Court File No. CV-12-452867-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CELIA SANKAR

Plaintiff

-and-

BELL MOBILITY INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT OF SERVICE

I, CARLY REYNER, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am a legal assistant with the law firm of Sotos LLP and, as such, have knowledge of the following matters.

2. I served the Defendant, Bell Mobility Inc., with a Notice of Appeal and Appellant's Certificate Respecting Evidence, by sending a copy by fax to (416) 216-3930 on March 13, 2015 to Steve Tenai at the law firm of Norton Rose Fulbright Canada LLP, the lawyers for the Defendant, Bell Mobility Inc.

3. Attached to this affidavit as Exhibit "A" is a true copy of the facsimile confirmation sheet.

BEFORE ME at the
City of Toronto, in the)
Province of Ontario)
this 17th day of March, 2015)
)

Commissioner for Taking Affidavits

CARLY REYNER

KATHLEEN R. MACFARLANE
Licensed Paralegal
LSUC P10413

****
*** FAX TX REPORT ***
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TRANSMISSION OK

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Sotos

SOTOS LLP | LAWYERS & TRADE-MARK AGENTS

FACSIMILE TRANSMITTAL

TO:	Steve Tenai Norton Rose Fulbright Canada LLP	**FROM:**	Louis Sokolov 416.572.7316
FAX:	416-216-3930	**DATE:**	March 13, 2015
TO:	Jordan Goldblatt Christine Davies Nadine Blum Sack Goldblatt Mitchell LLP	**FILE:**	# 20603
FAX:	416-591-7333		
RE:	**Sankar v. Bell Mobility** **Court File No.: CV-12-452867-00CP**		

MESSAGE:

Please see attached from Louis Sokolov.

This is Exhibit "A" referred to in the affidavit of Carly Rayner sworn before me, this 17th day of March 2015

A COMMISSIONER FOR TAKING AFFIDAVITS

PAGES (INCLUDING COVER): 14

IF NOT RECEIVED, PLEASE CALL CARLY AT 416-977-5333 x 336

CELIA SANKAR
Plaintiff

-and-

BELL MOBILITY INC.
Defendant

Court File No. CV-12-452867-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT OF SERVICE OF CARLY REYNER
(Sworn March 17, 2015)

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Lawyers for the Plaintiff/Appellant,
Celia Sankar

Court File No.

COURT OF APPEAL FOR ONTARIO

BETWEEN:

CELIA SANKAR

Plaintiff (Appellant)

- and -

BELL MOBILITY INC.

Defendant (Respondent)

Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF APPEAL

THE PLAINTIFF APPEALS to the Court of Appeal from the Judgment of the Honourable Justice Belobaba, dated February 12, 2015, made at Toronto, Ontario.

THE APPELLANT ASKS that the Judgment be set aside and a judgment be granted as follows:

1. Answering "yes" to all of the following certified common issues, granting judgment in favour of the class:

   A. *For the general class of "persons" (including consumers)*

      1. *Breach of Contract (General)*

         a) *Do the terms of the contracts between the defendant and class members require the defendant to wait until after the expiry of prepaid credits before the prepaid credits can be seized?*

         b) *If so, did the defendant breach the terms of the contract by seizing prepaid credits before it was entitled to?*

B. *For the sub-class of "consumers"*

1. *Breach of Contract (Gift Card Regulation)*

   a) *Are the pre-payments at issue in this action "gift cards", "gift card agreements" and "future performance agreements" within the meaning of the Consumer Protection Act, 2002 and O. Reg. 17/05 (the "Gift Card Regulation"), and otherwise subject to the Gift Card Regulation?*

   b) *If so, is the expiry and seizure of pre-payment funds contrary to law pursuant to the Consumer Protection Act, 2002 and the Gift Card Regulation?*

   c) *If so, is it a term of the contracts between the defendant and class members that pre-payment funds not expire?*

   d) *If so, has the defendant breached its contract with the class members?*

2. Granting the costs of the summary judgment motion, and appeal, plus applicable goods and services and harmonized sales tax to the plaintiff; and

3. Such other order respecting the conduct of this proceeding and its fair and expeditious determination as this Court deems just.

THE GROUNDS OF APPEAL ARE AS FOLLOWS:

1. This is a class action brought on behalf of a class of more than 1,000,000 prepaid wireless customers of Bell Mobility Inc. ("Bell"). The class proceeding challenged Bell's systemic practice of seizing prepaid credits in class members' wireless accounts that it deemed expired;

2. This action was certified as a class proceeding on October 4, 2013, following which the parties brought motions seeking summary determination of two issues central to the litigation: first, whether Bell breached its contract with the class members by seizing class members' prepaid credits before it was contractually entitled to do so (the "contract issue"); and second, whether Bell was prohibited from seizing "expired" prepaid credits because of the provisions of the *Consumer Protection Act, 2002*[1] and O. Reg. 17/05 (the "Gift Card issue"). The plaintiff's motion sought orders in the class' favour in respect of these issues while the defendant's motion sought summary dismissal;

3. The contract issue arose from the fact that, during the vast majority of the class period, the plain language of the contracts entered into between the class and the defendant provided that the defendant could seize funds only ***after*** an "expiry date" or a "specified time period". Contrary to the language in the contracts, for the bulk of the class period, Bell seized funds from class members ***on*, not after,** expiry dates it assigned to class members' wireless accounts and communicated to them. Accordingly, the plaintiff alleged that Bell breached its contracts with the class;

4. The Gift Card issue arose from the operation of the *Consumer Protection Act, 2002* and O. Reg. 17/05 which (with limited exceptions) prohibits "gift cards" from expiring. The plaintiff alleged that "top up" cards and other electronic payments used to put money into class members' wireless accounts fall within the definition of "gift cards" under the Consumer Protection Act, 2002 and O. Reg 17/05, and that by causing the class' credits

[1] SO 2002, c 30, Sch A.

to expire before their use, and by seizing funds from class members' accounts, Bell violated the *Consumer Protection Act, 2002* and O. Reg. 17/05;

5. The summary judgment motions were heard by the Honourable Justice Belobaba (the "Motion Judge") on January 28, 2015;

6. On February 12, 2015, the Motion Judge released his judgment, deciding the common issues in favour of the defendant;

7. The Motion Judge made palpable and overriding errors of fact and errors in principle in finding against the class on the contract issue. In particular:

    a. The Motion Judge made a palpable and overriding error in finding that it was "not in dispute", that "at no time during the class period did class members receive anything less than the full period of wireless service which they had contracted to receive". In fact, this was at the core of the dispute between the parties;

    b. The Motion Judge erred in principle and/or made a palpable and overriding error, by ignoring the explicit expiry dates that the defendant assigned to class members' wireless accounts and communicated to them. Instead, the Motion Judge committed a palpable and overriding error by inferring that an "expiry date" was the same as an "active period" for the wireless credits in the face of clear evidence that Bell treated "active periods" as distinct from "expiry dates";

c. The Motion Judge erred in principle and/or made a palpable and overriding error in finding that "the defendant intended and the subscribers understood that the top-up agreement and any unused funds would expire at the end of the active period". This finding was:

i. in direct contrast to Bell's explicit communications about the expiry dates,

ii. irreconcilable with the Motion Judge's finding of fact that "many of the class members' complaints were prompted in part by the defendant's reminder messages noting the 'expiration date'"; and

iii. irreconcilable with the Motion Judge's findings of fact that "the expiry date issue has been the subject of consumer complaints for some time. According to a recent study more than one-half of phone card consumers were concerned about the expiry of their cell phone credits and nearly a third said they experienced a loss of their prepaid credits on a monthly basis";

d. The Motion Judge erred in principle by concluding that class members were required to prove that they "reasonably relied" on the expiry date, when reliance formed no part of the plaintiff's contract claim; and

e. The Motion Judge erred in principle and/or made a palpable and overriding error by giving insufficient weight to the language of the contracts of adhesion, which were drafted by Bell, and which gave Bell the discretion to amend the language

of the contracts at any time, as it eventually did in November 2013;

8. The Motion Judge made palpable and overriding errors of fact and errors in principle in finding against the class on the gift card issue. In particular:

   a. The Motion Judge erred in principle in interpreting O. Reg. 17/05 as applicable exclusively where there is an intention to make a gift, when the regulation plainly says no such thing, and such an interpretation would lead to a commercially illogical result, namely, that two identical gift cards would be subject to different regulations, depending solely on whether they were gifted;

   b. The Motion Judge erred in principle in dismissing all claims of class members under the Gift Card Regulation based on an analysis of PIN receipts,[2] as PIN receipts represent only one form of customer payment at issue;

   c. The Motion Judge made a palpable and overriding error in finding that "the vast majority of pre-paid cards and top-up agreements are not subject to the Gift Card Regulation" because "they are purchased for personal use only and not as gifts for third parties", when there was no evidence in the record to support such a finding; and

   d. The Motion Judge erred in principle and/or made a palpable and overriding error in finding that the gift cards in this case involve only one specific good or service, when there was uncontradicted evidence in the record that the pre-paid

[2] PIN Receipts are the hard copy receipts generated where a class member purchased top-up cards at a retail location. The PIN Receipt provides a code which the class member then enters into his or her account to trigger the credit. This is to be contrasted with, for instance, where a class member directly logged into his or her account to add credits.

wireless credits could be used for a variety of goods and services including "wireless voice, data, text, picture, video or other messaging, content, downloads, applications, streaming" and other services; and

9. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE BASIS FOR THE APPELLATE COURT'S JURISDICTION IS:

1. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 6(1)(b);

2. The judgment appealed from is final; and

3. Leave to appeal is not required.

March 13, 2015

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Celia Sankar
Plaintiff (Appellant)

-and-

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Court File No.

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BETWEEN:

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Plaintiff (Appellant)

- and -

BELL MOBILITY INC.

Defendant (Respondent)

Proceeding under the *Class Proceedings Act, 1992*

APPELLANTS' CERTIFICATE

THE APPELLANTS certify that the following evidence is required for the appeal, in the appellants' opinion:

a) Affidavit of Celia Sankar, affirmed November 25, 2014, including exhibits;

b) Affidavit of Maria Ferranti, sworn December 1, 2014, including exhibits.

March 13, 2015

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Proceeding commenced at TORONTO

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