In the Court of Appeal for the Northwest Territories

Citation: Bell Mobility Inc v Anderson, 2015 NWTCA 3

Date: 20150107
Docket: A1-AP2013-000006
Registry: Yellowknife

Between:

Bell Mobility Inc.

Appellant
(Defendant)

- and -

**James Douglas Anderson and Samuel Anderson,
on behalf of themselves, and all other members of a class having a claim
against Bell Mobility Inc.**

Respondents
(Plaintiffs)

The Court:

**The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Neil Sharkey
The Honourable Mr. Justice Thomas W. Wakeling**

**Reasons for Judgment Reserved of The Honourable Mr. Justice Côté
Concurred in by The Honourable Mr. Justice Sharkey
Concurred in by The Honourable Mr. Justice Wakeling**

Appeal from the Order by
The Honourable Mr. Justice R.S. Veale
Dated the 17th day of May, 2013
(Docket: SICV2007000247)

Reasons for Judgment Reserved of
The Honourable Mr. Justice Côté

A. The Substantive Suit

1. Introduction

[1] This is an appeal from a trial judgment in a class action: 2013 NWTSC 25. The plaintiffs' basic complaint is that the defendant Bell charged for non-existent services, namely 911 calling. There is no 911 service in the three Territories (except in Whitehorse). Monthly bills in the Territories bore a separate 911 fee of 75¢ (trial Reasons, *supra*, paras 23-24).

2. Interpreting these Contracts

[2] One must approach this appeal through the contracts between the defendant Bell and its customers. That is because Bell relies heavily on the contracts for two purposes. First, Bell argues that it has an express contractual right to collect 911 fees from customers in areas where no 911 service of any kind is available. That is the central topic now litigated. Because of this suit, Bell dropped that fee for contracts made after November 2009: Agreed Facts, para 18. Second, Bell also argues that the contracts are a juristic reason for Bell's enrichment from those fees, so that there cannot be unjust enrichment. A valid and enforceable contract which grants or permits something of course is a juristic reason. So the contract's interpretation and enforceability is vital to the unjust enrichment issue.

[3] The actual wording of a contract is critical to its interpretation: see ***Sattva Capital Corporation v Creston Moly Corporation***, 2014 SCC 53, 461 NR 335, [2014] 9 WWR 427 (paras 57, 60). An objective assessment of a multi-party document must be undertaken: ***Sattva Capital Corp***, para 49.

[4] Counsel for Bell repeatedly assert that its contracts with customers plainly state that a monthly fee must be paid each month for some kind of 911 service. But in my view, the contracts do not bear out Bell's assertion, and instead many passages say much the opposite. I will approach the interpretation question in full and from the beginning. But I imply no criticism of the trial judge's interpretation. Our interpretations do not clash, and often overlap.

[5] Bell's written and oral argument to us says very little about the actual wording of the contracts, which are written. The same is true of Bell's written brief given to the trial judge at the end of the trial. The evidence filed contains copies of a number of contracts.

[6] A few copies are virtually illegible. I will deal in detail with those which can be read. I was tempted simply to rely upon what Alberta's Master Funduk once wrote. He said, "That which I cannot read I disregard. That which is not readable is not proved in evidence.": ***Uhrig v Zeiter*** [1983] AJ #394, [1983] AUD 1906 (M July 5) (para 19). However, I believe that one can see enough of the illegible form on AB pp 640 to 643 (Martins' Exhibit H, in trial exhibit 3) to tell that

it is the same or similar to legible ones, such as pp 625 ff. (This illegible one came into use in July 2008, says Martins.) Page 616 is totally unreadable, but it is marked in pen "2004". It is Martins' Exhibit J, and he confirms that it came into use in 2004. It is obsolete. Paying no attention to it is probably harmless. Neither party ever cited it.

[7] Martins' affidavit explains the circumstances under which one different form of contract rather than another was used. They are simply forms used at different times.

[8] However, the various forms in evidence involve much repetition, and there seem to be but two basic contract forms. One of the Andersons signed one form in 2005, and the other one signed the other form in 2007.

[9] It is vital to note that these are not contracts for use only in the three Territories. These are standard forms used in all parts of Canada. (See trial judge's first Reasons, paras 16, 25, and see Andersons' first factum, paras 2, 60.)

[10] At many relevant times, Bell was the only local cellphone provider in the Territories. (At times Inuvik may have had another provider, and whether anyone else was a provider after 2003 is not clear from the evidence.)

[11] The front page of one Bell contract form contains the following words:

> I understand that depending on the rate plan I select, I am also liable to pay . . . and a monthly 9-1-1 service access fee outlined by Bell Mobility.

(See for example AB v 4, p 600.) That sentence is doubly contingent: it expressly does not apply to all "rate plans", and also always depends on Bell's first "outlining" the fee, whatever that means.

[12] More important is a sentence on the next page of that same contract form (eg AB v 4, pp 601 and 619 and 621). It reads as follows:

> Your monthly charges **will** include your monthly access fee, all applicable taxes, and **may** include . . . 9-1-1 emergency service fees, . . . (emphasis added)

Therefore, the only firm charges which definitely "will" be charged, are monthly access fee and applicable taxes; all other charges merely "may" be included. In that latter list of possible charges are various services which various customers may or may not have or purchase, such as "features" or "connection charges" or "picture messaging charges" and "device leasing charges". Presumably that is because not all customers would have or purchase such things, or they would not occur some months. So the 911 fee seems to be of the same nature. One must note that the 911 fee is called a "service fee".

[13] The word "may" obviously means that it is possible that a 911 fee will not be charged. The criterion for that is left ambiguous. It may mean it will be charged when that service is available. Or it may mean that Bell will charge the fee if Bell chooses to do so. So the court must decide which interpretation is proper. I will return to that topic in subpart 4 below.

[14] Similar is another clause on the same page (AB v 4, p 601 and p 618). It is headed "What We'll Provide to You", so plainly the subject is services which Bell provides to the customer. A fee is not provided by Bell; it is paid to Bell. The clause says that "9-1-1 emergency service fees . . . may increase during the Term at our discretion after giving you at least 30 days notice." Once again the word "may" is used, but only in this clause is there any reference to Bell's discretion; the word is not used elsewhere with respect to 911 charges.

[15] The above excerpts are all from the form of contract which the plaintiff James Anderson signed (AB v 4, pp 617, 619).

[16] Another apparently alternate form of contract is called "Wireless Terms of Service". Clause 15 "Payments" begins this way:

> You agree to pay all **applicable** fees, charges and taxes **relating to the Services** and the Device(s) . . . Charges include a monthly 911 fee . . . (emphasis added)

The same clause ends by saying that after the end of "any Committed Service Period", the customer will pay for "all other Services provided . . . **unless or until features are no longer available** . . ." (emphasis added) (eg AB v 4, pp 607 and 636). Therefore, the fees payable are only those "applicable" and must relate to "Services and the Device(s)", and in many circumstances are not payable if the "feature [is] no longer available". Once again, that is more or less the opposite of a covenant to pay a fee irrespective of whether anything is received in return.

[17] Another contract form has a heading "Your Monthly Fee" and then states under it,

> System Access Fee & 911 fees are recurring monthly charges **unless they are included** in your monthly rate plan. (emphasis added)

(eg AB v 4, pp 622 and 630). So again a separate 911 charge is contingent and not always charged. That is in the contract which the plaintiff Samuel Anderson signed (AB v 4, pp 629-30).

[18] In evidence is another variant form, dated "October 2009" (AB v 4, p 647). Its clause 15 on "Charges and Payments" is somewhat different. It begins the way that the one described above does, but then instead of saying what "charges include", it says "You agree to pay a monthly 911 fee (unless otherwise stated in your Agreement)." Once again, there is a qualification. The clause still begins by saying that the fees and charges are relating to the Services and Devices. And the

end of the "Committed Service Period" paragraph still excludes charges for "features . . . no longer available".

[19] As the trial judge said, even if all the above analysis were wrong, the Andersons would nevertheless win on another ground (trial Reasons, paras 41-44). It is the *contra proferentem* doctrine which applies because all these are Bell's contracts, yet they do not clearly call for a fee for nothing in return (trial Reasons, para 16).

[20] I have not yet described the April 2008 introduction of a definition of 911 services. The definition section of a standard form contract had inserted after the phrase "911 service" the words "provision of emergency call routing". Counsel agree that it came in, in 2008, not 2009, as the trial judge said (e.g. see respondents' factum, para 17).

[21] A number of passages in Bell's factum assert that inserting that definition clinched Bell's interpretation of the contract, indeed confirmed Bell's victory. Bell must think that the matter is self-evident. It does not explain why the definition should have that effect, and I do not think that the new definition had much effect. Had the Andersons' claim really been that Bell had given a contractual covenant to provide a live 911 operator, then maybe the new definition would have rebutted such a claim. But (as noted in subpart 6) that is not the Andersons' claim now.

[22] In my respectful view, connecting someone to nothing is still nothing. A right to charge a door-to-door delivery fee for milk cannot be triggered by delivering empty bottles. An airline which produces on time an airplane with no vacant seats cannot charge a traveller for a ticket on that flight, absent very clear wording in the contract.

3. Background Facts to Aid Contractual Interpretation

[23] Bell relies heavily on the facts which the parties knew before they contracted, because such a background or setting gives some help in interpreting even a written contract. See the ***Sattva*** case, *supra*, at paras 46-48, 57. The Andersons' written closing trial argument asked the trial judge to take that factor into account (paras 51-55). The trial judge used and approved such law, which is far from new: see his first Reasons, paras 30-33, 48. Yet Bell complains that he did not do that (factum, para 53). At best, that argument merely tries to chop up the judge's Reasons into segments.

[24] In particular, Bell points to evidence that the public in the three Territories knew that there was no kind of 911 service there and never had been (except for the City of Whitehorse). Had these written contracts been specially drawn up for use in the three Territories, there might be some significance to that evidence. But (as noted above) they were not so drafted; they were Canada-wide contractual forms. Most parts of Canada have and have had 911 operator service for at least two generations. Therefore a reasonable observer in the Territories would probably infer that any references in the printed forms to 911 services, access, or fees, were for use in those parts

of Canada offering such services and access. The qualifying language quoted above from the contracts would strongly support that inference.

[25] And background facts can never modify or overwhelm the contract's actual wording: see the ***Sattva*** case, *supra*, (paras 57, 64).

[26] Printed form contracts of adhesion are legitimate contracts, and make many types of commerce possible or economical. But it is very common that such printed forms refer to topics which do not exist and cannot exist, for that locale or customer. A standard form proffered by a large Vancouver company to a Regina customer may speak about carriage of goods by sea, and ocean bills of lading. A reasonable bystander knowing that there is no ocean between Vancouver and Regina may conclude that the form is for use all across Canada and under many circumstances, and so that clause does not apply to landlocked customers. Similarly, a reasonable observer in Montreal would conclude that references in a national company's standard form to a certain legal mechanism found only in the common-law provinces, with no equivalent in Quebec legislation, simply does not apply to Montreal customers. A covenant in a national form to pay provincial sales tax would be interpreted as not applying in Alberta or the Territories. It would not be interpreted as calling on Albertans to pay British Columbia sales taxes for goods from Ontario sold in Alberta.

[27] Therefore, I cannot see that the trial judge here was obliged by law to put heavier weight on the background fact that people in the Territories knew that they had no 911 service, than he actually did put on it.

4. Legal Principles of Interpretation

[28] The first rule of interpretation is that a document must be read as a whole, looking at all its words and trying to make them all fit together: ***Sattva*** case, *supra*, at para 64. The contractual terms on the 911 fee topic are all conditional and ambiguous, as I have set out above (in subpart 2).

[29] Parties can contract on almost any terms that they wish. They can contract for sinecures or other payments for nothing. But where the wording of the contract is ambiguous, a court should be slow to adopt an interpretation which gives one party pay for nothing, or for what is virtually nothing. That is because ambiguous words give the court a choice; those words should not be given the unfair or non-commercial or non-sensible alternate reading: ***Consolidated Bathurst Export v Mutual Boiler Insurance*** [1980] 1 SCR 888, 899-902, 32 NR 488, 112 DLR (3d) 49 (para 16). See also to like effect, ***JAS v Gross***, 2002 ABCA 36, 299 AR 111, [2002] 5 WWR 54 (para 19); ***Non-Marine Underwriters at Lloyd's (Oppenheim) v Scalera***, 2000 SCC 24, [2000] 1 SCR 555, 591-92, 253 NR 1, [2000] 5 WWR 465 (para 71); ***Benfield Corporate Risk Canada v Beaufort International Insurance***, 2013 ABCA 200, 553 AR 204 (para 179).

[30] Receiving nothing of course refers to what the party asked to pay gets in return. I do not refer to expenses incurred by the party paid, where the expenses produce no benefit to the person asked to pay. For example, a customer of a movie rental service would derive no benefit from that

service's large selection of movies in some format or kind of tape or disc (foreign, cutting edge or old) which will not play in any computer or machine now commercially available in Canada. How much money the proprietor of the service has sunk into such formats, tapes or discs, and with what disappointed expectations, is of no interest to a customer. One reason that I say that, is that the interpretation of contracts, and use of background facts, is strictly objective, not subjective: ***Eli Lilly & Co v Novopharm*** [1998] 2 SCR 129, 227 NR 201 (para 54); ***Sattva*** case, *supra*, at paras 58, 59.

[31] This is not a case of a service or feature which works, but is of no interest to most customers, such as up-to-date weather forecasts for Mexico. It is a "service" which does not work at all because it is incomplete, like a special hairdryer cord with no hairdryer.

[32] I do not disagree in any way with the trial judge's interpretation of the contracts. Still less can I say that his interpretations were unreasonable. The trial judge pointed out and relied upon some of the precise words in the written forms which I have described above.

5. Standard of Review

[33] That in turn leads one to the standard of review. Interpretation of a contract used to be viewed as almost entirely a question of law, thus attracting no appellate deference to the trial judge's interpretation of the contract, particularly a written contract. However, the Supreme Court has now clarified the topic (after the factums here but before oral argument). Both counsel quoted from that decision during oral argument. It is ***Sattva Capital Corporation v Creston***, *supra*. The Supreme Court says that deference is almost always owed to the trial judge's interpretation of a contract, and that an extricable question of law alone on that topic will be rare. See paras 49-55.

[34] I do not see that the trial judge excluded or denied any established principle of interpretation, even use of background facts.

[35] Both sides cite leading authorities on how to interpret contracts, but I cannot see much difference in the legal principles of interpretation which the two sides espouse. Nor do they cite any authority contradicting the contractual interpretation principles which I have outlined above.

[36] The bills expressly made a 75¢ charge for 911 connections.

6. What was in Issue at Trial?

[37] Bell strenuously argues that one issue for trial was (and is) whether Bell is obliged by the contracts to hire live 911 operators. It is of course common knowledge that live 911 operators elsewhere in Canada are usually municipal employees, and do not work for any telephone company.

[38] In any event, all the customer cares about is the result, not who does their work or who subcontracts. The plaintiffs so argued to us. In effect, the customer only says, "if I can phone a live 911 operator of any kind, I'll pay your fee." By the time of trial at least, who had to hire any 911 operators was of little if any practical importance.

[39] Bell contends that the trial judge found it guilty of breach of a contract requiring it to hire live operators. That is not so. The trial judge expressly said the opposite (Reasons, paras 54, 112). The trial judge held that calling 911 must reach some live operator, **if** Bell wished to charge a 911 fee (Reasons, para 112). The allegation is that Bell collected, with some degree of compulsion, sums which no contract or legislation authorized. The trial judge agreed that that occurred, and that is the only breach of contract which he found.

[40] The plaintiffs argue that they are liable for 911 fees, only if, as, and when, there is an actual 911 service available in their area. They do not argue that Bell must create such a service, nor even that Bell must persuade local government to supply it.

[41] In short, Bell confuses a condition precedent with a covenant.

[42] Bell repeatedly contends that the trial judge, who had been managing this suit for years, misunderstood what the issues were.

[43] It is true that para 11 of the amended statement of claim seems to suggest that by charging each month for 911 emergency access, Bell has breached the contract by not providing the services paid for. But there is also another possible way to interpret that paragraph. The amended statement of claim does ask for damages, but also asks for repayment to the plaintiffs and class members (para 15). The latter (repayment) is not suitable for a breach of covenant to give a service. But Bell's interpretation would gain some support from the particulars provided by the Andersons' counsel on March 28, 2008.

[44] Bell's statement of defence is brief and adds little.

[45] The May 27, 2011 order certifying the class action lists seven "common issues for trial". The first might support Bell's contention, as it is about whether the contracts expressly require Bell to provide live 911 service. But that first issue is not clear either, as the sentence dangles. Does it mean provide live service or else be liable for damages (or specific performance)? Or does it mean provide live service if you want to keep charging the fee? The second issue about an implied term has the same ambiguity. It is doubtful that common question #2 covers who has to pay (hire) the 911 operator, a point which Bell stresses, but it is not necessary to pursue that. The third issue, whether Bell provided 911 live operator service, is neutral.

[46] The fourth issue is broad and general. It asks whether Bell broke the contracts. Bell assumes that that fourth issue merely repeats the first and second issues about a covenant to

provide a live operator. But there is no reason to confine the fourth question that way, nor to presume that a separately-described issue is mere duplication.

[47] In any event, under common issue #4, the trial judge stated expressly what the breach of contract was which he found. It was "billing for a '911 emergency service fee' when the class has not been provided a 911 live operator service." (Reasons, para 70). In other words, the **fee** is the breach of contract. That adopts the Andersons' trial argument.

[48] Bell thinks that the trial judge misunderstood its argument. But Bell's written brief for the trial judge at the end of the trial devotes only two sentences (paras 188, 189) to this common issue #4. That is doubtless because Bell thought that the earlier long factual discussion in its trial brief had adequately dealt with this topic. Bell's misunderstanding of the Andersons' big argument is unfortunate. But the trial judge cannot be blamed for the resultant comparative brevity of his Reasons on this topic.

[49] Common issue #5 was whether Bell was unjustly enriched. The trial judge said yes, because there was a fee collected for no service (para 84). He found the contract did not authorize that. That accords with the Andersons' trial argument. It certainly covers billing for nothing.

[50] The trial judge's Reasons on unjust enrichment are not lengthy either. But the portion of Bell's trial brief on that topic is fairly short. Once again, Bell probably assumed that it had covered that topic by citing oral trial evidence on what lay people thought their written contracts meant (paras 120-23).

[51] The trial judge says that the brief version of the Andersons' trial argument was a complaint that for "several years . . . Bell charged the Class Members for a non-existent service." (trial Reasons, AB p 509, para 10).

[52] That is not a complaint that the **service** was compulsory but not provided. That is a complaint that the **fee** was not proper because the defendant provided nothing. The former would allege a covenant to give services. The Andersons did not so argue on appeal. The latter alleges an optional service, but no right to bill when it is not provided. The Andersons clearly so argued at trial and on appeal. That latter was the trial judge's interpretation of the contracts (Reasons, para 54).

[53] Part F of Bell's appeal factum (para 68) argues that the trial judge answered, and based his judgment on, a question not certified for trial, and its counsel stressed that in oral argument on appeal. I do not agree. I have outlined above how to interpret the questions certified for trial. As described above, common question #2 might not fit the trial judge's conclusion, though the conclusion certainly fits the Andersons' trial argument. But common question #4 is very broad, and the Andersons' argument and the trial judge's conclusion fit within it. The amended statement of claim is not clear, but can be read that way also.

[54] Nor did the trial judge spring anything on Bell. The Andersons' counsel gave an opening statement to the trial judge, and it clearly, and repeatedly, posed the issue as billing for what was not provided, i.e. charging for nothing. (See transcript of trial, p 7, lines 22-25; p 8, lines 1-2, 6-10; p 12, lines 8-11; p 17, lines 9-12.)

[55] I have also read the Andersons' written closing argument at trial, and it removes any possible doubt on this topic. See especially the Overview (p 3, lines 6-7, 15-18, 19, 20, 23-24, 29-31). See also its p 38, para 142.

[56] What if any common question for trial did raise a covenant to provide a live operator? The questions are plainly alternative, and the Andersons need not win all questions to win the suit. So long as the trial judge's findings fit within one question, whether they also fit within other questions matters little. Courts of Appeal cannot upset trial judgments just because there might be an error in the headings in the trial reasons.

[57] Therefore, on appeal Bell comes close to setting up a straw man (covenant by Bell to provide a live operator) and then knocking down the straw man.

[58] In fairness to Bell, at an earlier stage the Andersons may have argued what Bell now suggests. And Bell could have read the statement of claim as raising such an issue. Whether that was ever the Andersons' sole contention is doubtful. But by trial they certainly did argue the winning point, and the pleadings and common questions cover that point.

7. Topics Which Go Nowhere

[59] One or both of the factums on the main appeal discuss some other topics at length. In my respectful view, many of them have modest weight, and the trial judge was entitled to put little or no reliance upon them. Not giving them more weight was not reversible error.

[60] One such topic which Bell raises is that a cellphone moves about in the purse or pocket of its owner or lessee, and so typically it can access cellphone service elsewhere in Canada if it is carried elsewhere. And so if that other place has 911 service, that cellphone can access it. That is a benefit to the holder of the cellphone. I do not see that in the statement of defence, nor in the questions to be tried. As the trial judge says, the important thing is what the contract provides and how to interpret it, which is also Bell's big point (Reasons, para 53).

[61] I doubt that that 911 service while travelling in southern Canada is a large benefit for the great majority of northern customers. (Whether size of benefit is legally relevant is discussed at the end of this subpart 7.) Besides, that travel benefit topic cuts both ways, because Bell cellphone customers living outside the Territories presumably pay a 911 fee every month, yet get no such service when they travel to any of the Territories. Such variations in degree and quality of service are inherent in any such mobile device. Bell could have provided for changes in charges or rates when the holder of the telephone travels. If Bell charged 75¢ a month when (but only when) a

Territorial cellphone holder spent significant time outside the Territories, I doubt that the Andersons could have complained. But Bell has not tried to do so, and maybe the amount thus collected would be smaller than the cost of collecting it. Nor would Bell want a temporary moratorium on such usual fees when the much more numerous southerners with Bell cellphones sojourn in one of the Territories. Therefore, I cannot see that the plaintiffs' suit, if successful, in any way produces any unfairness.

[62] More striking is the fact that in the rest of Canada, a cellphone customer gets free 911 service even if he does not have any contractual arrangement (direct or indirect) with the local phone company (Agreed Facts, para 9).

[63] An analogous argument by Bell (main factum, para 74) is that people living just outside Whitehorse's city limits would pay no 911 fee, if the suit succeeds, yet would often go to Whitehorse and could there enjoy its 911 service. But again the converse is true. Whitehorse residents pay the 911 fee (about which the plaintiffs do not complain), yet Whitehorse residents can get no 911 operator when they are in the suburban or adjacent areas. This is just a boundaries argument, and it could also be applied to the Alberta-N.W.T. border, and the hamlets on either side of that border. My comments above about a Yellowknife resident visiting the south also apply here. It all cancels out.

[64] Still less appealing is Bell's suggestion that when someone in the Territories dials 911, he or she sometimes gets the metaphysical benefit of being connected to someone else's recorded message (or a succession of messages) saying that there is no service, and to call local emergency services' phone numbers. The messages do not even give those phone numbers (Agreed Statement of Facts, para 11, Jacques' evidence, AB pp 460, 462, 469, and trial judge's Reasons, paras 3-5). Bell is not obliged to do more. But to seek to charge for that by calling it 911 service, seems to me very unreasonable. It is like delivering to a starving person a photograph of a turkey dinner, and then charging him or her for a turkey dinner (or delivery of one). By parallel reasoning, Bell could change fees for hardware or software known never to work. Or for an interface or port for some device which does not exist anywhere.

[65] Bell points out that the contract now defines e911 services as services which Bell is mandated to provide. Apparently the CRTC has said to provide connection to enhanced 911 services (a sort of call display) **wherever they exist**. But they do not exist in the Territories. It seems to me that that changes nothing. If there is no right to bill for connecting to nonexistent 911 service, there can be still less right to bill for connection to bells and whistles on 911 service, where even the basic service does not exist. That is a second layer of metaphysics.

[66] Bell also argues practicalities. If the Andersons claimed that Bell had a contractual duty to provide some service, I might understand that argument. But the Andersons now do not claim that. The Andersons simply ask not to pay for what they do not get. How can it be impractical for Bell to omit that line from their monthly bills? Had Bell not gone to the trouble of imposing the charge in the first place, there would be no effort in not charging for it in the future.

[67] Bell contends that it would be unduly burdensome to expect it to find out where there is and is not live 911 service. That clashes with Bell's main argument that everyone in the Territories knows that there is none (except in Whitehorse).

[68] What if Bell still does not know where 911 service exists in the North, or agreement at trial on that fact does not satisfy Bell? Since it wants to charge for a service which does not exist (or a connection to nothing), it could find out where there is 911 service or not. How could it find out? It could

(a) ask its sales people in the Territories,

(b) e-mail the bigger municipalities in the Territories, or

(c) phone the big municipalities (maybe even phone them toll-free). If it does not know their phone numbers, it could look at their websites, or in the phone book, or call directory assistance.

[69] Bell also says that it cannot be sure which subscribers actually live in the Territories. This recycles the boundaries issue discussed a few paragraphs above. Why not simply bill according to the address which the customer gives? Or ask subscribers for their home addresses? Or both? The number of subscribers who live in the south but give a territorial address must be minute anyway. This gets close to worrying about unicorns.

[70] Review of Mr. Martins' evidence on this topic reveals no more practical difficulties than are outlined above.

[71] Bell's main factum briefly mentions an interesting issue (para 87). It is this. Must any claim for failure of consideration fail because the failure of consideration here is not total, for any of the reasons suggested above? Bell's trial brief did not give the trial judge much help on this topic. It merely quotes a passage from ***Palachik v Kiss*** [1983] 1 SCR 623, 633, 47 NR 148 (para 19). The entire passage in ***Palachik*** is very qualified and scarcely assists Bell. In that ***Palachik*** case, the court found total failure of consideration. Furthermore the case holds that "consideration" is the name for two very different concepts. In this context, "consideration" does **not** have the narrow meaning of a peppercorn, etc. found in the rule that a contract not under seal needs "consideration". The latest edition of *Chitty on Contracts* (31st ed 2012) is a newer version of a textbook indirectly cited here. It shows considerable debate in England on whether failure of consideration need be total to give a cause of action: see paras 29-065 and 29-066. That is significant when coupled with the looser Canadian definition of "consideration" in the ***Palachik*** case, *supra*.

[72] In the ***Palachik*** case, the contract gave the winning party a significant chance or opportunity, which unexpectedly did not come to fruition. Yet the Supreme Court of Canada found failure of consideration. In my view, the failure of consideration here was close enough to total to be operative.

[73] And even if I am wrong, and the old cause of action for failure of consideration was not made out, that does not impair the other more general claim for unjust enrichment.

[74] Maybe it could have been different if Bell had added 911 connection features at the request of northern municipalities contemplating providing such operators, or in order to persuade municipalities hesitating about such a decision, or when such operators were imminent. But there is no plea argument or evidence to that effect. Bell merely pled that "the Plaintiffs have the benefit of availability to them" of such connection capabilities "if, as and when designated by local authorities . . .". That must mean if, as and when local governments provide live 911 operators. Bell's trial brief does not go further.

[75] It is true that the plaintiffs filed a Reply saying that if a fee was proper, the fees charged were too high. But Bell moved to strike out that Reply. The Court of Appeal granted that motion, and struck out the Reply, and also held that no such plea could be inserted into the statement of claim by amendment. Bell never amended its statement of defence. Neither side argued whether the 911 fees charged were too high or not, either at trial or on appeal, which is understandable. References by the Court of Appeal's decision on the pleadings to such pleas must not be thought to refer to pleading which survived to trial.

8. Conclusion

[76] I would dismiss the substantive appeal.

B. Costs Appeal

1. Preliminary Points

[77] Now I turn to the accompanying costs appeal.

[78] At one point there was an objection that this appeal needed leave to appeal, but leave was then granted, so that objection has gone.

[79] Trial of this class action was divided into liability and quantum segments. The latter part on quantum has not yet occurred.

[80] In the liability trial, the Anderson plaintiffs and the class got all that they sought, except punitive damages. Bell conceded that the plaintiffs were substantially successful (costs factum, para 7).

2. Costs Claimed

[81] The Andersons claim full costs for the whole lawsuit, to date, except for stages for which they have already received costs. They submitted a suggested bill of costs and suggested fees based on six times the top column (col 6) of the legislated costs tariff (Schedule A).

[82] The trial judge reserved decision and gave written reasons on costs (2014 NWTSC 20). He agreed there that the Andersons should get full costs of the suit, and that six times column 6 was also appropriate.

[83] The costs Reasons do not discuss costs for individual steps, nor exactly how to calculate the costs, though the trial judge obviously had the plaintiffs' proposed bill before him. The trial judge discussed no individual items or amounts.

[84] However, the formal costs order entered awarded a precise sum for fees, and another precise sum for disbursements, but also adds "as assessed on an enhanced basis of six times column 6 amount of Schedule A . . . ". Those precise sums correspond to the totals on the Andersons' proposed bill of costs. (Cf Reasons, para 7, and see para 28.)

3. Should the Plaintiffs Get Full Costs?

[85] One of Bell's important criticisms is that the trial judge gave the Andersons full costs. Bell says that success was divided, and so the costs should be nil or small.

[86] It is true that a number of issues were argued, and that the trial judge found for the Andersons on some and for Bell on others. But that was largely because each side posed alternative arguments or theories. Neither side had to succeed on all its arguments to win the suit.

[87] As noted, the Andersons got all they claimed, except for punitive costs. The issues on which they "lost" were merely alternate routes to their full success.

[88] So far as I can tell, the unsuccessful claim for punitive damages was based on the same evidence as the rest of the plaintiffs' claims, and so that extra claim can have added very little to the length of the trial. Courts often ignore one lost issue which took little extra time or effort. Nor has anyone argued that seeking punitive damages and not proving them is misconduct which should incur a costs penalty. That is not commonly argued, and I do not wish to raise that in the absence of argument and evidence.

[89] Such near-total success in the result, despite divided issues, is very common in trials. Rarely does a plaintiff achieve all that he or she sets out to get. Most plaintiffs suggest various possible routes to success. Trial judges routinely award such plaintiffs full costs of the suit. A different result is not common. See ***Wilde v Archean Energy (#2)***, 2008 ABCA 132, 429 AR 41; ***Elfar v Elfar***, 2012 ABCA 375, 539 AR 268 (paras 22-23).

[90] Party-party costs are always held to be discretionary: ***Okanagan Indian Band v R***, *infra*; ***Metz v Weisgerber***, 2004 ABCA 151, 348 AR 143 (paras 6, 7, 15). The Northwest Territories Rules confirm that (R 643). No trial judge is compelled to apportion costs issue by issue, especially where the issues were not plainly separated into different stages of trial. Courts of Appeal have often refused to interfere with a trial judge's discretion not to apportion costs issue by issue: ***Elfar v Elfar***, *supra*.

[91] Logically, one would expect such refusals, as discretionary decisions should receive appellate deference. Costs decisions do, as both sides' authorities show. See ***Hamilton v Open Window Bakery***, 2004 SCC 9, [2004] 1 SCR 303, 316 NR 265 (para 27); ***Sun Indalex Finance v United Steelworkers***, 2013 SCC 6, [2013] 1 SCR 271, 439 NR 235 (para 247); ***Pauli v ACE INA Insurance Co (#2)***, 2004 ABCA 253, 354 AR 348 (para 15), *lv den* 332 NR 398 (SCC 2004). That is doubly true where the costs award is by the trial judge, and trebly so where he or she has had extended experience with, or control over, the suit.

[92] Another important argument by Bell stresses that actual trial time was something like three days. (Four, say the Andersons.) And only five exhibits were marked (aside from the Andersons' expert's papers), says Bell. Bell argues that therefore the costs awarded are entirely disproportionate to so short a trial.

[93] However, one must recall two things. First, the costs sought and awarded here are for the whole lawsuit to date (except for stages already compensated), not just for the trial. This suit has gone on for 7 years. Second, the trial judge found that counsel did a great deal of work before trial to shorten and facilitate the trial, and had great success in doing so. They worked out a long Agreed Statement of Facts and a book of agreed exhibits. That those papers all got one exhibit number, not dozens, is meaningless form. See the trial judge's costs Reasons (supplementary AB, p 37, para 11). Indeed the only live evidence came from two conflicting expert witnesses (one from each side).

[94] Without such preparation and agreements, a number of more live witnesses, intricate discovery read-ins, and similar evidence, would have been necessary. Even the mechanical process of identifying documents referred to in affidavits of documents or examinations for discovery, or both, and marking the documents as trial exhibits, would have consumed many hours, possibly days.

[95] The Supreme Court of the Northwest Territories has no surplus of judges, and so has to make heavy use of deputy judges from elsewhere (as in this case). Administration of justice in the Northwest Territories costs taxpayers large amounts, including heavy travel expenses. And a long trial ties up the Territories' very scarce courtroom space, and so keeps other litigants (civil and criminal) waiting. So efficient streamlined trials are highly in the public interest. To refuse to reward efforts to achieve that would be perversely counterproductive, and unjust to boot. Most lawyers work hard, but not all are efficient, nor imaginative managers. Watching the clerk label numerous documents as trial exhibits, while one is gowned, is not hard work for counsel. So

rewards for efficiency matter a great deal. Therefore counting court hours is an unreliable measure for a costs award, especially in a class action. See ***Sankar v Bell Mobility***, 2013 ONSC 6886, 52 CPC (7th) 111, 115 (para 4(iii)).

[96] How much costs credit to give such extra pretrial preparation is a pure question of weight. The trial judge is far better equipped to assess that, and doubly so when he or she has managed the suit for some time. It is important to note that a short very efficient trial may preclude use of a small multiplier. Three times a small base sum (which Bell mentions) is still a fairly small sum. The multiplier in ***Fullowka*** may not be a good guide here (*pace* Bell's para 60), because ***Fullowka*** was a very long trial, i.e. had a big base fee. (See ***Fullowka v Royal Oak Ventures***, 2008 NWTCA 9, 437 AR 390 (paras 12-14).)

4. Proper Basis to Calculate Costs

[97] Furthermore, Schedule A item 25 on preparation for trial, should not be used raw in a prefabricated trial like this one, even with an overall multiplier. Item 25 is based entirely on the number of witnesses briefed, so documentary or agreed evidence counts for nothing under that item. Even item 49 on correspondence and negotiations is fairly modest. Bell's factum's para 66 simply quarrels with a number of lines in Schedule A, which it thinks are too high. But they include preparation and ancillary work. For example, item 21 (attending examination for discovery) would cover briefing the witness beforehand. (Departures from Schedule A are dealt with in subpart 6 below.)

[98] No judge in the Northwest Territories is bound to calculate party-party costs on the tariff (Schedule A), nor even to calculate costs by any method which refers to that tariff. That tariff is merely a default mode for the taxing officer: see R 648(1). In particular, note R 648(5) on services not provided for in Schedule A. Cf ***Sprung Instant Structures v Caswan Environmental Services*** (1999) 232 AR 336 (CA) (para 3).

[99] How should a trial judge arrive at a proper party-party costs award? The precise method ordinarily does not matter. It is only necessary that the trial judge weigh all the relevant factors, omit no important factor, and be reasonable. There is usually more than one permissible way to get to a reasonable final number, which is the true goal. Weighing only one or two factors is not enough to set costs, and frequently different relevant factors will point in different directions. The exercise is one of balancing as well as weighing. See ***Brewer v Fraser Milner & Co (#2)***, 2008 ABCA 285, 347 AR 79 (para 4); ***Hill v Hill Family Trust (#2)***, 2013 ABCA 313, 561 AR 50 (para 11), *lv den* (SCC Feb 27 '14).

[100] One comparator is what full indemnity would be. The Andersons usefully work that out in detail, likely following Ontario costs procedures.

[101] The Andersons calculate that the fees awarded by the trial judge amount to about 38% of their lawyers' usual hourly charges for the number of hours actually spent on the suit. I calculate it

at 44% of full indemnity. I have corrected an error in computation of articling students' fees. Those are calculated by the Andersons (supp AB, p 7) effectively at $547 per hour, which obviously reflects some clerical error, as the proper full rate per hour is $150 (supp AB, p 2). That clerical error affects only this percentage, and is in a merely comparative calculation. It does not affect the bill of costs calculated on Schedule A (supp AB, pp 10-12) which the trial judge used.

[102] Many commentators and Rule-making authorities have espoused a goal for party-party costs of 50% indemnity of reasonable legal fees. Cf ***Trizec Equity v Ellis-Don Management***, 1999 ABQB 801, 251 AR 101 (para 30), *affd* 1999 ABCA 306, 244 AR 365. So 44% does not seem manifestly unreasonable on its face. The number of hours actually worked by the Andersons' counsel are divulged, and no suggestion of wasted or excessive time has come from Bell's counsel. Had Bell thought that the number of hours recorded by the Andersons' counsel or their hourly rates were excessive, it could easily have gathered evidence to support either contention. Bell would not even have had to divulge its own counsel's hours or rates. Cf ***Hill v Hill Family Trust***, *supra*.

[103] I cannot see anything out of line in the number of hours recorded by Andersons' counsel. Much more importantly, obviously the trial judge did not see any either, and he was intimately familiar with the suit.

[104] Another relevant factor is the size and importance of the issues, including dollar amounts.

[105] Bell briefly suggests that no amount was in issue, and so if costs are awarded, column 1 should be used. Column 1 is also used for suits up to $25,000. Bell's argument assumes that Schedule A has to be used, and that one cannot look at the next half of the upcoming trial, and the assessment of the award of reimbursement to the class. Neither assumption is correct, of course. Some older cases took a very technical view of what the amount in issue is, but often those decisions were not about costs, and instead were about court jurisdiction, or whether leave to appeal was necessary.

[106] Patently the class members here are going to recover a total sum of significant size. The issues are important too, both in the three Territories and also possibly as a precedent. At no stage has Bell acted as though this suit was of little importance. Whether or not one agrees with the Andersons' allegation of a "scorched-earth" defence (costs factum, para 39), Bell has raised a host of substantive and procedural issues at almost every stage of the suit. The Andersons' counsel would have been remiss had they not at every stage researched, planned, and prepared carefully, dotted every i and crossed every t, and checked everyone's work. See ***Sankar v Bell Mobility***, *supra* (para 4(i)). Complexity is a relevant factor when setting party-party costs: ***Canadian Egg Marketing Agency v Richardson (#2)***, (1996) 38 Admin LR (2d) 87 (NWT CA) (para 5).

[107] Bell argues that amount in issue is either still in the lap of the gods, and so unknowable to mortals who cannot see the future, or is by definition unknowable. Unknowable, because the Rules speak of assessing costs **against** a plaintiff by his or her claim, and costs **to** a plaintiff by the size of the final award. One is inapplicable and the other not yet available, they say.

[108] Bell's first suggestion to the Court of Appeal in oral argument was to defer costs to the very end of the suit. There are many policy and practical reasons not to do that, especially in a class action. Cf ***Canadian Egg Marketing Agency v Richardson (#2)***, *supra*. Must successful plaintiffs wait a decade to get their legal expenses reimbursed? More importantly, it is conceded that no one asked the trial judge to defer his costs decision. It is not error for a trial judge to hear a motion when both sides ask him to hear it. A trial judge need not search for reasons to adjourn when both parties are ready and willing to proceed.

[109] With his long experience of this suit, the trial judge must have become acquainted with some likely scenarios which would permit a rough idea of the size of possible monetary recoveries. All arguments from both sides would help the trial judge somewhat in that exercise. The Rules do not exclude any. I repeat that Schedule A or its application is just a default mode, not compulsory. Cf ***Canadian Egg Marketing Agency v Richardson (#2)***, *supra* (para 5).

[110] I am particularly unwilling to say that the trial judge miscalculated the amount in issue because he did not use Bell's own examination-for-discovery answers, whose admissibility at Bell's instance is highly dubious.

5. Were any Irrelevant Factors Relied On?

[111] All party-party costs schemes and individual awards balance two factors. One is not discouraging meritorious litigation, by not making every "victory" by a plaintiff Pyrrhic. The countervailing factor is not making costs more important than merits, and not tempting a plaintiff who is likely to win to run up lavish legal bills. See ***R (BC) v Wilson (Okanagan Indian Band)***, *supra* (para 26). That is why Canada ordinarily gives partial indemnity for the winner's legal outlays.

[112] Therefore, it was proper for the trial judge here to give some weight to "access to justice". He knew that some of the cases cited involved a losing plaintiff not paying costs (or paying reduced costs), and were not about the size of a winning plaintiff's costs. He knew those cases offered *dicta* or analogies, and were not directly on point. He committed no error there.

[113] The trial judge briefly mentioned "behavior modification" (Reasons, para 25), which Bell submits is inappropriate because it is punitive (costs factum, para 48). But behaviour modification is a legitimate goal of class actions, so it cannot be irrelevant to their costs: ***Vander Griendt v Canvest Capital Management Corporation***, 2014 ABQB 542, JCC 0901 15232 (Sep 5) (paras 65-68). And in my view, the law of torts, unjust enrichment, and costs, all look at motivation to a degree. So do certain aspects of the law of contracts. So motivation is often a legitimate costs topic (among many others).

[114] This is a class action (albeit run under the representative party Rule and the Supreme Court of Canada's guidelines, not a statute). I cannot see why that should be irrelevant. Surely timing of payment and risk of failure are more acute for the plaintiff's lawyer in a class action, than in

ordinary suits. One plaintiff suing for hundreds of thousands of dollars can and should secure her lawyer's prospective fees in some manner, if only by regular payments. A nameless cloud of people suing for $9 per year each, practically speaking cannot do that. Nor can I see why actually certifying the suit as a class action makes that irrelevant, as Bell argues (costs factum, paras 34, 44, citing no authority). Surely if anything, certification aids it. Certification is no assurance of success, and the "merits" tests for certification are lax. Bell says that certification does not alter substantive rights (costs factum, para 45). But costs are procedure.

[115] Here, the trial judge's favorable judgment on liability removes all non-quantum issues. Surely that should have great weight on costs issues.

[116] Bell complains (costs factum, para 49) that the trial judge looked at its deep pockets and increased the costs for that reason. That refers to the costs Reasons, para 24(d), which is a one-or-two line mention of the 1989 Ontario Law Reform Commission Report on the Law of Standing. Though deep pockets are generally irrelevant to costs awards, para 24 of the Reasons here talks about costs in class actions, and para 25 speaks of access to justice. As noted above, all that is analogy. I do not think that the trial judge heavily relied on deep pockets as a general costs principle. Besides, the Ontario report only makes capacity to bear costs one of four necessary conditions, not a sufficient condition. Still less is it an independent or overriding principle. Even if the Ontario Report was phrased more generally, the trial judge's Reasons here were speaking only of class actions. In the context of small individual claims, and a large total liability of the sole defendant, the point being made had some (limited) weight.

6. Specific Tariff Items

[117] A few specific items in the bill of costs seem to be Schedule A items multiplied more than six times. (Two of them are dealt with at the beginning of subpart 4 above.) The appellant Bell's costs factum complains of these:

> Item 25 (near bottom suppl AB, p 11) "preparation for trial . . . 7 witnesses ($3000) $50,000 [16.67 X?]
>
> Item 26 bottom, (suppl AB, p 11) "trial brief" ($6000) $46,200 [7.5 X?]
>
> Item 29 (last item suppl AB, p 12) "written argument" ($900?) $36,000 [37 X?]

[118] I cannot see palpable error or any unreasonableness in item 25, preparation for trial, even if the multiplier is effectively almost 17, not 6. That is because the tariff item of $3000 is a very low base, computed merely on the number of live witnesses anticipated. As explained above (subpart 3), that is inappropriate in a trimmed-down prefabricated trial like this one.

[119] Likely much the same is arguably true of item 26, whose multiplier is not much above 6 anyway. I would not tinker slightly with that amount.

[120] But item 29, written argument, with its apparent effective multiplier of about 37, worries me. There was no separate discussion of this, and no explanation by the costs Reasons. True, the $900 base in Schedule A is extremely low. But even if it were $3600 (say), the effective multiplier would then still be 10 times. I have looked at the Andersons' written final argument for the trial. It is well done (and necessarily somewhat longer than a typical appellate factum). But some of this ground had been ploughed in previous motions and appeals, so huge new research was not necessary. The amount of $36,000 seems to me too high. The costs Reasons did not explain this item, and it is far over the 6 times column 6 which his Reasons approved. So the formal judgment is either internally inconsistent on this one item, or inconsistent with the trial judge's Reasons.

[121] If need be, this one item 29 should be taxed by the proper officer in Yellowknife, who can increase or decrease it. However, I would let the Andersons elect between cutting it in half **to** $18,000 (i.e. reducing the total **by** $18,000), and having item 29 taxed. The Andersons should have 45 days from the date of this judgment to file a written signed election.

7. Expert Witness Fees

[122] Bell has two comments about the Andersons' expert witness. The first is that he took up over 1/3 the trial, yet his evidence was found unhelpful. They suggest that costs as a whole should therefore be reduced. But much of that time was occupied not by that witness' evidence, but by Bell's unsuccessful attempts to keep him off the stand. And as noted earlier, the costs claimed are for most of the suit, not just for the trial.

[123] Bell's second comment is that since this expert was not found helpful, little or none of his bill should be reimbursed as a disbursement.

[124] But the Northwest Territories Rules deal with the latter question. Rule 278.15 speaks of "the nature of the litigation" and "the number and complexity or technical nature of the issues in dispute". Bell's approach to each stage of the dispute has raised substantive and semantic technical issues, and so it does not lie in Bell's mouth to argue that hiring an expert before trial to explain or counter that was unreasonable. Indeed, Bell stressed the idea that it only connected people and provided no other services, relying on all the internal technical features of its connection services, and called an expert to say that (main Reasons, para 66).

[125] It is trite law that the costs test for hiring an expert is not retrospective; the question is what seemed reasonable back at the time when the expert was hired and did his work. See ***McAteer v Devoncroft Developments***, *infra*; ***Goodzeck v Bassett Petroleum Distributors***, 2007 NWTSC 42, file S-001-CV2004000074 (June 28) (para 6). See also the older cases listed in 4 Stevenson & Côté, *Civil Procedure Encyclopedia*, pp 71-15 to 71-16 (2003).

[126] The test for witness disbursements is not whose evidence the trial judge later adopted. After all, experts are usually rebutted by countervailing experts. The trial judge has to choose one;

but that fact alone cannot mean that one side's retainer was proper and the other side's was improper.

[127] This trial judge knew the suit's history, and knew what he had in mind when he later deprecated this expert's evidence. Cf ***McAteer v Devoncroft Developments***, 2003 ABQB 425, 340 AR 1 (para 237). It would be dangerous for the Court of Appeal to substitute its own reconstruction about this disbursement. I decline to interfere.

8. Costs Conclusion

[128] I would dismiss the appeal from the costs award, except for the reduction or taxation of item 29 described above in subpart 6.

[129] I would give the respondents costs as for one appeal, but with double costs for a factum, and 1-2/3 times the usual costs for preparation for the appeal. A fee for second counsel is appropriate. In addition, the respondents should receive all their reasonable disbursements on appeal.

Appeal heard on October 21, 2014

Reasons filed at Yellowknife, N.W.T.
this 07 day of January, 2015

_____
Côté J.A.

I concur: _____
Authorized to sign for: Sharkey J.A.

I concur: _____
Wakeling J.A.

Appearances:

R.J.C. Deane
B.W. Dixon
for the Appellant (Defendant)

K.M. Landy
S.S. Marr
for the Respondents (Plaintiffs)

A-1-AP2013-000006

IN THE COURT OF APPEAL
OF THE NORTHWEST TERRITORIES

Between:

Bell Mobility Inc.

Appellant
(Defendant)

- and -

James Douglas Anderson and Samuel Anderson, on behalf of themselves, and all other members of a class having a claim against Bell Mobility Inc.

Respondents
(Plaintiffs)

REASONS FOR JUDGMENT