be in the jurisdiction the consumer resides. This would certainly be another appropriate circumstance where the principle of *contra proferentem* would be applied in favour of the consumer and require that express wording be required to limit the 911 service to when the subscriber was in another jurisdiction.

[54] I conclude that the Bell Mobility Agreement provided for the payment of a 911 live operator service fee, but that this clause cannot bind the class members to pay the 911 emergency service fee unless a 911 live operator service was provided. The Bell Mobility Service Agreement does not require Bell Mobility to specifically provide the service nor does it permit Bell Mobility to charge a fee without providing the service.

ISSUE 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?

[55] This issue addresses the same question in common issue one, but from a different perspective. Canadian courts have recognized the possibility of implying a term into a contract where the term is not expressly used. In my view, 911 service expressly means 911 live operator service, and there is no necessity to imply the words live operator. However, I will address this issue as each party presented expert evidence to establish an implied term of the service agreement.

[56] Geoff Hall, in the text *Canadian Contractual Interpretation Law*, 2nd ed., (Markham: LexisNexis Canada, 2012) puts the law this way at p. 101:

> 3.9.1. The Principle
>
> Where a custom or usage in a particular industry or market is reasonably certain, is generally known, and is generally accepted by those participating in the business, a court will endorse the custom or usage as part of a contract even if it is not expressly set out. However, the requirements for enforcement of a trade usage are stringent and the needed degree of proof is high ...

[57] In fact, Professor Fridman, at p. 464 purports to limit the application of the principle of implying a term of a contract to three main instances:

> (i) When it is reasonably necessary, having regard to the surrounding circumstances, and in particular the previous course of dealing between the parties, if any;
>
> (ii) Where there is an operative trade or business usage or custom that may be said to govern the relationship of the parties; and
>
> (iii) When some statute of its own motion implies a term into the kind of contract that is in question.

[58] *Georgia Construction Company v. Pacific Great Eastern Railway Company*, [1929] S.C.R. 630, at p. 633, expressed the principle as follows:

> ... Usage, of course, where it is established, may annex an unexpressed incident to a written contract; but it must be reasonably certain and so notorious and so generally acquiesced in that it may be presumed to form an ingredient of the contract, ...

[59] This Court has recognized and affirmed this principle in *Socanav Inc. v. Northwest Territories (Commissioner)*, [1993] N.W.T.J. No. 91, Vertes J. summarized the proper approach as follows, at para. 39:

> I recognize that it is possible for trade custom or trade usage to form part of the terms of a contract, although not expressly incorporated in the written document; see Hudson's Building and Engineering Contracts (10th edition), pages 52-54. To be a valid trade usage, capable of forming a part of a contractual relationship, a usage must satisfy four conditions: notoriety, certainty, reasonableness, and legality.

[60] In that case, Vertes J. found that the dispute over the point suggested a lack of the notoriety and certainty required.

[61] In the case at bar, two expert witnesses have been presented, both answering entirely different questions.

[62] Mr. Grant, on behalf of the Andersons, is the principal and owner of SeaBoard Group, a research company that has conducted research in the telecommunication industry and market for three decades. I gave further background in my decision to admit his opinion on the basis of threshold reliability. See *Anderson v. Bell Mobility Inc.*, 2013 NWTSC 14.

[63] I have concluded that Mr. Grant's report is not helpful. He acknowledged that he has no 911 expertise. His methodology is not acceptable as he simply spoke to other industry people in the various jurisdictions in Canada and reported their information as fact. The result is that his opinion is not an expert opinion but a summary of the factual situation, not always entirely accurate, in other jurisdictions. It is really hearsay dressed up as expert opinion.

[64] Bell Mobility presented Mr. Kellett as an expert. He is undoubtedly a well-qualified expert in the technology side of 911 services, but he admitted no expertise on the words 911 in the service contracts. He gave a great deal of detail

about basic 911, enhanced 911 and province-wide e911. He stated very clearly what Bell Mobility has said from the outset of this case:

> In the Northwest Territories, Nunavut, and the Yukon (with the exception of Whitehorse) territorial or local authorities have not put services in place with the ILEC [incumbent local exchange carrier] for a wireless 911 platform, nor have they established public safety answering points (PSAPs).

[65] Mr. Kellett's opinion is expressed as follows:

> Is it Customary for WSPs to Provide Live 911 Operator Services?
>
> In the author's opinion, the answer to this question is no.
> ...
>
> In Canada, no wireless service providers (WSPs) have their own Operator Services interconnected into the 911 infrastructure for answering/processing emergency calls.

[66] Mr. Kellett focussed on the wireless industry practice of not providing the 911 live operator. Mr. Kellett's evidence would be useful in the case of two industry or trade companies in a contract where there was some question about the interconnect or routing technology, but it has marginal value for the Bell Mobility Service Agreement, which was drafted for consumers in plain language and without mention of a routing service.

[67] I conclude that neither the Andersons nor Bell Mobility have satisfied the requirements of the trade custom or trade usage necessary to imply the term in the service agreement.

[68] I also find that the term should not be implied by operation of law as the legal incident of a particular class of contract. The legal incident test does not rely on the presumed intention of the parties. These facts do not rise to the necessity requirement found in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at para. 54, where the law has been imposing a legal duty on employers for years to give reasonable notice of termination to employees.

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

[69] Bell Mobility has acknowledged that it did not provide live operator service to class members and I so find.

ISSUE 4: Did Bell Mobility breach the contracts with class members?

[70] Based upon my finding that "911 emergency service" means 911 live operator service, I conclude that Bell Mobility has breached its service agreement with class members by billing for a "911 emergency service fee" when the class has not been provided a 911 live operator service.

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

[71] The answer to this question is yes. A claim for restitution for unjust enrichment requires the plaintiff to establish:

(a) an enrichment for the defendants;

(b) a corresponding deprivation of the plaintiff; and

(c) no juristic reason for the enrichment.

[72] The Andersons have established that Bell Mobility was enriched by charging a fee for no service and a corresponding deprivation of the class members who paid the 75 cents monthly fee specifically referred to as the 911 fee. The contentious issue is whether the service agreement provides a juristic reason for the enrichment as advocated by Bell Mobility.

[73] It is well established that a contract is a juristic reason to deny an unjust enrichment claim. In *Kerr v. Baranow*, 2011 SCC 10, at para. 40 and 41:

> 40 The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see *Pettkus*, at p. 848; *Rathwell*, at p. 456; *Sorochan*, at p. 44; *Peter*, at p. 987; *Peel*, at pp. 784 and 788; *Garland*, at para. 30.

> 41 Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law. ...

[74] The Bell Mobility Service Agreement is clearly a contract, but the question is whether my finding that there has been a failure to provide a 911 live operator service when Bell Mobility was charging a 911 fee results in there being no juristic reason for the enrichment.

[75] In *Windisman v. Toronto College Park Ltd.* (1996), 28 O.R. (3d) 29 (Gen. Div.), Sharpe J., as he then was, explained that a contract rendered unenforceable by law or equity may not qualify as a juristic reason for the enrichment. At para. 69, he says:

> 69 ... A contractual right is recognized as a juristic reason entitling a party to retain a benefit conferred: *Pettkus v. Becker*, supra. The law's general policy favouring security of transactions means that the courts will not grant restitutionary recovery where the parties have entered into a contract and that contract has not been held unenforceable or rescinded for a reason recognized by either law or equity: P.D. Maddaugh and J.D. McCamus, The Law of Restitution (Aurora: Canada Law Book), 1990 at p. 46. ...

[76] Côté J., in *Bell Mobility Inc. v. Anderson*, *supra*, in refusing to strike out an amended statement of claim in this case, said the following about unjust enrichment at para. 9:

> 9 Where someone has paid money under a contract but got nothing in return, there is a very old and well-established cause of action for return of the money for failure of consideration. The defendant may have a defence if the failure is partial and not total, but that defence may not work, and the plaintiff may win, if the parts of the consideration are separate or severable, or if the defence otherwise is unjust. The law is developing here. See 1 *Chitty on Contracts*, paras. 29-062 and 29-063 (pp. 1671-72) (29th ed. 2004). A shrinking defence is no ground to strike out a statement of claim.

[77] In *Microcell Communications Inc. v. Frey*, 2011 SKCA 136, G.R. Jackson J.A. addressed this question in the appeal of a class action certification decision on the basis of unjust enrichment involving cellphone fees, in a case very similar to the one at bar. In that case, six corporations provided wireless services and charged a "system access fee" which allegedly was collected from the subscribers and remitted to the government as a fee for that subscriber. The government fee was eliminated but the plaintiffs claimed that the wireless service providers continued to collect the fee under the guise of the "system access fee" which the plaintiff claimed should be returned. The defendants claimed the fee defrayed certain operating costs. Jackson J.A. said at paras. 26 and 27:

> 26 That the existence of a contract between the parties authorizing the impugned enrichment can provide a satisfactory juristic reason justifying the enrichment, and thus negate a cause of action based on unjust enrichment, is clear. This is inherent in the very notion of an enforceable bargain and is, in any case, confirmed in a number of cases in addition to *Garland*. (citations omitted).
>
> 27 However, for the contract to provide a juristic reason for the enrichment, the clause doing so must in fact justify the defendant's enrichment at the expense of the plaintiff, and the clause must be valid and enforceable. Thus, it is open to the Respondents to argue either that the clauses authorizing the collection of the "system access fees", properly interpreted, do not justify the Appellants' retention of these sums for their own use, or enrichment, or, alternatively, if they do, that they are not valid or enforceable.

[78] In para. 30, Jackson J.A. went on to include that the clauses permitting collection of the "system access fees" could be arguably unenforceable for lack of consideration and therefore not a juristic reason for the enrichment. She also relied on the decision of Côté J. referred to above.

[79] Counsel for Bell Mobility submits that because the service agreement was not disavowed by the subscribers, it remains as a valid juristic reason for the enrichment of the defendant. In other words, the subscribers signed the service agreement with the knowledge that there was no 911 emergency service. Counsel relies on two specific authorities.

[80] In *Macleod v. Viacom Entertainment Canada Inc.* [2003] O.J. No. 331 (Ont. Sup. Ct.), Cullity J. dismissed a claim in a certification proceeding claiming certain late fees and unreturned video fees, charged by the defendant, on the basis that the charges breached an implied term that any such fees would be reasonable. The contract itself contained no provision for late or unreturned video fees. The dismissal was essentially on the basis of improper pleadings in the statement of claim, however at para. 25 Cullity J. said:

> 25 I reach the same conclusion with respect to the issues relating to unjust enrichment. If the fees were paid pursuant to a binding agreement between a member and the defendants, there would be a juridical reason for the payment and no issues relating to unjust enrichment would arise. Relief based on unjust enrichment must be premised on the absence of any such agreement to pay the fees. ...

[81] However, I understand the conclusions of Cullity J. regarding unjust enrichment to ultimately turn on the question of whether the related proposed common issue was common to the class as a whole. He found it was not, as there was a question about whether each member's knowledge and understanding about the fees and any intention to charge them varied in the circumstances of the particular transactions. This is different than the case before me.

[82] In *Hassum v. Contestoga College Institute of Technology and Advanced Learning*, [2008] O.J. No. 1141 (Ont. Sup. Ct.), the plaintiffs claimed that there was a binding policy directive of the Ministry prohibiting the tuition-related ancillary fees. Lax J. found that the policy directive was administrative and did not have the force of law. At para. 80, she stated:

> 80 A contract is an established category and constitutes a juristic reason for enrichment. The essence of the plaintiffs' primary submission is that the policy directive makes any contracts that contravene it illegal. The plaintiffs' claim in unjust enrichment therefore requires as a precondition to success that the Colleges' contractual rights to the fees paid by the students be extinguished as these contractual rights would otherwise provide a juristic reason for the Colleges' enrichment. In order to extinguish the Colleges' contractual rights necessarily requires that a court find that the policy directive has the

> force of law. As the policy directive does not have the force of law, it cannot be judicially enforced to deny the Colleges the fees paid under the contracts. (my emphasis)

[83] Again, in my view, the facts in *Hassum* are quite distinguishable from the case at bar, because there is a very specific term of the Bell Mobility Service Agreement about 911 emergency service fees and my finding that the 911 live operator service was not provided. Unlike a policy directive, the Bell Mobility Service Agreement does have the force of law.

[84] I come back to the issue in this case of whether there is a juristic reason for the enrichment of Bell Mobility in charging the 911 fees. When Bell Mobility charges a fee for a 911 emergency service and then fails to provide the service, there is no juristic reason for its enrichment. In my view, it cannot be argued that the recorded message was consideration. Nor is the access that the subscribers may have had to 911 live operator service in other parts of Canada any consideration for the charging of 911 fees in the home jurisdiction where the contract was signed. There is a failure of consideration and therefore Bell Mobility has no juristic reason for having enriched itself through the fee.

[85] I conclude that the Andersons' claim for damages for unjust enrichment succeeds because there is no juristic reason to permit Bell Mobility to charge the 911 emergency service fee when there is no service provided.

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

[86] The concept of waiver of tort allows a plaintiff who has been the victim of tortious conduct to elect to receive compensation in the amount that the defendant has been enriched, rather than the damage the plaintiff has suffered as a result of the tortious conduct. See *Pro-Sys Consultants Ltd. v. Microsoft Corp.* (2006), 57 B.C.L.R. (4th) 323 (S.C.), at paras. 78-79 (aff'd on this point 2011 BCCA 186) and *Serhan Estate v. Johnson & Johnson* (2006), 85 O.R. (3rd) 665 (Div. Ct.), at para. 50. Professor John D. McCamus suggests that a more appropriate and descriptive term is "disgorgement of the profits of tort". See P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, looseleaf (Toronto: Canada Law Book, 2012).

[87] Although the claim of waiver of tort is somewhat novel with many unsettled aspects, the fundamental premise is that the defendant has committed a tort. This class action is grounded upon a service agreement or contract claim and there is no evidence that amounts to tortious conduct, nor any claim of tort.

[88] Having said that, I am aware of the British case of *Attorney General v. Blake*, [2001] A.C. 268 (H.L.), which permitted the relief of disgorgement of profits in the context of a breach of contract. Blake was employed by MI5. He was a traitor and eventually fled to Russia. He wrote a book about his experience as a double agent, and the Attorney General sought and succeeded in a disgorgement of profits claim arising out of a breach of the employment contract. A useful summary of the law by Murray J. in *Huttonville Acres Ltd.(c.o.b. Forest Homes) v. Archer,* [2009] O.J. No 4139 (Ont. Sup. Ct.) suggest that a disgorgement of profits claim can arise in the context of a breach of contract, but only in very exceptional circumstances like those in *Blake*. The fact that a breach is cynical and deliberate is not in itself sufficient reason to depart from the normal rules governing damages.

[89] The answer to this question is no.

ISSUE 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?

[90] This trial has proceeded to determine liability only. This section addresses the issue of whether punitive damages should be awarded in the circumstances of this case but will not address the quantum of such damages, if any.

[91] The leading case on punitive damages is *Whiten v. Pilot Insurance Co.,* 2002 SCC 18. In that case, Whiten's house had burned down and she was entitled to a $345,000 insurance claim. The insurer made a single payment of $5,000 for living expenses and then denied the claim and entered into a planned and deliberate course of action to deny the claim based on an arson defence. There was no evidence of arson from the local fire chief, the insurance company's expert investigator or the initial expert retained by the insurance company. The jury assessed punitive damages of one million dollars and although the Supreme Court found it to be at the high end of punitive awards, it did not interfere with the amount.

[92] The Court ruled, at para. 82, that a punitive damages award does not require that the impugned conduct amount to an independent tort but rather that:

> ... An independent actionable wrong is required, but it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation.

[93] Binnie J. also stated at para. 79, that an actionable wrong for an insurer can include the breach of a contractual duty of good faith and fair dealing.

[94] The Court set out a number of principles at para. 94 to determine when a punitive damage claim is appropriate and, excluding those that deal with quantum, they can be summarized as follows:

(1) Punitive damages are very much the exception and not the rule;

(2) Punitive damages should be imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviours;

(3) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation;

(4) Their purpose is not to compensate the plaintiff but to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence) and to mark the community's collective condemnation (denunciation) of what has happened.

(5) Punitive damages are only awarded where compensatory damages, which to some extent are punitive, are insufficient to accomplish the above objectives.

[95] With respect to subparagraph (5), I am following the practice of first determining whether the conduct of Bell Mobility justifies punitive damages. If punitive damages are justified, the assessment of those damages would take place after the damages hearing. See *Chalmers (Litigation guardian of) v. AMO Canada Co.,* 2010 BCCA 560.

[96] There are four areas of evidence that the plaintiffs rely on to support the claim for punitive damages.

[97] The first is the alleged breach of the CRTC directive requiring wireless service providers to provide initial and periodic notification of the "limitations of the 911 service offered by the WSP given the increasing public reliance on

wireless services in emergency situation." Bell Mobility denies that the CRTC directive has any application to the northern territories.

[98] On August 12, 2003, the CRTC published Telecom Decision CRTC 2003-53. In the section entitled 'Public Safety Obligations of WSPs', the CRTC stated that given the increasing public reliance on wireless services in emergency situations, they considered it appropriate to impose "some public safety obligations on all WSPs" including the following:

> File by 13 November 2003 a proposal for providing the WSPs subscribers with initial and periodic notification of the availability, characteristics and limitations of the 911 service offered by the WSP.

[99] Bell Mobility responded that it would communicate key messages to customers including:

...

- User relevant information concerning the characteristics and limitations of wireless 911 service, eg:
    - to always give the operator your cellphone number ...

[100] Bell Mobility says it did not provide information on the limitations of 911 wireless services to its subscribers who are class members in the northern territories, as it did not consider the CRTC Decision applied to them. In other words, Bell Mobility says it does not provide any 911 service so the Decision has no relevance.

[101] Counsel for Bell Mobility also submits that, in any event, there were no complaints to the CRTC which has its own procedures to deal with and resolve such complaints.

[102] I conclude that this CRTC matter does not support a claim for punitive damages.

[103] The second area is a string of e-mails between Bell Mobility employees between July 22, 2007 and September 21, 2007 that included, among other things, the following:

Re 911 fee positioning in the north west territory (*sic*):

> We are receiving legitimate complaints from customers about the lack of 911 service in NMI territory. Is this something that is planned? If not, we cannot continue to charge for the fee indefinitely and will have to modify our billing system for customers in Northern BC, Yukon and NWT.
>
> ...
>
> We need to be able to suppress this fee for this region, do we need to create new rate plans or can the 911 option be waived selectively?
>
> ...
>
> We are getting complaints now, and if someone decides to launch a class action lawsuit we would have no reasonable grounds to defend the charge.

[104] After September 21, 2007, the e-mail trail has been redacted on the ground of solicitor and client privilege. Bell Mobility says that these were not employees with decision-making power on pricing, so their views are not particularly significant.

[105] The evidence also revealed that in spite of the policy put forward by Bell Mobility indicating it billed 911 fees to everyone in Canada "without distinction", this policy did not include Newfoundland and Labrador, where Bell Mobility did not charge a 911 fee.

[106] Bell Mobility gave an explanation for the discrepancy. Mr. Martins said it was because Newfoundland and Labrador did not have an 'enhanced' 911 service. Nevertheless, the fact remains that some customers in Newfoundland and Labrador without 911 service did not have to pay the fee, while the class members in the northern territories paid the 911 fee without the service.

[107] It may be considered somewhat high-handed of Bell Mobility to continue charging 911 fees in the face of concerns and the inconsistent application of policy, but it does not rise to the level of reprehensible conduct required for punitive damages.

[108] The third area is the fact that there were potential life threatening situations where a wireless caller, in an emergency, would receive a recorded message but no assistance in making the emergency call. There is no evidence that such a situation occurred.

[109] The fourth area is the power imbalance between a customer who is charged 75 cents a month for a 911 live operator service that they do not receive. The customer is faced with a standard form contract that cannot be modified. Bell Mobility, on the other hand, is a Canada-wide corporation that refused to stop billing a fee until a class action was commenced despite its full knowledge of the lack of service for which it was charging a fee.

[110] While the conduct in this case strikes me as, again, tending towards the high-handed end of the spectrum, I do not find that the conduct "departs to a marked degree from ordinary standards of decent behaviour". While I have not accepted the "we are only a router of 911 emergency service" submission, Bell Mobility has not fabricated a defence to deny the plaintiffs their just recovery as was the case in the *Whiten*. Thus, despite the fact that some Bell Mobility employees clearly had sympathy for the customers' complaints, Bell Mobility's decision to vigorously defend the class action does not approach the mark of being malicious, arbitrary or highly reprehensible misconduct. The perception of unfairness arising out of the overwhelming power imbalance is tempered to some extent by the remedy of a class action.

[111] I conclude that there should be no punitive damages assessed.

SUMMARY

[112] To summarize, I find the common issues should be answered as follows:

Issue 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? No, but Bell Mobility cannot charge the 911 emergency service fee in the absence of the service.

Issue 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? No.

Issue 3: Did Bell Mobility provide 911 live operator service to class members: No.

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

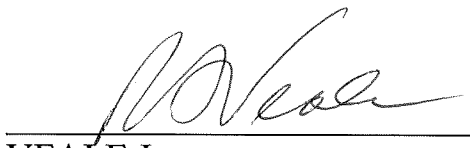
Issue 5: Has Bell Mobility been unjustly enriched for no juristic reason, or has there been a failure of consideration? Yes.

Issue 6: Is Bell Mobility liable to the class members on the basis of waiver of tort? No.

Issue 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? No.

[113] The issues of compounded pre-judgment and post-judgment interest, the claim for goods and services tax and costs remain to be addressed.

[114] In conclusion, Bell Mobility has breached the service agreements, and alternatively has been unjustly enriched. Counsel may speak to the issues of damages in case management.



VEALE J.

S-1-CV2007-000247

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