

CANADA / JUDGMENT

8640025 Canada Inc. v. TELUS Communications Company

2016 BCSC 2211

COURT

Supreme Court of British Columbia

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2016 BCSC 2211 8640025 Canada Inc. v. TELUS Communications Company

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

8640025 Canada Inc. v. TELUS Communications Company,

2016 BCSC 2211

Date: 20161125

Docket: S1610194

Registry: Vancouver

Between:

8640025 Canada Inc.

Plaintiff

And

TELUS Communications Company

Defendant

Sealing order made on November 14, 2016, sealing some of the Affidavits filed until further court order.

Before: The Honourable Madam Justice Fisher

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

November 14, 16, 18, 2016

Place and Date of Judgment:

Vancouver, B.C.

November 25, 2016

[1] The plaintiff, 8640025 Canada Inc. (864), made an application for an interlocutory injunction to restrain the defendant, TELUS Communications Company (Telus), from terminating telecommunication service agreements and all services provided under those agreements pursuant to a notice to terminate to be effective November 21, 2016. The application was heard November 14, 16 and 18, 2016. Because of the urgency of the matter, I made an order at the conclusion of the hearing, refusing to grant the injunction, with reasons to follow. These are my reasons.

Background

The parties

- [2] 864 is a federal company in the telecommunications business. Formerly known as Telephone Navigata-Westel Communication Inc. (TNW), 864 was owned by Telephone Corp. until January 1, 2014 and thereafter by Investel Capital Corporation. Benoit Laliberte was the Chief Executive Officer of 864 and the President of Telephone until August 2014 and thereafter has been an advisor and consultant to 864. He is also the Managing Director of Investel.
- [3] 864 is a Competitive Local Exchange Carrier (CLEC) which operates in competition with Incumbent Local Exchange Carriers (ILECs) and other CLECs. ILECs are companies that operated as a monopoly before the Canadian Radio-Television and Telecommunications Commission (CRTC) opened the market to local competition in 1998. Telus operates as an ILEC in British Columbia and Alberta and a CLEC in the rest of Canada. As an ILEC, Telus operates both wholesale and retail divisions. Telus Wholesale sells services to Telus' competitors and Telus Retail sells services to the same customers as its competitors.

- [4] 864 has been a purchaser of Telus Wholesale services for many years. Under a series of service agreements, Telus agreed to provide 864 with data, network and other communications services and 864 agreed to pay for these services as the charges became due. Since 2012, 864 has defaulted from time to time on its obligation to pay for these services, to the extent that Telus now claims amounts owing as of September 30, 2016 of over \$9 million.

864's debts to Telus

- [5] 864's debt to Telus relates to service agreements and an obligation it took on in November 2012 when it acquired the assets of a company called Navigata Communications 2009 Inc. (later known as Cascade Divide Enterprises, Inc.). At that time, Cascade was indebted to Telus under service agreements for approximately \$2.6 million. In a November 30, 2012 Assignment, Assumption, Repayment and Guarantee Agreement (AARGA), Telus approved an assignment to 864 of Cascade's service agreements and \$1,925,111 as an agreed amount for Cascade's existing debt (referred to as the Legacy Obligation). Telephone guaranteed 864's obligations and provided a convertible debenture, for a face value of \$1,925,111, as security for the guarantee. The service agreements assigned to 864 in this transaction are the agreements under which it has since fallen into arrears. I will refer to them as the Service Agreements.
- [6] After 864 fell behind in its payments to Telus under the Service Agreements and the Legacy Obligation, Telus took numerous steps to deal with the problem. 864 often promised to make the payments required, claiming that it was about to obtain a large credit or financing, and payments were sometimes made on 864's behalf by Telephone and other related entities. However, cheques were often returned for insufficient funds and the shortfalls continued. By the end of 2013, Telus demanded that 864 make material payments and provide a plan to reduce the arrears. 864 continued to make promises to pay that did not materialize. From April 2014 to September 2015, Telus made repeated efforts to demand payment and negotiate a settlement that would permit 864 to pay the amounts owing in an orderly way, and expressly reserved its right to terminate the Service Agreements. By March 2015, Telus recorded debt owing by 864 in the amount of \$6,256,732 CDN, which included \$1,280,118 for the Legacy Obligation, and \$539,323 USD.

The Target acquisition and settlement of 864's debt

- [7] Around this time, early 2015, 864 became interested in acquiring another communications company, referred to in these proceedings as the Target. 864 wanted to acquire the Target's customers and service contracts with Telus and most importantly, the Target's wireless spectrum licence (AWS Licence). The AWS Licence would allow 864 to become a registered wireless carrier using a new technology. On July 10, 2015, the Target, 864 and "A New Canadian Corporation" to be incorporated and owned by Investel entered into a non-binding letter of intent whereby the new Investel-owned company would purchase the Target's assets.

- [8] The Target's service agreements with Telus could only be assigned with Telus' consent, and the Target was also indebted to Telus, for over \$2 million. Mr. Laliberte had discussions about 864's strategic plan in respect of this acquisition with Telus' then Vice President Sales and Marketing, Hanif Dato. In these discussions, Mr. Laliberte disclosed confidential information to Mr. Dato about 864's technology and marketing plan.
- [9] There is much dispute in the evidence about what Telus's position was with respect to approving the assignment of the Target's service agreements. Mr. Laliberte deposed that Mr. Dato was supportive of the acquisition and on August 7, 2015 advised that Telus would approve the assignment if 864 entered into a settlement agreement in respect of its outstanding accounts. Mr. Dato deposed that he repeatedly advised Mr. Laliberte that the debts of both 864 and the Target had to be addressed before he would consider any assignment.
- [10] On August 12, 2015, Telus' Credit Strategy Manager, Gary Budd, forwarded to 864 a draft settlement agreement. When 864 did not respond to this, on September 4, 2015, Mr. Budd sent a demand letter to 864 for immediate payment of \$3,000,000 towards an overdue outstanding amount of \$4,544,521. Subsequently, there were discussions between Mr. Budd and Mr. Laliberte, which resulted in a revised settlement agreement that 864 signed on September 14, 2015 (the Settlement Agreement). In the Settlement Agreement, 864 agreed to make additional payments towards overdue account receivables, specific payments towards an undisputed overdue balance of approximately \$4,151,574, and a process was set out for settling disputed overdue balances.
- [11] 864 says that it needed this acquisition in order to pay its outstanding debt to Telus and the Settlement Agreement was subject to the condition that Telus would approve the assignment of the Target's service agreements and the settlement of the Target's debt on terms substantially similar to what was contained in agreements that were delivered to the Target by Telus (the Settlement Condition). 864 further says that Telus knew that its ability to meet the commitments made in the Settlement Agreement were contingent on Telus complying with this condition.
- [12] Telus disputes this, saying the settlement of 864's debt issue was a separate matter from the assignment of the Target's service agreements.
- [13] On September 17, 2015, 864 made a \$100,000 payment to Telus pursuant to the Settlement Agreement and Telus retracted the September 4, 2015 demand letter. 864 says that this payment was made in reliance on Telus' compliance with the Settlement Condition.
- [14] Mr. Laliberte deposed that the following day, September 18, he learned for the first time that Mr. Dato required the Target to transfer its AWS Licence to Telus as a condition of settling the Target's debt. 864 was very concerned, as the AWS Licence was a key component to 864's strategic plan. The evidence about this is also in dispute. Mr. Dato deposed that he advised Mr. Laliberte only that the Target's debt had to be addressed before Telus would consider approving the assignment and that one way to do this was for the Target to transfer the AWS

Licence to Telus. In the days that followed, there were a number of discussions between Mr. Laliberte and Mr. Dato, some of which were recorded by Mr. Laliberte. 864 says that this evidence confirms that Mr. Dato made representations that Telus would approve the assignment of the Target's service agreements and would either give 864 a sub-licence or allow it to purchase the AWS Licence. Telus disputes this. Mr. Dato deposed that he was trying to find a way for 864 to carry through with the acquisition and suggested that the AWS Licence could be sub-licensed from Telus to 864, subject to approval by Industry Canada. He maintained that he advised Mr. Laliberte that he intended to settle the Target's debt one way or another before he would consider the assignment.

- [15] On September 28, 2015, Mr. Laliberte received a copy of Telus' proposal to the Target, which included the transfer of the AWS Licence to Telus and Telus' commitment to sub-licence it to 864 once Industry Canada approved the purchase. There were further discussions between the parties after this, continuing to late 2015. However, in January 2016, the acquisition collapsed.
- [16] 864 asserts that Telus continued to represent that it would approve the assignment and would provide it with the AWS Licence as a sub-licence, that it failed to do so, and that its failure prevented 864 from proceeding with the acquisition. Telus says that the acquisition did not complete because the Target, and ultimately 864, did not satisfy their debts to Telus, which was always a requirement before Telus would consider approving the proposal. Telus did, however, later (in April 2016) acquire the AWS Licence from the Target in satisfaction of its debt.

Telus legal action, notices of default and termination of services

- [17] Meanwhile, 864 failed to make payments under the Settlement Agreement, and on January 15, 2016, Telus sent a demand letter to 864 regarding this default. On March 2, 2016, Telus filed a Notice of Civil Claim against 864 seeking judgment for debts owing under the Service Agreements and the Settlement Agreement. Telus obtained a consent judgment against 864 on August 24, 2016 in the amount of \$241,095, which addressed some of the claims contained in the Notice of Civil Claim (which were in respect of dishonoured cheques). 864 has not paid this judgment.
- [18] On March 7, 2016, Telus issued a default notice to 864 under the Service Agreements seeking the defaults to be remedied by June 6, 2016.
- [19] On June 16, 2016, Telus issued a notice of termination of the Service Agreements to be effective August 17, 2016, based on breaches or defaults under the Service Agreements and the Settlement Agreement. It calculated the total debt owing as of April 30, 2016 to be \$8,221,963. Telus filed this letter with the CRTC, which directed 864 to provide 30 days' notice to its customers and Telus extended the termination date to September 16, 2016.

- [20] On August 31, 2016, 864 made an application on an expedited basis to the CRTC seeking an extension of the termination notice for 180 days to allow it to notify its clients and a further 90 days following notification before disconnection. 864 did not challenge Telus' right to terminate. The CRTC considered the relief requested by 864 to be unreasonably long and on September 22, 2016, directed Telus not to commence disconnection services prior to November 21, 2016.
- [21] On September 30, 2016, 864 applied to the CRTC to review and vary its September 22 decision and proposed to prepay Telus' services with bridge financing Investel had secured that would pay for services during a four-month period. The CRTC was not satisfied that there was a basis to vary its prior decision and on November 1, 2016, it confirmed the November 21, 2016 termination date. It also directed 864 to notify its customers no later than November 8, 2016.

Other proceedings against 864

- [22] On October 28, 2016, Scotiabank issued a formal demand to 864 for payment and notice of intention to enforce security in respect of 864's indebtedness under its operating line of credit. The total amount claimed to be due and owing is \$2,740,531.
- [23] On November 3, 2016, Telus applied to this Court for a bankruptcy order against 864. This followed an unsuccessful attempt, in September 2016, to execute on the August 24, 2016 consent judgment.

864's claim against Telus

- [24] On November 3, 2016, after a final, unsuccessful attempt to reach a settlement with Telus, 864 filed its Notice of Civil Claim in these proceedings.
- [25] The focus of this claim stems from alleged misrepresentations by Telus in respect of the Target acquisition and breaches of the Settlement Condition. 864 alleges that Telus intentionally prevented it from being able to fulfil its obligations under the Service Agreements and the Settlement Agreement, wrongfully interfered with 864's economic interests by preventing completion of the Target acquisition and preventing 864 from entering into the wireless market, and acted in bad faith by using and exploiting 864's confidential information for its own use.
- [26] 864 claims damages for breach of contract, breach of confidence, negligent misrepresentation, and breach of the duty of good faith. It seeks declarations that the Settlement Agreement was of no force and effect and that 864 is not in breach of the Service Agreements. In the alternative, it seeks a declaration that Telus does not have a right to terminate the Service Agreements and it seeks an order that Telus rescind the disconnection notice. 864 also seeks an interlocutory and permanent injunction enjoining Telus from soliciting its customers, disclosing 864's confidential information from Telus Wholesale to Telus Retail, and disconnecting services under the Service Agreements.

[27] The legal basis for the claim for breach of the Service Agreements arises from specific allegations related to a service disruption in August 2015, a failure to provide fiber access in early 2016, and a failure to provide certain tariff services in the summer of 2016; breaches of confidentiality obligations; and wrongfully issuing the disconnection notice. However, in the factual basis for the claim, 864 asserts that the disconnection and suspension notice were not properly issued and of no force and effect for three reasons: (a) the Settlement Agreement was of no force and effect due to Telus' breaches of the Settlement Condition; (b) "all or most" of the amount owed under the Service Agreements was converted to equity in Telephone under the terms of the debenture provided as security for the Legacy Obligation; and (c) 864's inability to meet its obligations under the Service Agreements and alternatively the Settlement Agreement was due to the wrongful actions of Telus.

Interlocutory injunction

[28] 864 seeks an interlocutory injunction on terms that would require it to pay Telus first under the August 24, 2016 consent judgment and second in advance for services on an ongoing basis. It says that it has secured financing under a Binding Memorandum of Understanding (MOU) with a new lender to fund this but such financing is contingent on the injunction being granted.

[29] The test to be applied in determining whether the court should grant an interlocutory injunction is well known. It was re-stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, and asks three questions: (1) Is there a serious question to be tried? (2) Has the applicant demonstrated that it will suffer irreparable harm if the injunction is not granted? (3) Where does the balance of convenience lie as between the parties? These criteria are not to be treated as watertight categories, as each relates to the other, and strength on one criterion may compensate for weakness on another: *British Columbia (Attorney General) v. Wale* (1986), 9 BCLR (2d) 333 (CA), aff'd [1991] 1 SCR 62.

[30] Ultimately, the fundamental question is whether the granting of an interlocutory injunction is just and equitable in all the circumstances: *Edward Jones v. Voldeng*, 2012 BCCA 295 at para. 19, citing *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481.

The nature of the injunction

[31] The parties disagree about the nature of the relief being sought. 864 asserts that the nature of the injunction it seeks is prohibitory in nature, while Telus asserts that it is mandatory. A mandatory injunction is one that requires a defendant to act positively by taking specific action rather than refraining from taking action. In a contractual setting, an order that establishes a new right is considered mandatory and one that requires parties to act in accordance with the contract is considered prohibitory: *Setanta Sports NA Ltd. v. Score Television Network Ltd.*, 2009 CanLII 41213 (Ont SCJ) at para. 42; *Look Communications Inc. v. Bell Canada*, 2007 CanLII 30476 (Ont SCJ) at para. 12. Given the nature of a mandatory injunction, the onus resting on an applicant is higher.

- [32] There is case law in other jurisdictions that requires the applicant seeking a mandatory injunction to establish a strong *prima facie* case at the first stage of the analysis: see for example, *Telephone Corp v. Comwave Wholesale Inc.*, 2015 ONSC 5142 at para. 19. However, the law in British Columbia requires the mandatory nature of the injunction to be taken into account at the balance of convenience stage: see *RCG Forex Service Corp. v. HSBC Bank Canada*, 2011 BCSC 315 at para. 10 and the cases cited therein.
- [33] 864 submitted that the injunction sought is prohibitory because it seeks only to restrain Telus from disconnecting a contractual service. Telus submitted that the injunction is mandatory because it requires Telus to continue in a business relationship with 864 that it is entitled to, and has in fact, terminated.
- [34] In contractual disputes where a party's right of termination is the central issue, courts have generally considered orders seeking to prevent that party from terminating a contract to be prohibitive: *Setanta Sports* at paras. 42-43.
- [35] In *Look Communications*, a case relied on by 864, the plaintiff sought an interlocutory injunction to stop Bell from terminating telecommunications services it was providing under service agreements similar to those here. Look proposed to pay Bell the maximum amount of its monthly services as a term of the injunction. The underlying dispute between the parties concerned whether and how much Look was indebted to Bell for past services. When Bell issued a notice to disconnect Look's services for non-payment, Look disputed its right to do so. It relied on a provision in the service agreement that prohibited Bell from terminating service under certain conditions where there was a dispute about the basis for the proposed termination. In these circumstances, the court determined that the injunction was prohibitory only, reasoning as follows:
- [15] It is true that the effect of the order sought would be to require the parties to continue to do business with one another pending the outcome of the lawsuit, but they would do so on previously established terms. It is also important to keep in mind that Bell does not have an unlimited right to terminate service in the event of non-payment. As Article 22.2(d) makes clear, Bell may not terminate service for non-payment where there is a dispute and Bell does not have reasonable grounds for believing that the purpose of the dispute is to evade or delay payment. The injunction sought by Look requests the court to enforce that term of the parties' contract. Put another way, Look contends that disconnection by Bell would be a breach of contract in light of the strictures imposed by Article 22.2(d), and thus Look seeks an order prohibiting Bell from breaching that term of their contract.
- [16] In my view, the factual matrix of this case is such that the order sought by Look is not one that establishes a new right. Rather, the order sought requires Bell to comply with Article 22.2(d) and to perform its other obligations under the parties' other existing arrangements and contracts for the provision of telecommunications services, as Look pays Bell's monthly charges on a going-forward basis.

- [36] In the context of the circumstances in Look Communications, the prohibitory nature of the injunction was clear: Bell did not have an unlimited right under the terms of the service agreement to terminate for non-payment given the dispute about that very issue, and Look was simply seeking to have the contract enforced pending determination of that issue. The context of this case is much less clear, as Telus has the right to terminate for non-payment that has not been remedied after due notice, and 864 has acknowledged that there has been non-payment for at least some of the amounts claimed by Telus. In this context, the injunction does not seek to have the contract enforced but rather seeks to prevent Telus from exercising an undisputed contractual right, thus giving 864 a new right. Put another way, in resisting the injunction, it is Telus that seeks to enforce the contract.
- [37] Courts have considered orders that require a party to continue in a business relationship that, for its own business reasons, it does not want to continue, to be mandatory injunctions: see for example, *Western Paint & Wallcovering Co. Ltd. v. Benjamin Moore & Co. Limited*, 2009 MBQB 1 (a supplier terminating a retailer agreement); *RCG Forex Services Corp.* (a bank closing a customer's accounts). In *RCG Forex*, Verhoeven J. expressed the view (at para. 59) that courts should be very cautious about making such orders. In *Telephone Corp v. Comwave* (at para. 16), the court held that an order requiring Comwave to continue to provide network services to the plaintiffs was mandatory in nature because it required Comwave to take positive steps.
- [38] In this case, Telus has given notice to terminate and disconnect service, which was yet to come into effect at the time the injunction was sought. On this basis, 864 submitted that the contract had not yet been terminated, and therefore an injunction would simply allow the contract to be enforced pending trial. In my view, this distinction is without substance in the context here. On June 16, 2016, Telus made the decision to terminate its business relationship with 864 after a long history of payment defaults, only some of which were disputed. The period of notice was regulated by the CRTC in order to provide an orderly process for termination of services. I do not consider these circumstances fundamentally different from those where a contract has already been terminated (such as in *Western Paint*). Whether or not the termination has been effected, an injunction would require Telus to continue to provide services that it has already chosen to discontinue due to 864's payment history.
- [39] I fully appreciate that 864 has numerous claims against Telus, some of which challenge the validity of Telus' right to terminate the Service Agreements. However, this issue is not the central focus of the action, and as I explain below, there is little basis, on the pleadings and the evidence presented in this application, for challenging Telus' contractual right to terminate.
- [40] Therefore, I do consider the nature of the order sought by 864 to be in the nature of a mandatory injunction, which I will take into account at the balance of convenience stage of the analysis.

1. Serious question to be tried

- [41] As the court indicated in *RJR-MacDonald*, there are no specific requirements to meet this first branch of the test and the threshold is low. I am to make a preliminary assessment of the merits of the plaintiff's case, based on the pleadings and the evidence, and satisfy myself that it is neither frivolous nor vexatious. Subject to exceptions that do not apply here, I am not to get into a prolonged or detailed examination of the merits. Within these confines, I may draw appropriate inferences from the evidence: *Expert Travel Financial Security (E.T.F.S.) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd.*, 2005 BCCA 5.
- [42] Telus submitted that there is no serious question to be tried because 864 has not established any legal basis to challenge Telus' right to terminate the Service Agreements in accordance with their terms, and 864's claims for damages cannot be the basis for relief in the nature of rescission of the termination notice.
- [43] 864 submitted that if one or more of its claims for breach of the Settlement Condition, negligent misrepresentation, breach of confidence, breach of duty of good faith and interference with economic relations is made out at trial, the disconnection notice will be set aside, and Telus may be found liable for damages.
- [44] In its Notice of Civil Claim, 864 does not explicitly or directly challenge Telus' contractual rights of termination under the Service Agreements. Its discrete claim for breach of the Service Agreements "by wrongfully issuing the Disconnection Notice" claims only damages arising therefrom. However, the essence of the claim that the "Disconnection Notice and the Suspension Notice" are of no force is that 864's ability to meet its obligations under the Service Agreements was caused by the wrongful actions of Telus in relation to the loss of the Target acquisition. The legal basis for these wrongful actions includes a breach of a collateral contract (the Settlement Condition), breach of confidence, negligent misrepresentation, breach of the contractual duty of good faith, and interference with economic relations. There is nothing contained in this pleading that provides a clear legal basis to support anything other than damages as a remedy for these causes of action.
- [45] Telus' notice of termination relied not only on the Settlement Agreement but also the Service Agreements. Therefore, whether or not the Settlement Agreement was conditional and was of no force and effect, Telus' rights under the Service Agreements remain.
- [46] Under the Service Agreements, Telus provides tariffed (regulated) and forborne (unregulated) services to 864 and 864 pays fees of approximately \$425,000 per month for both. The Service Agreements permit either party to terminate on 30 days' notice after December 31, 2015 (the expiration date). They also permit Telus to terminate both the tariffed and forborne services where there has been default in paying past due accounts. Under s. 115.2 of the General Tariff, Terms of Service, Telus may suspend or terminate a customer's service if the customer "fails to pay a past due account if it exceeds \$50 or has been past due for more than two months." Under Schedule B of the Service Agreements, Telus may terminate the forborne services if the customer "is in material default of any

provision of this Agreement" or "is in default of its payment obligations" and fails to remedy the default or make payment in full within 30 days after receiving written notice. The only exception is where there is a bona fide billing dispute; in that case Schedule B sets out a process for review.

- [47] While Telus has the right under the Service Agreements to terminate for any reason, it purported to do so due to 864's default in its payment obligations and failure to remedy the default. Regardless of 864's claims against Telus, it has not disputed at least some of the indebtedness. This is evidenced at the very least by the consent judgment obtained on August 24, 2016, but there is evidence from which a clear inference can be drawn that a more substantial portion of Telus' claim for over \$9 million is undisputed. For example, Mr. Laliberte's own evidence confirms a shortfall in payments between December 2012 and April 2015 in the amount of \$3,415,496, net of a disputed amount of \$827,959.
- [48] There is also evidence that 864 acknowledged Telus' right to terminate. On June 14, 2016, two days before Telus issued the notice, Mr. Laliberte wrote in an email to Mr. Budd and another Telus representative:

If you can no longer wait for me, I will understand, just let me know please. If you want to pull the plug on the network today, please let me know.

- [49] Even as late as August 31, 2016, Mr. Laliberte was imploring Telus to give 864 "just a little more time" while also acknowledging that Telus had been "more than patient".
- [50] There was considerable argument about the effect, if any, of the CRTC's decisions of September 22 and November 1, 2016. Telus submitted that it is not open for 864 to claim rescission of the termination notice because the CRTC, which has preferential jurisdiction over this issue, has already determined Telus' entitlement to terminate the Service Agreements. 864 submitted that the CRTC made no such determination, as the only issue before it was the length of the notice Telus was required to give prior to disconnection.
- [51] I agree with Telus that the CRTC has jurisdiction to deal with the validity of a notice of termination under a service agreement but I do not agree that the CRTC made a determination of Telus' right to terminate. This is because 864 did not take issue with its right to do so. In its August 31 application, 864 sought only an extension of the notice period prior to disconnection in order to allow it and its customers time to implement plans to switch to other carriers. Counsel for 864 submitted that under CRTC policy, it was not open to 864 to challenge Telus' right to terminate at an expedited hearing, and therefore nothing should be inferred from its failure to do so.
- [52] I do not consider it necessary to address these arguments because such issues are not germane to the issues I must determine in this application. The fact that 864 chose not to at least reserve its right to challenge the validity of the termination notice before the very body with authority to directly address that issue bears only tangentially on my analysis under the first criterion. However, I consider the CRTC process and its decisions regarding notice to be

pertinent to an assessment of the balance of convenience, and I will come back to this later in these reasons.

- [53] There is one aspect of 864's claim that requires some comment in the context of a preliminary assessment. There is considerable dispute between the parties about the extent of the guarantee obligation of Telephone under the AARGA as well as the amount secured by the debenture. 864 says that both the Legacy Obligation and payment for future charges were guaranteed by Telephone and secured with the debenture. Telus says that only the Legacy Obligation was secured by the guarantee and debenture. 864's position is important to its claim that "all or most" of the amount owed under the Service Agreements was converted to equity in Telephone under the terms of the debenture.
- [54] 864's allegation that Telus elected to convert the Telephone debenture to equity is supported in this application only by the evidence of Mr. Laliberte. He deposed that he met with Mr. Datoos on December 21, 2015 "to discuss the 864 Investment and the conversion of the Telephone Debenture into equity in Telephone which was requested by Mr. Datoos", sent an email the following day stating that they would "be initiating the conversion on the convertible debenture of Telus on Telephone Corp before the expiration date", and issued a share certificate for 39,000,000 Telephone shares to Telus on March 25, 2016 (two days before the conversion rights under the debenture expired).
- [55] Mr. Datoos deposed that he had no recollection of receiving Mr. Laliberte's email about this and that he did not authorize the conversion of the debenture. He understood that Telephone's shares were under a cease trade order and there was no commercial reason why Telus would convert the Legacy Obligation into shares of a valueless company. There is evidence that Telephone is the subject of a cease trade order issued by the B.C. Securities Commission on October 25, 2013.
- [56] Mr. Laliberte deposed in reply that the value of Telephone is based on a \$45,000,000 receivable note issued by Investel to Telephone for the purchase of 864's shares, and therefore the value of Telus' shares amounts to 25% of that value. He characterized the Telephone debenture as an investment by Telus, which Telus disputes, and asserted that the debenture offered Telus the opportunity to make a significant gain if Telephone and 864 performed well.
- [57] There is reason to question 864's assertion of value based on the Investel receivable note given the absence of evidence about the value of Investel as well as unexplained provisions in the recent MOU that allows Investel to cancel "inter-company or related party debt" in the amount of \$45,000,000. There is reason to question 864's assertion about the value of the debenture given that it is expressly stated to be in the principal amount of \$1,925,111, with a value that is to decrease with payment. There is also reason to question the evidence that Telus exercised its option to convert the debenture into equity. The debenture requires written notice in a form attached to the document and there is no evidence that such a document exists, and given the October 25, 2013 cease trade order, any purported issuance

of Telephone shares to Telus after that date was prohibited.

- [58] There was much more evidence and argument given on this issue, but it would be inappropriate for me to delve into it any further. A preliminary assessment of this indicates that 864's claim that its debt to Telus was eliminated or reduced by the conversion of the debenture is a weak one that takes little away from Telus' assertion of its right to terminate the Service Agreements for non-payment under their terms.
- [59] The rest of 864's claims against Telus raise serious issues related to a claim for damages, which may result in a set-off of amounts owing under the Service Agreements, but it is questionable whether there is a basis to support a claim of wrongful termination justifying relief in the nature of rescission of Telus' contractual right under the Service Agreements. However, I accept the submission of counsel for 864 that Telus' contractual right to issue the notice to terminate and disconnect services is joined in the Notice of Civil Claim. While I have considerable doubts that there is a serious issue to be tried as it relates to the validity of the notice to terminate, given the low threshold described in *RJR-MacDonald*, I would not refuse the injunction sought on this basis alone. The weakness of this aspect of 864's claims can be addressed under the third part of the test, which addresses the balance of convenience.

2. Irreparable harm

- [60] As outlined in *RJR-MacDonald* at 341, "irreparable" refers to the nature of harm suffered rather than its magnitude:

It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision . . . where one party will suffer permanent market loss or irrevocable damage to its business reputation . . .

- [61] The evidence on this issue must be particular enough to demonstrate a real probability of irreparable harm and general assertions are insufficient: see *International Relief Fund for the Afflicted and Needy (Canada) v. Canadian Imperial Bank of Commerce*, 2013 ONSC 4612 at para. 37.
- [62] 864 submitted that the evidence clearly demonstrates that insolvency is imminent if the injunction is not granted because disconnection of Telus' services will result in a loss of 42% of its Canadian revenues, without which the company cannot survive, and a receiver will likely be appointed as a result of Scotiabank's recent default notice and notice to enforce security.
- [63] 864 says, however, that it has secured financing if the injunction is granted, which, as Mr. Laliberte deposed, is to be used "to pay out Scotiabank or another financing arrangements acceptable to Scotiabank" and to pre-pay Telus for services on a going forward basis.

- [64] Telus accepts that insolvency may amount to irreparable harm, but submitted that the evidence in this case demonstrates that 864 is already insolvent and it has not satisfied its onus to show that this irreparable harm will be caused by the termination of the Service Agreements and not its own business conduct. Telus says that there is no need for an injunction to permit 864 to obtain communications services because such services are available from other providers and 864 has had ample time to make other arrangements. Telus also questions the appropriateness of 864 purporting to obtain financing that is conditional on an injunction being issued.
- [65] I agree with Telus that if a party is insolvent due to its own conduct and is essentially the "author of its own misfortune", its insolvency will not constitute irreparable harm. This was the case in *B-Filer Inc. v. TD Canada Trust*, 2008 ABQB 749; *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2006 CanLII 26171 (Ont SCJ); and *Vertex Brands Inc. v. BRK Brands Inc.*, 2004 CarswellOnt 95 (SCJ). While these cases involved different circumstances, in each one the irreparable harm asserted by the plaintiff was considered to be self-inflicted such that it could not justify the granting of an injunction. Vertex involved the termination of a distribution agreement for non-payment. The court had no doubt that irreparable harm would occur, but concluded the plaintiff "to be the author of its own misfortune by reason of its failure to keep its payments current" (at para. 17).
- [66] 864's submissions on this issue focused on its imminent insolvency by being put out of business and by suffering a huge loss of customers. This is the kind of harm that can be irreparable where it cannot be quantified: see *RJR-MacDonald* at 341. However, there was no suggestion that in the circumstances here, 864 will not be able to quantify its losses, and it is clear that Telus will be able to pay damages if 864 is successful in its action.
- [67] In any event, I agree with the submission of Telus that 864 has failed to establish that irreparable harm will be caused by the termination of the Service Agreements and disconnection and not just by its own business conduct.
- [68] Even with Telus' services, 864 is insolvent. The company is not in a position to pay its past debt and monthly obligations to Telus because it is unable to meet its ongoing liabilities and has been in such circumstances for some time. This is evidenced by Telus' repeated, unsuccessful attempts since 2013 to have 864 cure its payment defaults. Although 864 did make substantial payments, it continued to be in a shortfall position, and there is no dispute about this in the evidence. This impecuniosity is not restricted to 864's relationship with Telus, as evidenced by various orders made against 864 in other actions. While some of these orders may have been subsequently paid (one under a consent order and another pursuant to garnishee proceedings), the Scotiabank notice demonstrates that 864 is unable to meet its operating expenses despite the services it has obtained from Telus. It also demonstrates the steps 864's creditors have had to take to obtain payment.

- [69] 864 has had notice from Telus since June 16, 2016 of its intention to terminate the Service Agreements and there is no evidence as to what efforts, if any, 864 has made to secure services elsewhere. According to Telus, the tariffed services it provides could be obtained from other CLECs in western Canada, albeit for a higher price, and many of the forborne services could be obtained from CLECs such as Bell, Rogers, Allstream or Axia. In response to this evidence, Mr. Laliberte deposed only that he "strongly disagreed" that such services are readily available.
- [70] On the last day of the hearing, counsel for 864 sought to introduce a further affidavit purporting to provide evidence about what specific services are unavailable, but I considered the admission of such evidence at such a late date to be unfair, particularly in light of Telus' position that it disputed the accuracy of that evidence. This evidence ought to have been included in 864's application in the first place or at the very least in its responding materials prior to the hearing.
- [71] In any event, technical information about what services may or may not be available is only part of the problem. In my view, it should have been a fairly straightforward matter for 864 to provide evidence about what efforts it made to obtain other services to accommodate its customers. This is especially important in light of the additional notice period granted by the CRTC.
- [72] The state of the evidence here can be contrasted with that in *Look Communications*. There, uncontradicted evidence was adduced showing that the plaintiff was unable to secure replacement telecommunication services for a considerable time and at considerable expense, and expected to lose substantially all of its customers within one week. On this basis, the court found that by the time alternate services could be obtained, Look's entire customer base would be gone, its investment in building that customer base would be forfeited, and its goodwill and reputation would be irreparably damaged.
- [73] In 864's submission, the fact that it has obtained the backing of a significant funder indicates that its insolvency is not inevitable if the injunction is granted, as presumably this funder would not be prepared to advance money to a company in that position. Further, 864 suggested that it does not need to rely solely on the new financing to pre-pay for Telus' services given that it does generate significant cash flow from the services it provides to its customers, as shown in its historical payment history.
- [74] I do not accept this submission. 864 has provided no financial statements or other documentation that would permit the court to assess the company's ability to carry on, and its historical payment history indicates not only that it has been unable to meet its monthly obligations but also that its parent company or other entities have often made payments on its behalf. In addition, I have serious concerns about the nature, scope and sufficiency of the financing now being offered to 864.

- [75] In a reply affidavit, Mr. Laliberte deposed that if the injunction is granted, a new lender will provide a line of credit in the amount of \$2,500,000 USD to Investel "to provide working capital and for repayment of outstanding indebtedness", which will be used to pay the amounts due to Telus under the August 24, 2016 consent judgment and to pre-pay Telus for services on a going-forward basis. He also deposed that Investel has confirmed financing from another lender who will "pay out or provide the necessary assurances" to Scotiabank so that it will withdraw its default notice. The only documentation provided relates to the former financing, with a copy of the MOU and a comfort letter.
- [76] The MOU is between the lender and Investel. It refers to 864 as TNW, its prior name. It provides that funding for a proposed business relationship with Investel will be undertaken in two stages: (a) a line of credit "to maintain TNW and move projects forward in the interim", and (b) "a larger funding" which consists of assistance with preparing and implementing a proposal to secure third party funding of up to \$25 million USD. The lender has no obligation to make any further investment and does not guarantee that such funding will be successfully raised.
- [77] The line of credit is to be provided in three draws and the specific use of these funds is not set out in the document, but is to be agreed upon by the parties in "Definitive Documentation", which is not attached. The document does state, however, that the line of credit is to be used for working capital purposes and only for payment of outstanding indebtedness that is agreed to in writing by the lender. The lender's obligation to fund each draw is subject to a number of conditions, including consent "if applicable" of the other lender (regarding the Scotiabank debt), no material adverse change in the financial condition of "Investel Parties", use of proceeds to be consistent with a use approved by the lender in writing, satisfactory completion of due diligence, and execution of the Definitive Documentation.
- [78] There is nothing from the lender itself that confirms that these conditions have been met, in particular, agreement as to the specific uses for the line of credit as it relates to 864. There is only Mr. Laliberte's assertion that the lender "has advised that they are satisfied with their due diligence performed under the MOU and closing documents are expected to be finalized this week, with closing no later than Monday, November 21, 2016". Interestingly, there is also nothing in the documentation that makes this financing conditional on the granting of an injunction.
- [79] The comfort letter confirms interim funding of \$2.5 million USD to Investel "to be used for the operation of its telecommunication assets" but does not assure continued funding beyond the initial line of credit:

We will work with Investel to access additional capital to further the development of the TNW platform, and to facilitate the strategic growth and operational deployment of Investel's patent portfolio.

- [80] This evidence does not provide an unconditional commitment to lend the funds to 864 to pay both the consent judgment and its monthly obligations to Telus, and even if it did, it provides only enough to keep 864 afloat for no more than six months. There is no commitment to continued funding beyond the initial line of credit other than a pledge to assist Investel with a proposal to secure financing from an unnamed third party. There is no evidence providing any details about the financing to be used to address the Scotiabank notice.
- [81] The economic harm that 864 will now experience as a result of Telus' termination arises from decisions it has made about the conduct of business and its already established impecuniosity. The need to obtain additional financing to carry on business underscores the problem, and the financing presented is insufficient to ensure that 864 will be able to pre-pay for all Telus services until trial. Again, the circumstances here are considerably different from those in Look Communications, where the plaintiff was in a more stable financial position, having been found to have "an underlying asset of significant value" (para. 36).
- [82] In my view, granting the injunction will not save 864 from insolvency; it will simply postpone it. In such circumstances, I am not satisfied that 864 will suffer irreparable harm if the injunction is not granted.
3. Balance of convenience
- [83] This part of the test has been described as "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits": per *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110, cited in *RJR-MacDonald* at 342.
- [84] The factors to be considered, which will vary in each case, may include the ability of parties to pay damages, preservation of the status quo, the strength of each party's case, and harm to third parties: *RJR-MacDonald* at 342-343; *Crosshair Exploration & Mining Corp. v. Universal Uranium Ltd.*, 2010 BCSC 334 at para. 47; *British Columbia Hydro and Power Authority v. Boon*, 2016 BCSC 355 at para. 69; *Edward Jones* at para. 46. The insolvency of a party that prevents it from giving a meaningful undertaking as to damages is also a factor to take into account in assessing the balance of convenience: see for example, *Re Canadian Petcetera Limited Partnership*, 2009 BCSC 520 at para. 26.
- [85] There is no dispute that Telus is fully capable of paying any damages that may be awarded against it. Preservation of the status quo is not particularly helpful here, as what constitutes the status quo depends on one's view about the validity of Telus' right to terminate. In my view, the balance of convenience favours Telus for the following reasons:
- a) the relative weakness of 864's case to support a remedy in the nature of rescission of the termination notice;

- b) the amelioration of harm to third parties as a result of the CRTC's regulation of the notice period for that very purpose;
- c) the insufficiency of the financing proposed to meet the proposed terms of an injunction;
- d) the real risk that 864 will default in the terms of pre-payment, which will result in Telus again giving notice to terminate and having to provide services without any assurance of payment during the notice period;
- e) the inability of 864 to provide a meaningful undertaking as to damages.

[86] Telus has good reason to doubt 864's assurances of payment given its history and the court should be careful not to make an order that would force it to continue in a business relationship that it wishes to end. The mandatory nature of the injunction is also a factor that favours Telus, but given all of the other factors at play here, I would come to the same conclusion even if the injunction is considered to be prohibitory.

[87] I have already discussed the basis for my assessment of the weakness of 864's claim for rescission.

[88] With respect to third parties, 864 stressed the serious impact disconnection will have on "nearly 30,000 working telephone numbers" belonging to its customers. This ignores the entire regulatory process before the CRTC and the provision of an extended notice period in order to ensure a smooth transition for 864's affected customers. In its September 22, 2016 decision, the CRTC ordered 864 to "notify, forthwith", all affected customers, and to provide confirmation of this and a list of all affected customers, in confidence, no later than September 30, 2016. Similar orders were made in the CRTC's November 1, 2016 decision.

[89] I appreciate that the pre-payment conditions proposed by 864 were intended to create a situation whereby Telus would not be prejudiced by an injunction but I am not satisfied that these conditions can be adequately met. I have addressed the insufficiency of the financing proposed, which takes on particular importance in light of 864's history of non-payment or insufficient payment and the evidence of its insolvency notwithstanding Telus' continued provision of services. There is a real likelihood that 864 will be unable to meet the pre-payment terms of an injunction through to trial.

[90] In the event of a default of the pre-payment term by 864, Telus will again be in the position to issue notice of termination and required to satisfy the regulatory process in order to protect the interests of 864's affected customers. During the notice period, Telus will very likely be in the position of having to provide services to 864 while 864 is in default of paying for those services.

- [91] While 864 indicated a willingness to provide an undertaking as to damages, it submitted that little, if any, damage would flow to Telus from an injunction. This submission assumed that 864 would continue to pre-pay Telus for all services provided until trial, something that the evidence does not establish as likely. Given 864's financial circumstances, there is no indication that it is able to provide a meaningful undertaking as to damages.
- [92] Finally, it is important to recognize that an interlocutory injunction is an extraordinary equitable remedy. The fact that 864 has taken no steps to satisfy the August 24, 2016 consent judgment does not bode well for a party seeking this kind of equitable relief.
- [93] For all of these reasons, I concluded that it would not be just or equitable to grant the interlocutory injunction sought by 864, and the application was dismissed.
- [94] Telus is entitled to its costs.

"Fisher, J."

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