

CANADA / JUDGMENT

Drover v. BCE Inc.

2015 BCCA 132

COURT

British Columbia Court of Appeal

DECIDED

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2015 BCCA 132 Drover v. BCE Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Drover v. BCE Inc.,

2015 BCCA 132

Date: 20150325

Dockets: CA040624, CA041132

Docket: CA040624

Between:

Steve Drover, Shelley Frank, John Gillis, Michael Lucas, Mark Frey, Trudy Bethel, Bryan Pawlachuk, Nathalie Pawlachuk, D&S Homes Ltd., Jerry Karalash, Jennifer Evenson, Danielle Favreau, Jeff Ledding, Terese Hafichuk-Walkin, Jessica Cordingley, Alison Weinberger, Terry Parker, Carol Walker, Cindy Belton, Leigh Edmunds, Lauren Tomashich, Stan Pappas, Amanda Donald, Richard Skuce, Lant Lutterodt, John Doe I, Jane Doe I, John Doe Ltd. I, John Doe II, Jane Doe II, John Doe Ltd. II, John Doe III, Jane Doe III, John Doe Ltd. III, John Doe IV, Jane Doe IV, John Doe Ltd. IV, John Doe V, Jane Doe V, John Doe Ltd. V, John Doe VI, Jane Doe VI, John Doe Ltd. VI, John Doe VII, Jane Doe VII, John Doe Ltd. VII, John Doe VIII, Jane Doe VIII, John Doe Ltd. VIII, John Doe IX, Jane Doe IX, John Doe Ltd. IX, John Doe X, Jane Doe X, John Doe Ltd. X, John Doe XI, Jane Doe XI, John Doe Ltd. XI, John Doe XII, Jane Doe XII, John Doe Ltd. XII, John Doe XIII, Jane Doe XIII, John Doe Ltd. XIII, John Doe XIV, Jane Doe XIV, John Doe Ltd. XIV, John Doe XV, Jane Doe XV, John Doe Ltd. XV, John Doe XVI, Jane Doe XVI, John Doe Ltd. XVI, John Doe XVII, Jane Doe XVII, John Doe Ltd. XVII, John Doe XVIII, Jane Doe XVIII, John Doe Ltd. XVIII, John Doe XIX, Jane Doe XIX, John Doe Ltd. XIX, John Doe XX, Jane Doe XX, John Doe Ltd. XX, John Doe XXI, Jane Doe XXI, John Doe Ltd. XXI, John Doe XXII, Jane Doe XXII, John Doe Ltd. XXII, John Doe XXIII, John Doe XXIV, John Doe XXV, John Doe XXVI, and John Doe XXVII

Appellants

(Plaintiffs)

And

BCE Inc., Bell Canada, Bell Mobility Cellular Inc., Bell Mobility Inc., Aliant Telecom Inc., TELUS Corporation, TELUS Mobility, Telus Communications (B.C.) Inc., Saskatchewan Telecommunications (SaskTel), Saskatchewan Telecommunications Holding Corporation, Rogers Communications Inc., Rogers Cantel Inc., Rogers Wireless Inc., Rogers AT&T Wireless, and MTS Inc.

Respondents

(Defendants)

- and -

Docket: CA041132

Between:

Steve Drover, Shelley Frank, John Gillis, Michael Lucas, Mark Frey, Trudy Bethel, Bryan Pawlachuk, Nathalie Pawlachuk, D&S Homes Ltd., Jerry Karalash, Jennifer Evenson, Danielle Favreau, Jeff Ledding, Terese Hafichuk-Walkin, Jessica Cordingley, Alison Weinberger, Terry Parker, Carol Walker, Cindy Belton, Leigh Edmunds, Lauren Tomashich, Stan Pappas, Amanda Donald, Richard Skuce, Lant Lutterodt, John Doe I, Jane Doe I, John Doe Ltd. I, John Doe II, Jane Doe II, John Doe Ltd. II, John Doe III, Jane Doe III, John Doe Ltd. III, John Doe IV, Jane Doe IV, John Doe Ltd. IV, John Doe V, Jane Doe V, John Doe Ltd. V, John Doe VI, Jane Doe VI, John Doe Ltd. VI, John Doe VII, Jane Doe VII, John Doe Ltd. VII, John Doe VIII, Jane Doe VIII, John Doe Ltd. VIII, John Doe IX, Jane Doe IX, John Doe Ltd. IX, John Doe X, Jane Doe X, John Doe Ltd. X, John Doe XI, Jane Doe XI, John Doe Ltd. XI, John Doe XII, Jane Doe XII, John Doe Ltd. XII, John Doe XIII, Jane Doe XIII, John Doe Ltd. XIII, John Doe XIV, Jane Doe XIV, John Doe Ltd. XIV, John Doe XV, Jane Doe XV, John Doe Ltd. XV, John Doe XVI, Jane Doe XVI, John Doe Ltd. XVI, John Doe XVII, Jane Doe XVII, John Doe Ltd. XVII, John Doe XVIII, Jane Doe XVIII, John Doe Ltd. XVIII, John Doe XIX, Jane Doe XIX, John Doe Ltd. XIX, John Doe XX, Jane Doe XX, John Doe Ltd. XX, John Doe XXI, Jane Doe XXI, John Doe Ltd. XXI, John Doe XXII, Jane Doe XXII, John Doe Ltd. XXII, John Doe XXIII, John Doe XXIV, John Doe XXV, John Doe XXVI, and John Doe XXVII

Appellants

(Plaintiffs)

And

BCE Inc., Bell Canada, Bell Mobility Cellular Inc., Bell Mobility Inc., Bell Atlantic, Aliant Telecom Inc., Saskatchewan Telecommunications, Saskatchewan Telecommunications Holding Corporation

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Frankel

(In Chambers)

On appeal from: Orders of the Supreme Court of British Columbia, dated January 14, 2013, and July 26, 2013 (Drover v. BCE Inc., 2013 BCSC 50 and 2013 BCSC 1341, Victoria Docket 04-4697).

Counsel for the Appellants:

E.F.A. Merchant, Q.C.

Counsel for the Respondents:

BCE Inc., Bell Canada, Bell Mobility Cellular Inc., Bell Mobility Inc., and Aliant Telecom Inc.

S.T.C. Warnett

Counsel for the Respondents:

TELUS Corporation, TELUS Mobility, and Telus Communications (B.C.) Inc.

A.D. Borrell

Counsel for the Respondents:

Saskatchewan Telecommunications, and Saskatchewan Telecommunications Holding Corporation

M. Shams

Counsel for the Respondents:

Rogers Communications Inc., Rogers Cantel Inc., Rogers Wireless Inc., and Rogers AT&T Wireless

S.R. Schachter, Q.C.

G.B. Gomery, Q.C.

Counsel for the Respondent:

MTS Inc.

J.R. Shewfelt

Place and Date of Hearing:

Vancouver, British Columbia

February 13, 2015

Place and Date of Judgment:

Vancouver, British Columbia

March 25, 2015

Summary:

Applications to reinstate an appeal statutorily dismissed as abandoned and to remove a related appeal from the inactive list. Applications dismissed. It was not in the interests of justice to permit these appeals to go forward as the delays were due to a conscious choice to disregard this Court's processes.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

[1] This matter involves applications brought in two related appeals arising out of orders made in a putative class proceeding in the Supreme Court of British Columbia. One application seeks an order reinstating what I will refer to as the "Service Appeal". That appeal was statutorily dismissed as abandoned. The other application seeks an order removing what I will refer to as the "Abuse of Process Appeal" from the inactive list. It was statutorily placed on that list due to the appellants taking no action beyond filing the notice of appeal.

[2] For the reasons that follow, the applications are dismissed.

Court of Appeal Act and Court of Appeal Rules

[3] The following provisions of the Court of Appeal Rules, B.C. Reg. 297/2001, are relevant:

Rule 19: Provides that, unless otherwise ordered, an appellant must file and serve an appeal record "[w]ithin 60 days after bringing an appeal".

Rule 21: Provides that, unless otherwise ordered, an appellant must file and serve a factum "within 30 days after filing the Appeal Record".

Rule 26: Provides that, unless otherwise ordered, an appellant must file and serve an appeal book "within 30 days after filing the Appeal Record".

Rule 28: Provides that an appeal is ready for hearing "when the Appeal Record and the appellant's factum and Appeal Book are filed" and requires the appellant to file a certificate of readiness "immediately after an appeal is ready for hearing." In the event the appellant does not file a certificate of readiness, the respondent "may" do so after filing the respondent's factum. The party that files the certificate of readiness "must contact the registrar to obtain a date for the hearing of the appeal".

[4] The following provisions of the Court of Appeal Act, R.S.B.C. 1996, c. 77, are relevant:

Section 25(1): Provides that if a certificate of readiness is not filed within one year after the filing of the notice of appeal, then the appeal will be placed on the inactive appeal list. The registrar is required to mail a notice to each counsel of record that such action has been taken.

Section 25(2): Authorizes a judge in chambers to order an appeal removed from the inactive list.

Section 25(5): Provides that "[i]f an appeal has remained on the inactive list for 180 consecutive days, on the 181st day it stands dismissed as abandoned."

Section 25(6): Authorizes a judge in chambers to order the reinstatement of an appeal that has been dismissed as abandoned.

Factual Background

- [5] In 2004, Merchant Law Group ("MLG"), a law firm with offices throughout Canada, commenced virtually identical putative class proceedings in every province, except Prince Edward Island, against cellular and wireless telecommunications providers with respect to system access fees paid by their customers. The statements of claim included the following causes of action: breach of contract; breach of duty to inform; breaches of implied and express warranties and covenants; fraudulent misrepresentation; negligence; breaches of the Competition Act, R.S.C. 1985, c. C-34; and breaches of provincial consumer protection legislation.
- [6] To consider the present applications in their proper context, it is necessary to have regard to some of what has occurred outside of British Columbia. It is also necessary to have regard to another putative class proceeding commenced in British Columbia against some of the defendants in respect of system access fees.
- [7] A further necessary context is the role of the proposed representative plaintiffs and other class members, the named appellants in these proceedings. It is evidence that MLG is responsible for the national litigation strategy and the conduct of the respective proceedings. In these applications, it is counsel from MLG who depose to the reasons for the want of prosecution and the intention to appeal. I, therefore, will refer to MLG, not the appellants, in discussing the steps taken in these proceedings.
- [8] It does not appear any steps have been taken by MLG to prosecute the proceedings commenced in Ontario, Quebec, New Brunswick, and Newfoundland and Labrador.

- [9] The British Columbia proceeding (known as the "Drover Action") was commenced on November 1, 2004. On November 4, 2004, MLG faxed the writ of summons and statement of claim to the head offices of the defendants. The writ did not include the required endorsement for service ex juris upon the non-British Columbia resident defendants. Some of those defendants filed appearances, but others did not.
- [10] On September 17, 2007, the proceeding commenced by MLG in Saskatchewan (known as the "Frey Action") was certified as a national "opt-in" class action on the unjust enrichment claim: *Frey v. BCE Inc.*, 2007 SKQB 328, 312 Sask. R. 4. On May 7, 2009, MLG's application to amend the certification order to have the proceedings become a national "opt-out" class action was dismissed: 2009 SKQB 165, 334 Sask. R. 55.
- [11] On July 24, 2009, MLG commenced another putative class proceeding in Saskatchewan (known as the "Collins Action"). MLG sought to have that proceeding certified on a national "opt-out" basis. In February 22, 2010, that proceeding was conditionally stayed as an abuse of process in light of the Frey Action: *Collins v. BCE Inc.*, 2010 SKQB 74, 352 Sask. R. 205.
- [12] On March 15, 2010, a judge of the Court of Appeal for Saskatchewan granted MLG's application for leave to appeal the decision refusing to certify the Frey Action on a national "opt-out" basis. MLG was directed to file a formal notice of appeal setting out its grounds of appeal within ten days: *Frey v. BCE Inc.*, 2010 SKCA 30, 350 Sask. R. 117 (Chambers). MLG did not file a notice of appeal within ten days.
- [13] On November 15, 2011, the Court of Appeal for Saskatchewan upheld the national "opt-in" certification order in the Frey Action: 2011 SKCA 136, [2012] 3 W.W.R. 423, leave to appeal ref'd [2012] 2 S.C.R. viii.
- [14] On December 16, 2011, a Vancouver law firm commenced a putative class proceeding in British Columbia (known as the "Ileman Action") against some of the defendants in the Drover Action with respect to system access fees.
- [15] On August 27, 2012, MLG filed an application in the Court of Appeal for Saskatchewan seeking to extend the time for filing the notice of appeal it was ordered to file some 28 months before with respect to its appeal from the order refusing to certify the Frey Action on a national "opt-out" basis (see para. 12 above).
- [16] No steps were taken by MLG with respect to the Drover Action until November 9, 2012, when it filed an application seeking a declaration that the defendants, including those that had filed appearances, had been validly served. In the alternative, MLG sought an order permitting service on any of the defendants found not to have been properly served.
- [17] MLG's application in the Drover Action for a declaration with respect to service was dismissed by Mr. Justice G.C. Weatherill on January 14, 2013: *Drover v. BCE Inc.*, 2013 BCSC 50, 43 B.C.L.R. (5th) 146. He held service by fax was not valid and that, as the writ and statement of claim had expired, they could not be served unless they were renewed. He went on to consider whether the writ and statement of claim should be renewed and

decided they should not. This decision effectively ended the Drover Action as against the Telus, SaskTel, Rogers, and MTS defendants. Being of the view that the conduct of E.F.A. Merchant, Q.C. caused costs to be wasted through delay and neglect, Weatherill J. ordered him personally liable for the costs of that application.

- [18] On February 12, 2013, MLG filed a notice of appeal from Weatherill J.'s order: File No. CA040624 (the "Service Appeal"). By early-May of 2013, MLG had filed the appeal record, the appeal book, and the appellants' factum. That factum is signed by Darren Williams of MLG. The relief sought in the factum is an order renewing the writ and statement of claim, and setting aside the costs order against Mr. Merchant.
- [19] On March 8, 2013, MLG's application for an extension of time to file the notice of appeal with respect to the order refusing to certify the Frey Action on a national "opt-in" basis was dismissed: *Frey v. BCE Inc.*, 2013 SKCA 26, 409 Sask. R. 266 (Chambers).
- [20] On March 28, 2013, the Bell defendants filed an application in the Drover Action seeking an order either dismissing or staying that action on the ground that it is an abuse of process. A similar application was filed by Aliant Telecom on April 19, 2013.
- [21] On April 9, 2013, MLG commenced a second putative class action in Alberta: Edmonton Q.B. File No. 1303 04984. That proceeding was later replaced by Edmonton Q.B. File No. 1403 13288 (known as the "Turner Action").
- [22] By early June of 2013, the respondents on the Service Appeal had filed a joint appeal book and their respective factums.
- [23] On July 26, 2013, Mr. Justice Weatherill found that, in light of the Frey Action, the Drover Action was an abuse of process: 2013 BCSC 1341, 54 B.C.L.R. (5th) 153. He ordered the Drover Action stayed on the condition that it could be reactivated in the following circumstances (para. 58):
- a) if the defendants in the Frey Action withdraw their offer to consent to the extension of the class period in that action; and
 - b) if the Ileman Action is discontinued.

[Emphasis in original.]

The extension related to making the class time period in the Frey Action identical to the period claimed in the Drover Action.

- [24] On August 20, 2013, MLG filed a notice of appeal from the order staying the Drover Action: File. No. CA041132 (the "Abuse of Process Appeal").
- [25] On November 12, 2013, Mr. Justice Donald of this Court made a consent order in the Abuse of Process Appeal directing that the Abuse of Process Appeal be heard with the Service Appeal. On November 26, 2013, Mr. Justice Harris of this Court made a consent order in the Abuse of Process Appeal adding the SaskTel defendants as respondents. SaskTel asked to be

added on the basis that it had an abuse of process application before the Supreme Court that would have to be argued should the Service Appeal be allowed and, therefore, had an interest in the outcome of the Abuse of Process Appeal.

- [26] On November 19, 2013, the first (i.e., 2004) proceeding MLG commenced in Alberta was dismissed on account of delay: *Pappas v. BCE Inc.*, Calgary Q.B. Registry No. 0401 12400. That order was based on MLG having done nothing to prosecute that action for nine years.
- [27] On January 16, 2014, MLG filed an amended notice of appeal in the Abuse of Process Appeal, adding the SaskTel respondents.
- [28] On February 27, 2014, the deputy registrar of this Court sent a letter to Brian J. Smith of MLG, advising that the Service Appeal had been placed on the inactive list and that, if no steps were taken, then it would stand dismissed as abandoned on "August 12, 2013 [sic]." That letter referred to s. 25 of the Court of Appeal Act and included a copy of that provision.
- [29] On June 5, 2014, Mr. Justice Weatherill dismissed an application to certify the *Ileman Action*: *Ileman v. Rogers Communications Inc.*, 2014 BCSC 1002, 28 B.L.R. (5th) 215. On June 18, 2014, plaintiffs' counsel in that action filed a notice of appeal from that decision: File No. CA041916.
- [30] On July 17, 2014, a motion for an order staying the proceeding MLG commenced in Nova Scotia in 2004 as an abuse of process was dismissed: *Gillis v. BCE Inc.*, 2014 NSSC 279, 348 N.S.R. (2d) 276. That judgment is under appeal to the Nova Scotia Court of Appeal: File No. CA430564.
- [31] On August 12, 2014, this Court closed its file with respect to the Service Appeal. The Court's records document it being dismissed as abandoned under s. 25.
- [32] On August 25, 2014, the proceeding MLG commenced in Manitoba in 2004 was stayed unconditionally as an abuse of process on the basis that nothing had been done to prosecute it for 10 years: *Hafichuk-Walkin v. BCE Inc.*, 2014 MBQB 175, 308 Man. R. (2d) 215. That judgment is under appeal to the Court of Appeal for Manitoba, judgment having been reserved on March 9, 2015: File No. AI14-30-08244.
- [33] On August 28, 2014, the deputy registrar of this Court sent a letter to E.F. Anthony Merchant, Q.C. of MLG advising that the Abuse of Process Appeal had been placed on the inactive list and that, if no steps were taken, then the appeal would stand dismissed as abandoned on February 17, 2015. That letter referred to s. 25 of the Court of Appeal Act and provided a copy of that provision.
- [34] On November 17, 2014, a judge of the Court of Queen's Bench of Alberta heard an application in the *Turner Action* for an order staying those proceedings as an abuse of process.

- [35] On November 24, 2014, this Court reserved judgment on the appeal taken from the refusal to certify the Ileman Action.
- [36] On January 30, 2015, Anthony Tibbs of MLG sent a letter to counsel for the respondents in the Abuse of Process Appeal to advise that an application to restore that appeal to the active list would be brought on February 13, 2015, "so that it may be finalized and move forward to a hearing in conjunction with [the Service Appeal]."
- [37] On February 5, 2015, MLG filed and served two notices of motion in connection with the Abuse of Process Appeal returnable on February 13, 2015. The principal motion sought an order removing that appeal from the inactive list. The second motion sought an order abridging the time for service of the principal motion. The principal motion was supported by an affidavit sworn by Mr. Tibbs on February 2, 2015.

(Note: Rule 33(1)(d) requires filed copies of a notice of motion and supporting material to be served on the other parties "at least 5 business days before the date set for the hearing of the application.")

- [38] On February 10, 2015, MLG filed and served written submissions in support of each of its applications.
- [39] On February 10, 2015, the Bell and Aliant respondents filed and served an affidavit sworn that day by a legal assistant in the law firm that acts for them. Included in the attachments to that affidavit were a copy of the deputy registrar's letter of February 27, 2014 with respect to the Service Appeal having been placed on the inactive list and a copy of an entry in this Court's publically available electronic records indicating it had been closed on August 12, 2014. Additional material was filed and served on February 12, 2015, by the Bell, Aliant, and SaskTel respondents.

(As discussed later in these reasons, MLG's position is that it was not aware the Service Appeal had been dismissed as abandoned until it received the above mentioned attachments.)

- [40] On February 12, 2015, MLG filed and served two notices of motion in connection with the Service Appeal returnable on February 13, 2015. The principal motion sought an order reinstating that appeal. The second motion sought an order abridging the time for service of the principal motion. Those motions were supported by an affidavit sworn by Mr. Merchant on February 11, 2015.
- [41] At the hearing of this application on February 13, 2015, MLG filed an affidavit sworn by Mr. Smith on February 12, 2015.
- [42] On March 10, 2015, a judge of the Court of Queen's Bench of Alberta ordered an interim stay of the Turner Action: 2015 ABQB 169. I have been advised that Bell Mobility Inc. intends to appeal that decision.

Abridging Time

- [43] The respondents do not oppose these applications being heard on short notice. As a formality, pursuant to s. 10(2)(d) of the Court of Appeal Act, I order the time for the service with respect to the Abuse of Process Appeal application be February 5, 2015, and the time for service with respect to the Service Appeal be February 12, 2015.

Affidavits in Support of the Application

- [44] Mr. Tibbs's affidavit contains information with respect to the proceedings in this matter, the Ileman Action, and some of the proceedings in other provinces. With respect to why the Abuse of Process Appeal should be allowed to proceed, Mr. Tibbs deposes:
13. The Appellants in this matter were initially hopeful that the Ileman case would serve to protect the interests of British Columbia residents with respect to the subject matter of this litigation (that being the "system access fees" charged by cellular providers); however, Ileman was unsuccessful at certification and the decision on appeal has not been rendered. If the within appeal is disposed of without being considered, and the appeal in Ileman is unsuccessful, British Columbia residents will not be protected with respect to this litigation. It is for this reason that pursuing the within appeal is now of significantly greater importance for the Appellants and for the putative class members.
- [45] Mr. Merchant's affidavit also contains information with respect to this matter, the Ileman Action, and some of the proceedings in other provinces. He deposes that the affidavit filed by the Bell and Alliant respondents was received in his office on February 10, 2015, and that it was not until that day that Mr. Tibbs became aware of the deputy registrar's February 27, 2014 letter with respect to the Service Appeal. Mr. Merchant says he did not become aware of that letter until February 11, 2015.
- [46] Mr. Merchant further states in his affidavit that:
- (a) Mr. Smith worked at MLG until June 30, 2014; he was one of many lawyers who worked on the system access fee file;
 - (b) He has no recollection of Mr. Smith telling him about the February 27, 2014 letter from the deputy registrar concerning the Service Appeal,
 - (c) Mr. Tibbs advised him he has no recollection of Mr. Smith telling him about that letter;
 - (d) He was advised by a senior paralegal at MLG that she conducted an examination of the firm's files, including electronic files, and did not find that letter or a copy of it;
 - (e) He and his firm believed the "Service Appeal was simply awaiting a joint hearing [with the Abuse of Process Appeal]" and "[w]e did not know that the within Service Appeal had been deemed abandoned"; and

- (f) As the two appeals were to be heard together, "awaiting the outcome of Ileman was thought by [him] to be appropriate".
- [47] With respect to why the Service Appeal should be allowed to proceed, Mr. Merchant deposes:
26. Allowing the Drover action to proceed, and hence the Abuse of Process Appeal and within Service Appeal may be the only meaningful opportunity for British Columbia residents to receive effective access to justice over the system access fee issue.
29. The Appellants in this matter were initially hopeful that the Ileman case would serve to protect the interests of British Columbian residents with respect to the subject matter of this litigation (that being the "system access fees" charged by cellular providers); however, Ileman was unsuccessful at certification and the decision on appeal has not been rendered.
- [48] Mr. Smith deposes that since at least 2013, his practice is to scan all incoming and outgoing correspondence into electronic form. He says that he has no recollection of ever seeing the deputy registrar's letter of February 27, 2014. He further says that had he received that letter, he would have scanned and saved it electronically and drawn it "to the attention of E.F. Anthony Merchant, Q.C., Anthony Tibbs, Casey Churko, or any of the other lawyers at MLG who were working on the matter at that point in time." Mr. Smith did not depose to having conducted a search for the letter at MLG's offices.

The November 17, 2014 Hearing in Alberta

- [49] In response to MLG's position that Mr. Merchant and others in his firm only became aware of the statutory dismissal of the Service Appeal in February of 2015, the Bell and Aliant respondents filed the transcript of the November 17, 2014 hearing in the Court of Queen's Bench of Alberta on the application to dismiss the Turner Action as an abuse of process. At that hearing Mr. Merchant and Casey R. Churko appeared for Ms. Turner.
- [50] During that hearing, when Kathryn Podrebarac, counsel for Bell Mobility Inc., began to refer to the reasons for judgment of Weatherill J. giving rise to the Service Appeal, the following exchange occurred:

MR. MERCHANT: Incidentally, this is under appeal but - and Mr. Justice Weatherill has since rejected certification saying quite briefly, I don't agree with the Saskatchewan Court of Appeal. And I don't know whether that's still under appeal.

MS. PODREBARAC: Well first of all, Mr. Merchant, I know for a fact that this appeal that you've just referred to has been dismissed, has abandoned.

MR. MERCHANT: I've abandoned it?

MS. PODREBARAC: It was administratively dismissed. I can -

MR. MERCHANT: Oh -

MS. PODREBARAC: - send you the letter.

MR. MERCHANT: - right. You have to proceed within a certain period of time in British Columbia but as far as I know we're proceeding with that appeal. But - we're certainly discussing it but I just say it's under appeal and --

MS. PODREBARAC: But my point -

MR. MERCHANT: - I think that the certification rejection is also under appeal but my friends will know better than I about that if we're not counsel on it.

MS. PODREBARAC: Right. Because he's talking about now - let's talk about two things. Service judgment - if it's necessary I can bring in the letter - it's statutorily dismissed because the plaintiffs did not pursue it. It was dismissed this summer. And the decision that Mr. Merchant is referring to is the competing Ileman Action brought by another firm which includes statutory claims, et cetera, and that certification decision is under appeal. The - Justice Weatherill did not certify that claim and the plaintiffs have appealed. But I just don't want to lose the point here that we're trying to make about abuse and

[Emphasis added.]

Analysis

[51] I begin by noting that as a result of the passage of time, the Abuse of Process Appeal now stands dismissed as abandoned by operation of s. 25(5) of the Court of Appeal Act. However, when I found it necessary to reserve judgment on these applications, the respondents agreed that the question of whether the Abuse of Process Appeal should be allowed to proceed should be determined having regard to the test for removal of an appeal from the inactive list, not the more stringent test applicable on an application to reinstate an appeal that has been deemed abandoned.

Applicable Tests

[52] As Chief Justice McEachern observed in *Rowan v. Dunwoody & Company*, 1999 BCCA 755 at para. 20, 131 B.C.A.C. 311, "The purpose of s. 25 is [to] prevent dormant appeals from sleeping too long, not to foreclose reasonable access to the appeal process."

[53] The approach taken on an application to remove an appeal from the inactive list is reflected in *Murphy v. Wynne*, 2008 BCCA 26, 250 B.C.A.C. 249 (Chambers), wherein Chief Justice Finch stated:

- [19] Section 25 of the Court of Appeal Act governs inactive appeals. There is no rigid test on an application to reinstate. The overriding issue has been said to be whether it is in the interests of justice to grant the application: *Kar Recovery Ltd. v. KDA*, 2004 BCCA 503. Factors which have been considered by the Court in removing a case from the inactive list are the extent of the delay, any explanation for the delay, the existence of prejudice arising from the delay, and the likelihood of success on appeal.
- [20] The applicant bears the onus of establishing a good reason for reactivating the appeal under s. 25(2): see *Galiano Conservancy Association v. British Columbia (Ministry of Transportation and Highways)* (1997), 40 B.C.L.R. (3d) 171 (C.A.) at 176.
- [54] With respect to an application to reinstate an appeal that has been statutorily dismissed as abandoned, there is, again, no rigid test. The relevant factors are the same as those on an application to remove an appeal from the inactive list, with the interests of justice being the primary consideration. However, applications to reinstate are subject to "closer scrutiny because the applicants have let time march on so that the automatic purging progression developed in s. 25 has reached its end point": *Convoy Supply Ltd. v. Drummond* (1996), 78 B.C.A.C. 27 at para. 14, 6 C.P.C. (4th) 5 (Chambers). In *Canada (Attorney General) v. No Strings Enterprises Ltd.*, 2001 BCCA 671 (Chambers), application for review dismissed, 2002 BCCA 175, 164 B.C.A.C. 381, leave to appeal refused [2002] 4 S.C.R. vi, Mr. Justice Lambert said this in dismissing an application to reinstate brought approximately one month after the appeal had been dismissed as abandoned:
- [7] The test for reinstatement of a dismissed appeal under s.s. (6) of s. 25 is significantly more rigorous [sic] than the test for restoring an appeal to the active list under the earlier subsections of s. 25. It is not sufficient to determine whether the appeal has any prospect of success and if it is demonstrated that the appeal has some prospect of success to restore the appeal. There has to be a significant proper reason why no steps have been taken. It has to be in the overall interest of justice as it affects both parties that the appeal be reinstated. In my opinion, having regard to the arguments, there was no sufficient justification on Mr. Kennedy's part for letting so much time pass without taking any formal steps to prosecute this matter.

[Emphasis added.]

MLG's Position on the Importance of Both Appeals

- [55] MLG submits if its appeals are not allowed to proceed, then there is a possibility that millions of consumers in British Columbia--"almost every family"-- will be denied redress for the improper billing practices of the respondents. It says this will be the result if it is not allowed to proceed with its appeals and the *Ileman* Action is not certified. During his submissions, Mr. Merchant stated that should the *Ileman* Action be certified, it is likely his firm will abandon these appeals, even though the class period sought in the *Drover* Action is potentially six to eight years longer than that sought in the *Ileman* Action. Mr. Merchant

went so far as to say that he is prepared to undertake to abandon these appeals in the event the Ileman Action is certified, should I require him to do so. I told Mr. Merchant that I did not consider it appropriate to ask for that undertaking.

Service Appeal

Delay and Explanation for the Delay

- [56] MLG's position is that it was taken by surprise in early February of this year, to learn that the Service Appeal had been statutorily dismissed seven months earlier. In effect, it asks me to infer that neither Mr. Merchant nor any of the other lawyers working on the Drover Action file were aware this had occurred or that there was a time limit within which the appeal must be prosecuted. Such an inference strains credulity.
- [57] I accept the statement by Mr. Merchant in his affidavit that it was the delivery of the affidavit filed by the Bell and Aliant respondents that drew his attention to the fact the Service Appeal had been dismissed. However, I do not accept that prior to this he and other lawyers at MLG did not know this had happened. I, further, do not accept such a statement as an explanation for the significant delay in prosecuting this appeal. Rather, I am satisfied that Mr. Merchant had put the Service Appeal out of his mind because he was focusing on system access fee litigation in other provinces, an order had been entered to hear it was the Service Appeal, and he was content to sit back and await developments in the Ileman Action. I am also satisfied that Mr. Merchant and his colleagues at MLG were aware of this Court's rules requiring appeals to be diligently prosecuted and that the Court of Appeal Act contains provisions to dismiss appeals that are not so prosecuted.
- [58] The transcript of the November 17, 2014 hearing before the Court of Queen's Bench of Alberta indicates both Mr. Merchant and Mr. Churko appeared on behalf of Ms. Turner. In his submissions, Mr. Merchant told me that he heard what Ms. Podrebarac said but did not "twig" to what she was saying. Rather, he thought she was referring to the Service Appeal having been moved to the inactive list pursuant to s. 25(2) of the Court of Appeal Act. He further told me that following that hearing he did not take any steps to determine the status of the Service Appeal but was not concerned because he believed it was waiting to be heard with the Abuse of Process Appeal. There is no affidavit from Mr. Churko that he, too, failed to "twig" to what Ms. Podrebarac said.
- [59] Mr. Merchant's explanation does not bear scrutiny. Ms. Podrebarac's statement with respect to the Service Appeal could not have been clearer: "it's statutorily dismissed because the plaintiffs did not pursue it. It was dismissed this summer." Even if Mr. Merchant had understood her to be referring to the Service Appeal having been moved to the inactive list it is inconceivable that he would have made no enquiry as to its status if he genuinely intended to pursue the appeal. In my view, the failure to make such an inquiry evinces that Mr. Merchant and MLG had no interest in pursuing that appeal in a timely way.

- [60] I turn now to the letters sent by the deputy registrar, both of which included a copy of s. 25 of the Court of Appeal Act. On the basis of the affidavits of Mr. Merchant and Mr. Smith it appears the letter with respect to the Service Appeal may not have been delivered or, if delivered, was misplaced. However, even if that letter never came to the attention of any of the lawyers at MLG involved in the Drover Action file, the letter advises only of the statutorily required action that occurred. Further, there is still the matter of the letter pertaining to the Abuse of Process Appeal (dated August 28, 2014). MLG does not suggest Mr. Merchant and the other lawyers were unaware of that letter or, more importantly, were unaware of the provisions of s. 25.
- [61] Given that the two appeals were to be heard together, I cannot accept MLG's explanation that upon being advised that the Abuse of Process Appeal was in jeopardy of being dismissed it did nothing to determine the status of the Service Appeal and remained oblivious to the fact that the latter had already been dismissed.
- [62] In effect, Mr. Merchant and MLG ask this Court to countenance their position that the explanation for the delay is their lack of awareness that the Service Appeal had been placed on the inactive list and then statutorily dismissed. In other words, Mr. Merchant asks to have the delay excused because he and MLG did not know the s. 25(5) clock was ticking with respect to the Service Appeal.
- [63] In his affidavit, Mr. Merchant deposes as follows with respect to the consent order directing the Service Appeal and the Abuse of Process Appeal to be heard together:
13. Counsel for the Appellants believed, based on the Consent Order, that the within Service Appeal was being held by the Court in abeyance pending the readying of the Abuse of Process Appeal for hearing, and that nothing further was required with respect to the Service Appeal in the interim.
- [64] Mr. Merchant went further in his oral submissions. He told me that he took the order to allow MLG to hold back both appeals to await the certification decision and subsequent appeal in the Ileman Action, because it has been his intention to abandon the Drover Action if the Ileman Action is certified. He said he found the decision denying certification of the Ileman Action "surprising".
- [65] The operative terms of the order directing the appeals to be heard together reads:
- IT IS ORDERED that this appeal be heard together with Appeal File No. CA040624 and before a single division.
- AND IT IS FURTHER ORDERED that no costs are payable to any party for this application.
- [66] Mr. Merchant's asserted understanding of the effect of that order rings hollow. No lawyer could possibly construe the order as an open-ended exemption from the requirements of this Court's Act and Rules, or as the equivalent of a stay of proceedings pending the determination of a matter not referred to in the order. In addition, the statement in his

affidavit that he and others at MLG believed the order allowed the Service Appeal to be held back "pending the readying of the Abuse of Process Appeal for hearing" is belied by the fact that after that order was made nothing was done to "ready" that appeal for hearing. As matters now stand, MLG has filed none of the material required to prosecute the Abuse of Process Appeal.

- [67] In my view, Mr. Merchant's position in regard to the order reflects yet another attempt to camouflage his conscious decision to ignore these appeals until such time as MLG considered it was in its best interests to proceed, with no regard for this Court's processes.
- [68] My conclusion that the delay here is inordinate and that failure to prosecute the Service and Abuse of Process Appeals was not an oversight but deliberate is further supported by the approach MLG has taken with respect to this matter in the trial court and with respect to the proceedings it has commenced in other jurisdictions. It is plain and obvious that MLG's litigation strategy is to pick and choose where, when, and how it pursues its various actions and appeals regardless of the rules and processes in place in any particular jurisdiction. To cite but one example, as referred to at paras. 8 and 9 of Weatherill J.'s reasons for judgment on the application for a declaration or service, shortly after faxing its pleadings to the defendants' offices MLG was put on notice by counsel for Rogers that service by fax was disputed. MLG immediately responded by saying "we believe the Court will accept service by Facsimile". It then waited more than eight years to bring its application for a declaration. Of note is that in its Service Appeal factum, MLG does not take issue with Weatherill J.'s finding that service by fax was not proper service.

Merits of the Appeal

- [69] MLG's position is that the Service Appeal has considerable merit. Mr. Merchant invited me to review the factums and submitted that "it is a good appeal". Having done so, I am not so sanguine.
- [70] While it cannot be said that the appeal is frivolous, I consider it to have a limited prospect of success. I say that because the orders sought to be set aside--the refusal to renew the writ and statement of claim, and the costs order against Mr. Merchant personally--are discretionary decisions entitled to deference on appeal.

Prejudice

- [71] As there has been inordinate and inexcusable delay, a rebuttable presumption of prejudice arises: *Booty v. Hutton*, 2009 BCCA 376 at para. 26, 275 B.C.A.C. 139. That presumption includes the fact that the respondents have been denied the orderly conduct of the Service Appeal: *Verslucce Estate v. Knol*, 2008 YKCA 18 at para. 8, 263 B.C.A.C. 65, leave to appeal ref'd [2009] 1 S.C.R. x.

- [72] In its written submission, MLG submits that "there is no prejudice and can be no prejudice" (*italics in original*) to the respondents in the Service Appeal for two reasons. The first reason given is that some of the respondents on the Service Appeal are also respondents in the Abuse of Process Appeal and should the latter appeal be removed from the inactive list, they "can be under no prejudice when they are participating in a similar appeal surrounding substantially the same factual circumstances." The second reason given is that the respondents have raised, and continue to raise, the abuse of process issues in various courts across the country. There is no cogency to either of those reasons.
- [73] With respect to the first reason, MLG's submission ignores the fact that only the SaskTel defendants are involved in both appeals. In so far as the other respondents in the Service Appeal are concerned (i.e., the Telus, Rogers, and MTS defendants), their participation in the Service Appeal, and the Drover Action, ended when that appeal was statutorily dismissed. They did not participate in the abuse of process applications before Weatherill J. and are not involved in the appeal taken from that decision.
- [74] As to the second reason, the fact that MLG is continuing to engage the respondents in other jurisdictions does not mean that they will not be prejudiced by the reinstatement of the Service Appeal. The Telus, Rogers, SaskTel, and MTS defendants are not presently in jeopardy in the Drover Action and they would face additional costs should the Service Appeal be reinstated. In this regard, *Tejani v. Institute of Chartered Accountants of British Columbia*, 2000 BCCA 123, is apposite. In that case, Mr. Justice Lambert, in dismissing an application to vary a decision by a chambers judge refusing to reinstate an appeal, said this:
- [2] In *Redfearn v. District of Elkford*, [1999 BCCA 639, 130 B.C.A.C. 257] decided in October 1999 and re-considered in January 2000, the Chambers judge said that there must be some good reason in balancing the interests of justice as they affect both parties before an appeal will be reinstated. It is important to understand that what must be considered is the interests of justice as they affect both parties. Once the appeal has been dismissed, the party that was successful in the court below has moved out of any jeopardy arising from the appeal process. To reinstate that appeal with the resulting renewal of jeopardy requires that there be powerful interests of justice making it unfair to leave the appeal dismissed.

[Emphasis added.]

- [75] I accordingly find that the respondents would be prejudiced by the reinstatement of the Service Appeal.

The Interests of Justice

- [76] The decisive question on an application of this nature is whether reinstatement is in the interests of justice "as they affect both parties": *Tejani* at para. 2.

- [77] In making this assessment it is sometimes necessary to take into account whether the delay is attributable to the applicant or to the applicant's counsel: *Hannigan v. Hannigan*, 2005 BCCA 408 at para. 35, 43 B.C.L.R. (4th) 259 (Chambers), application to vary dismissed, 2006 BCCA 167, 226 B.C.A.C. 100. Here it is clear that this litigation and related litigation in other jurisdictions is being driven and directed by MLG. There is no suggestion in either the affidavits filed by MLG or in Mr. Merchant's oral submissions that the named plaintiffs in the Drover Action have had any involvement in decisions with respect to where, when, and how, that action is pursued. There is no affidavit from any of the named plaintiffs deposing to their interest in the appeal.
- [78] Mr. Merchant submits the denial of this application would be contrary to the interests of justice because it would deny access to justice to millions of consumers in British Columbia. That submission, however, disregards the fact that MLG is interested in pursuing the Drover Action only if the Ileman Action is not certified; this notwithstanding that MLG is prosecuting the Frey Action and will have considerable input with respect to how British Columbia consumers are made aware of their ability to "opt-in" to that litigation. It also ignores the fact that the Drover Action covers a longer period and alleges causes of action not alleged in the Ileman Action.
- [79] In my view, the interests of justice do not warrant reinstating the Service Appeal. To do so would not only place the respondents in renewed jeopardy, but would countenance MLG's conscious decision, as part of its national litigation strategy, to ignore the processes of this Court because doing so suited its purposes.

Abuse of Process Appeal

Delay and Explanation for the Delay

- [80] As stated above, I am satisfied MLG decided, for tactical reasons, not to prosecute the Abuse of Process Appeal in accordance with this Court's rules. At the risk of repetition, I make the following observation.
- [81] The deputy registrar's August 28, 2014 letter to Mr. Merchant not only notified him that the Abuse of Process Appeal had been placed on the inactive list but expressly stated, "If no steps are taken the appeal will stand dismissed as abandoned pursuant to Section 25(5) on February 17, 2015." As of the date of the letter, the only steps MLG had taken had been to file a notice of appeal (on August 23, 2013) and an amended notice of appeal (on January 16, 2014) pursuant to a consent order adding the SaskTel respondents. Thereafter, it did nothing to move the appeal forward. It was not until February 5, 2015, that MLG filed what I would describe as an "eleventh hour" application to have this appeal removed from the inactive list. Mr. Merchant does not dispute that he knew in mid-2014 that the appeal was on the inactive list, nor does he suggest the imminent arrival of the statutory dismissal date took him by surprise. It is apparent that MLG did not bring its application sooner because it was content to sit back and await developments in the Ileman Action.

Merits of the Appeal

- [82] Once again, Mr. Merchant submits this is a "good appeal". He relies on the fact that in *Gillis v. BCE Inc.*, the application seeking dismissal of the action proceeding commenced by MLG in Nova Scotia as an abuse of process was dismissed. He also relies on the November 17, 2014 transcript from the Turner Action for certain comments made by the judge during the course of that hearing. He notes, correctly, that trial judges have expressed differing opinions on the question of whether MLG's multiplicity of proceedings across the country constitutes an abuse of process. I note the decision in the Turner Action was recently released and its conclusion represents a further opinion on how to respond to those proceedings.
- [83] In light of the differing judicial approaches that have been taken with respect to the multiplicity of proceedings commenced by MLG, I agree with Mr. Merchant that the abuse of process issue is arguable and cannot be said to be without merit.

Prejudice

- [84] For reasons already expressed, I am of the view that the respondents have suffered some prejudice as a result of the delay. However, the extent of that prejudice is tempered by the fact that the appeal is only inactive. As the Abuse of Process Appeal has not been statutorily dismissed, the respondents' jeopardy has not ended.

The Interests of Justice

- [85] As he did with respect to the Service Appeal, Mr. Merchant submits the denial of this application would be contrary to the interests of justice because it will deny access to justice to millions of consumers in British Columbia. However, as indicated above, the Drover Action is not the only means by which those consumers may be able to obtain redress for the alleged actions of cellular and wireless telecommunications providers. Further, given my decision with respect to the Service Appeal, even if that appeal is permitted to proceed, is allowed, and the Drover Action eventually certified, the case will proceed only against the Bell and Aliant defendants; customers of Telus, Rogers, SaskTel, and MTS will have to seek redress elsewhere.
- [86] I am mindful of the fact that the test for removing an appeal from the inactive list is less rigorous than that for reinstating a statutorily dismissed appeal. That being said, I find it impossible to treat this application on a stand-alone basis and entirely disregard MLG's conduct with respect to the Service Appeal. MLG certainly did not make that distinction. It decided to "park" both appeals indefinitely, pending the outcomes in other cases in this and other jurisdictions. MLG's intention was to pursue these appeals at some time in the future if, and only if, it considered it to be to its advantage to do so. Such a decision was reached without regard to this Court's processes or the input of the respondents.

- [87] Rather than acting unilaterally, MLG could have applied for an order that would have allowed it to hold the Abuse of Process Appeal in abeyance pending the outcome in the Ileman Action. Had it done so, then a judge of this Court would have decided whether such action was appropriate after hearing from both MLG and the respondents.
- [88] Moreover, this is not a case where an appeal was ready or near-ready for hearing when the delay intervened. No material step has been taken to ready the Abuse of Process Appeal for hearing since the amended notice of appeal was filed more than a year ago. Given the consent order to hear that appeal with the Service Appeal, such inaction brought both appeals within the ambit of s. 25 without any explanation other than MLG's deliberate decision to do nothing.
- [89] Even though this appeal is arguable, given what I find to be MLG's blatant disregard for the processes of this Court, I am of the view the interests of justice would not be served by removing it from the inactive list.

Costs

- [90] There is one further issue on these applications. Following Mr. Merchant's submission in reply, it was apparent to all counsel that I intended to reserve judgment. At that point, Stephen R. Schachter, Q.C., who acts for the Rogers respondents, rose and asked that his clients be given an opportunity to address costs after I had rendered my decision. He intimated that in the event I dismissed these applications, his clients might seek something other than the usual costs.
- [91] Three days later, Mr. Merchant sent a letter to the registrar of this Court containing what he described as "an extraordinary submission in extraordinary circumstances." In that letter Mr. Merchant says, in effect, that he was taken by surprise by Mr. Schachter's request. Further, he says that had he been aware the respondents might seek more than the usual costs, he would have provided additional evidence by way of affidavits. A written submission was enclosed with the letter, described as "Appellants' Submissions Regarding a Second Hearing Concerning Costs (5 pp.)". Mr. Merchant concluded by saying that in the event the registrar did not think it appropriate to draw his submissions to my attention, I be advised he intends to file further affidavit evidence and submissions with respect to costs. That letter was copied to counsel for the respondents.
- [92] Geoffrey R. Gomery, Q.C., who also acts for the Rogers respondents, responded that same day. In his letter to the registrar, Mr. Gomery stated counsel for all of the respondents opposed my receiving additional submissions on costs until such time as I had rendered a decision on the merits.
- [93] The registrar provided me with copies of the two letters, but not Mr. Merchant's submissions. I did not ask for those submissions as I considered it premature to consider any costs-related issues.

- [94] A request to make submissions after the release of a reserved judgment is not unusual. Indeed, this Court has a practice directive which addresses costs submissions in respect of appeals: Costs (Civil Practice Directive, 30 May 2013). Although there is no directive in respect of chambers applications, the accepted practice is the same, i.e., the registrar is notified there is a costs issue and sets a schedule for the filing of submissions. However, sometimes, as happened here, counsel will indicate during a hearing that, depending on the outcome on the merits, there may be a request to make submissions on costs.
- [95] If, after reviewing these reasons, any party wishes to make submissions on costs, then counsel for that party should notify the registrar and counsel for the other parties. If counsel are unable to agree on a filing schedule, then the registrar will set one.

Disposition

- [96] The applications to abridge time are allowed. The application to reinstate the Service Appeal is dismissed as is the application to remove the Abuse of Process Appeal from the inactive list.

"The Honourable Mr. Justice Frankel"

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