

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: 2007 SKQB 328

Date: 2007 09 17
Docket: QBG 1611/2004
Judicial Centre: Regina

IN THE QUEEN'S BENCH JUDICIAL CENTRE OF REGINA

BETWEEN:

MARK FREY, TRUDY BETTHEL, BRYAN PAWLACHUK, NATHALIE PAWLACHUK, D & S HOMES LTD., DOROTHY DIETZ, JOHN DIETZ, NEIL MacDONALD, NEIL WOOLSTON, ERIK DOUCET, BETTY LOU GAUDETTE, ANNA HANSON, JULIE ELKERTON, GREGORY TEED, SCOTT ANDREWS, DAVID MUSARAI, MARK BURKE, ROZANNE AQUIN, JEFF PARENT, COREY OPPEBEON, JOHN FEARON, NEVIN LOW, JERRY KARALASH, JENNIFER EVENSON, DANIELLE FAVREAU, JEFF LEDDING, TERESE HAFICHUK-WALKIN, JESSICA CORDINGLEY, ALISON WEINBERGER, TERRY PARKER, CAROL WALKER, CINDY BELTON, LEIGH EDMUNDS, LAUREN TOMASHICH, STAN PAPPAS, AMANDA DONALD, RICHARD SKUCE, LANT LUTTERODT, SHELLEY FRANK, STEVE DROVER, JOHN GILLIS, MICHAEL LUCAS and JOHN DOE I, JANE DOE I, JOHN DOE LTD. I, JOHN DOE II, JANE DOE II, JOHN DOE LTD. II, JOHN DOE III, JANE DOE III, JOHN DOE LTD. III, JOHN DOE IV, JANE DOE IV, JOHN DOE LTD. IV, JOHN DOE V, JANE DOE V, JOHN DOE LTD. V, JOHN DOE VI, JANE DOE VI, JOHN DOE LTD. VI, JOHN DOE VII, JANE DOE VII, JOHN DOE LTD. VII, JOHN DOE VIII, JANE DOE VIII, JOHN DOE LTD. VIII, JOHN DOE IX, JANE DOE IX, JOHN DOE LTD. IX, JOHN DOE X, JANE DOE X, JOHN DOE LTD. X, JOHN DOE XI, JANE DOE XI, JOHN DOE LTD. XI, JOHN DOE XII, JANE DOE XII, JOHN DOE LTD. XII, JOHN DOE XIII, JANE DOE XIII, JOHN DOE LTD. XIII, JOHN DOE XIV, JANE DOE XIV, JOHN DOE LTD. XIV, JOHN DOE XV, JANE DOE XV, JOHN DOE LTD. XV, JOHN DOE XVI, JANE DOE XVI, JOHN DOE LTD. XVI, JOHN DOE XVII, JANE DOE XVII, JOHN DOE LTD. XVII, JOHN DOE XVIII, JANE DOE XVIII, JOHN DOE LTD. XVIII, JOHN DOE XIX, JANE DOE XIX, JOHN DOE LTD. XIX, JOHN DOE XX, JANE DOE XX, JOHN DOE LTD. XX, JOHN DOE XXI, JANE DOE XXI, JOHN DOE LTD. XXI, JOHN DOE XXII, JANE DOE XXII, JOHN DOE LTD. XXII, JOHN DOE XXIII, JOHN DOE XXIV, JOHN DOE XXV, JOHN DOE XXVI, and JOHN DOE XXVII

PLAINTIFFS

- and -

BELL MOBILITY INC., ALIANT TELECOM INC., BELL ATLANTIC, MARITIME TEL & TEL LTD., NBTEL INC., ISLAND TELECOM INC., NEWTEL COMMUNICATIONS INC., MTS COMMUNICATIONS INC., TELUS CORPORATION, TELUS MOBILITY, B.C. TEL, TELUS COMMUNICATIONS (B.C.) INC., CLEARNET COMMUNICATIONS INC., ALBERTA GOVERNMENT TELEPHONES (AGT), SASKATCHEWAN TELECOMMUNICATIONS (SASKTEL), SASKATCHEWAN TELECOMMUNICATIONS HOLDING CORPORATION, AT&T CANADA INC., MICROCELL COMMUNICATIONS INC., MICROCELL SOLUTIONS INC., FIDO SOLUTIONS INC., ROGERS INC., ROGERS WIRELESS INC.

DEFENDANTS

Counsel:

E.F. A. Merchant, Q.C. and C.R. Churko for the plaintiffs

B.A. Tough and J.M. Lynch for the defendants, Bell Mobility Inc. and Bell Atlantic

E.S. Hopley for the defendants, Aliant Inc.,
Aliant Telecom Inc., Maritime Tel & Tel Ltd., NB Tel Inc.,
Island Telecom Inc. and Newtel Communications Inc.

J.N. Grubb, Q.C. for the defendant, MTS Communications Inc.
(now MTS Allstream Inc.)

G.J. Kuski, Q.C. for the defendants TELUS Corporation,
TELUS Mobility, B.C. Tel, TELUS Communications (B.C.) Inc.,
Clearnet Communications Inc. and Alberta Government Telephones (AGT)

R.W. Leurer, Q.C., and J.W. Mohrbutter for the defendants, Saskatchewan
Telecommunications (SaskTel) and Saskatchewan Telecommunications
Holding Corporation

K.E. Thomson and J.D. Bunting for the defendants, AT & T Canada Inc.,
Microcell Communications Inc., Microcell Solutions Inc.,
Fido Solutions Inc., Rogers Inc., and Rogers Wireless Inc.,

FIAT
September 17, 2007

GEREIN, J.

[1] This is the renewal of an application for an order certifying the within action as a class action. It comes about in this way.

[2] On July 18, 2006, I issued a fiat in this matter. At that time I was satisfied that the requirements of s. 6(a) to (d) of *The Class Actions Act*, S.S., c. C-12.01, had been met, but it was otherwise with respect to s. 6(e). Accordingly, I declined to certify the action, but granted leave to renew the application with respect to the requirements of s. 6(e). That has now been done and the issue to be determined is whether the earlier deficiencies have been rectified so as to permit certification of the action.

ANALYSIS

[3] While I am concerned with only the last part of s. 6 of *The Class Actions Act, supra*, for ease of reference I reproduce the entire section.

Class Certification

6. The court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class;

(c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;

- (d) a class action would be the preferable procedure for the resolution of the common issues; and
- (e) there is a person willing to be appointed as a representative plaintiff who:
 - (i) would fairly and adequately represent the interests of the class;
 - (ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

The issue now is whether a suitable representative plaintiff has been put forward and, within that issue, whether a workable plan has been produced.

REPRESENTATIVE PLAINTIFF

[4] Two persons have been proposed as representative plaintiffs, namely; Colin Chatfield and Joanne Kimm. The former lives in Saskatoon, Saskatchewan and the other lives in Victoria, British Columbia. In their respective affidavits each states a willingness to serve as a representative plaintiff.

[5] The significant question is whether "... they will fairly and adequately represent the interests of the class." It is argued on behalf of the defendants that the two persons are inadequate. A number of deficiencies are cited such as limited knowledge of past proceedings; no contact with other members of the class; minimal contact with counsel; and no role in preparing the litigation plan. These criticisms enjoy some validity, but they are not so serious as to warrant rejection of the individuals.

[6] When I read the two affidavits of Mr. Chatfield and the one of Ms. Kimm, I am convinced they have a basic knowledge of the relevant events and an understanding of the proceedings and their role in them. They may have come to this knowledge and understanding only recently, but that does not disqualify them. I recognize that their knowledge is not truly comprehensive or all embracing and they lack any real expertise. However, this is not surprising.

[7] It is a very rare litigant who is otherwise. They retain counsel because of this. They look to counsel to know the law, the procedures and to devise the strategy whereby a remedy will be obtained. That does not mean the litigant plays no role. Rather that person must have a knowledge of the overall factual situation; must assist in gathering evidence; and must decide whether to pursue the claim. And yet all of this takes place within the purview and advice of counsel. As a result, even an incompetent litigant can obtain a favourable result through the efforts of competent counsel. All of which leads me to the opinion that one should not expect too much or be too demanding in evaluating whether a person can properly serve as a representative plaintiff.

[8] In this instance, I am satisfied that Mr. Chatfield "will vigorously and capably prosecute the interests of the class:" as was stated in *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534 at para. 41 and *Scott v. T.D. Waterhouse Investor Services (Canada) Inc.* (2001), B.C.L.R. (3d) (B.C.S.C.) at para. 154. As well I am satisfied that he will fairly and adequately represent the interests of the class and he is not in any position of conflict. Thus he meets the requirements of s. 6(e)(i) and (iii) of the Act.

[9] In this case the class is comprised of persons resident and non-resident in Saskatchewan. Section 8(1) of the Act mandates that there be resident and non-resident subclasses. The legislation does not require a separate representative plaintiff for each subclass and therefore I am prepared to appoint Mr. Chatfield to serve for the two subclasses.

[10] I have not made reference above to Ms. Kimm as I am not prepared to appoint her as a representative plaintiff for the reason that cross-examination has demonstrated that she personally has no claim against any of the defendants. In my opinion, except in the rarest of cases, such a person should not be a representative plaintiff.

LITIGATION PLAN

[11] On the initial application the litigation plan was rejected largely because of a lack of detail and precision. Now counsel has gone to the opposite extreme. The new plan is fifty-seven pages in length; contains extraneous material; purports to address most every conceivable contingency while saying nothing about some matters; and even suggests some new procedures. For example, it commences with a summary of facts and something of a legal brief. Both are unnecessary and inappropriate. It is suggested that several persons from each defendant will be examined for discovery by the plaintiff. No mention is made of the requirement to obtain court approval for this. On the other hand, no mention is made of discovery by the defendants. It is proposed to proceed against a test defendant. It is most unlikely, if not impossible, that this will occur.

[12] Despite these deficiencies and others, I am not persuaded that they justify rejection of the plan. It is evident that serious thought has gone into its formulation. One must keep in mind that any plan is grounded in a certain amount of speculation. One cannot be absolutely certain about how the proceedings will unfold. It is better to include too much rather than not enough. Any plan will always be subject to the rules of civil procedure. That which is fanciful, inappropriate or wrong will never come into effect.

[13] We must not lose sight of the fact that we are talking about what is only a plan. It is not carved in stone and will certainly undergo modification. What is important is that when one cuts through some of the extremes and improbabilities, there is a plan whereby the action can be moved along and a determination ultimately achieved. When I review with some care the plan proposed in this instance, I am satisfied that it is essentially workable. Some parts will be ignored; some parts will be excised; some procedures will be added; and some modifications will be made. The necessity for this does not justify rejection of the entire plan.

[14] I want to address two other arguments, which are not entirely dissimilar. To put them into context one must remember that in the earlier decision it was held that the statement of claim disclosed only one valid cause of action, namely; that of unjust enrichment.

[15] On behalf of one defendant it is now argued that the claim of unjust enrichment was put forward at the last moment by way of an amendment to the statement of claim. It is said there was insufficient time to then prepare proper

[16] I am not prepared to adopt that course. That issue has been decided and it is not open to me to revisit it even under the pretence that the litigation plan is unworkable because the single cause of action is invalid. No matter how it is presented, what is being sought is a review of the earlier decision and that must be done in another forum.

[17] The second argument is that the plan is unworkable because there is no way in which the plaintiffs can establish an unjust enrichment. It is said that the plan is an attempt to circumvent the earlier ruling rejecting the claims based on fraud and misrepresentation.

[18] It may happen that the plaintiffs cannot prove unjust enrichment. However, that is not to be determined at this stage of the proceedings. The plaintiffs must be afforded an opportunity to prove their claim and only then will it be determined whether or not the claim is valid.

[19] To the concern about the plaintiffs doing indirectly what they cannot do directly, I give the same answer. At this stage of the proceedings, I cannot be certain about what is intended. Should it happen that the concern becomes a reality, time enough to deal with it then. I am confident that counsel will resist the impugned approach if it is pursued and, if necessary, the Court will then decide whether or not the approach is permissible.

[20] Upon a consideration of the litigation plan itself and within the context of the several submissions, I am satisfied that the plan is workable with any deficiencies

being rectified through the management process. Accordingly, the requirements of s. 6(3)(e)(ii) have been met.

[21] There is one other matter. Counsel for the plaintiffs referred me to a number of American decisions. I reviewed them and found them to be of no assistance. They played no part in my conclusions.

CONCLUSION

[22] In the result, it is ordered that the within action be certified as a class action. A draft order which meets with the approval of all counsel will be prepared and filed for my approval. In the event that agreement as to the terms of the order is not possible, any counsel may apply to me for directions on a date fixed by the Registrar and upon giving 10 days notice.

 J.