Court File No. C60176

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CELIA SANKAR

Plaintiff (Appellant)

- and -

BELL MOBILITY INC.

Defendant (Respondent)

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE APPELLANT

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PART I - NATURE OF THE APPEAL

1. This is an appeal by the plaintiff (appellant) from the order of the Honourable Justice Belobaba dated February 12, 2015, dismissing this certified class action on a motion for summary judgment.

PART II - OVERVIEW

2. The respondent Bell Mobility Inc. ("**Bell**") markets pre-paid wireless service under the Virgin Mobile ("**Virgin**"), Solo Mobile ("**Solo**") and Bell Mobility brands. Pre-paid wireless customers have no ongoing obligation to their provider. Instead, they "top-up" their accounts with credits that can be used to buy products and services like cell-phone minutes, texts, data, ringtones and games. This case concerns Bell's practices of expiring those credits and seizing its customers' money. The appellant argued that Bell's practices breached its contracts with the class and were contrary to the *Gift Card Regulation*[1] (the "**Regulation**") under the *Consumer Protection Act, 2002*.[2] The Motion Judge disagreed, and summarily dismissed the class action.

3. During the relevant time, Bell's contracts with its pre-paid wireless customers limited its obligations in two distinct ways. First, the contracts restricted its customers' access to its network to an "active period," during which they could use their credits to purchase products and services. Second, the contracts gave Bell the right to forfeit customers' unused credits after an expiry date. In this regard, the Virgin contract said: "the balance left on your account **after the expiry date** is forfeited and non-refundable." The Bell and Solo contracts said: "credits are non-refundable, non-transferable, and will expire **after a specified time period**."

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1 *General, O. Reg. 17/05*.
2 SO 2002, c 30, Sch A.

4. This case is concerned with only the second limitation – Bell's right to forfeit the unused credits and thereby seize its customers' money. The appellant argued that the contracts restricted Bell's right to forfeit the credits until the day after the "expiry date" for Virgin Mobile customers, and the day after the "specified time period" for Bell/Solo customers. The Motion Judge agreed, and found for the class on this common issue. The more contentious issue was the meaning of "expiry date" and "specified time period," neither of which were defined in the terms of service.

5. The appellant argued that the meaning of these phrases was clear because Bell's systems assigned a specific expiry date to each top-up at the time it was made. This specific date could be immediately viewed by the customer on his or her phone or online, and was subsequently conveyed to every customer by text message. For example, customers who checked their balance on their phones would see the following:

Virgin	Bell/Solo
Balance: $xx.xx Balance Expiry Date: dd-mmm-yyyy	➔Account balance: $ xx.xx Expires: mmm dd, yyyy

6. For most of the class period, the expiry dates that were assigned and communicated by Bell were one day after the active period. However, it is common ground that at those times, Bell's practice was to forfeit the balance some time *on* the expiry date, not *after* the stipulated expiry date. As a result, the appellant argued, Bell systematically breached its contracts for most of the class period.

7. Bell, on the other hand, advanced a more elaborate interpretation of "expiry date" and "specified time period." It asserted that its marketing materials and customer receipts were the "surrounding circumstances" of the contract and that these demonstrated that customers were

only reasonably entitled to the "active period." Bell claimed that it was free to forfeit customers' credits at any point after the active period, irrespective of specific expiry dates that it had assigned and communicated to its customers. The Motion Judge agreed and dismissed the contract claim.

8. The appellant appeals the Motion Judge's determination of the contract claim on the basis that it was premised on errors of law and palpable and overriding errors of fact. In particular,

(a) he erred by discarding the best evidence about the meaning of the contractual terms at issue - the actual expiry dates that Bell assigned to every account and communicated to every customer. In his view, such evidence could only be relevant to "promissory estoppel or a claim in misrepresentation," both of which would require proof of individual reliance and not be amenable to a class proceeding. This was wrong because it misconstrued the nature of the appellant's claim and further, as confirmed by this Court, contract rights do not require reliance to enforce;[3]

(b) he erred by instead elevating the "surrounding circumstances" regarding the formation of the contract in such a way as to overtake the written words used by the parties contrary to the approach mandated by this Court.[4] Moreover, his analysis of the surrounding circumstance evidence was premised on an incomplete and inaccurate reading of the evidence that amounted to palpable error and overriding error;

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[3] *Hickey-Button v. Loyalist College of Applied Arts & Technology*, 2006 CanLII 20079 at para. 43, 267 DLR (4th) 601 (ON CA), Book of Authorities of the Appellant ("**BOA**"), Tab 1 ("***Hickey-Button*").**

[4] *Martenfeld v. Collins Barrow Toronto LLP*, 2014 ONCA 625 at para 40, 116 OR (3d) 401, BOA, Tab 2. ("***Martenfeld***").

(c) he improperly interpreted the contracts by reading in language from a later agreement that Bell had written after this case was certified;[5] and

(d) he erred by disregarding Bell's obligation to clearly explain to customers the risk of forfeiture in a manner that complied with the language of the contract. To authorize the seizure of customer credits, the terms of the contract had to be clear and explicit, particularly in a contract of adhesion which Bell had a unilateral right to amend at any time.

9. The appellant also argued that Bell's practices breached the Regulation.[6] The Regulation contains a general prohibition on the expiry of "gift cards" purchased in Ontario and is premised on correcting the mischief of seizing cash equivalent credits. The appellant argued that the top-ups at issue in this action met the plain wording of the Regulation.

10. The Motion Judge agreed with Bell's arguments that the Regulation did not apply. He found that it was restricted to "gifts" only and found that "the vast majority of pre-paid cell phone cards and top-up agreements are not subject to the Regulation" because "they are purchased for personal use only and not as gifts for third parties."[7]

11. The Motion Judge's determination of this was based on a number of errors. In particular,

(a) there is no language in the Regulation to suggest a requirement to prove a subjective intention to gift. If upheld by this Court, the judgment would import a subjective element (the gifting intent) into the Regulation that would severely limit its application and render it unworkable;

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5 On November 17, 2013, Bell amended the terms of service for all brands to link the concepts of "active period" and "expiry date" to provide that "[u]nused funds will expire at the end of the Active Period." The Motion Judge read this wording into the contracts at issue in this action notwithstanding that the Virgin contract expressly distinguished between "active period" and "expiry date" and the Bell/Solo contract made no mention of "active period" whatsoever.

6 *General, O. Reg. 17/05*.

7 Summary Judgment Reasons ("**Reasons**") Appeal Book and Compendium ("**ABC**"), Tab 3, p. 24 para. 43.

(b) there was no evidence in the record to support the Motion Judge's finding that "the vast majority of pre-paid cell phone cards and top-up agreements" were purchased for personal use and not as gifts;

(c) the Motion Judge's finding that Bell was exempt from the Regulation because it supplied a "single service" (namely, access to Bell's wireless network) was contradicted by the evidentiary record; and

(d) he erred in finding that there was no time limitation on "top-up" payments because he misconceived the nature of the transactions in question and the operation of the Regulation.

12. The ramifications of this case are significant, both to the class and consumers in general. Pre-paid wireless caters to the most cost-sensitive customers who choose not to, or do not have the means to, enroll in long-term wireless service contracts. The Motion Judge found that Bell could forfeit class members' credits and take their money in the absence of a clear and unequivocal contractual language authorizing it to do so. With respect, this decision was based on a misapplication of the decision of the Supreme Court of Canada in *Sattva,* a misreading of the evidentiary record, and a failure to apply well-settled principles of contractual interpretation. Moreover, the Motion Judge failed to interpret consumer legislation in a purposive manner and, indeed, interpreted the Regulation in a way that would render it useless. The appeal should be allowed.

PART III - FACTS

A. Background

13. This class action focuses solely on pre-paid, pay-per-use wireless services that Bell offers under the Bell Mobility, Solo and Virgin brands. Bell's pre-paid customers pay for Bell wireless

services in advance and have no long-term contractual commitment. Their money is recorded as electronic "credits," *i.e.*, in an account that Bell creates for each pre-paid wireless customer. Payments made to such pre-paid accounts are known as "top-ups."[8] Many of Bell's pre-paid wireless customers make their top-ups by acquiring physical gift cards sold by third-party retailers. These are turned into "PIN receipts" at the cash register that are later "activated" on Bell's websites or over the phone. Top-ups can also be directly acquired online or over the phone.[9] In all cases, once the top-up is made, it is recorded as credits in the customer's account which can then be used to buy various products and services including talk time, texts, ring tones, data, games etc.[10] Pre-paid wireless customers are overwhelmingly cost-sensitive. Indeed, the Consumers Council of Canada has determined that "98 per cent of users of prepaid wireless service choose prepaid service to control or minimize the cost of their wireless usage."[11]

14. The terms of service for Virgin customers provide that, in exchange for their top-ups, they will have access to the network for an "active period." In the case of a $15 top-up and Virgin provides that the active period is for 30 days. As described in further detail below, Bell assigns an "expiry date" to the top-ups at the time that they are made, and then communicates this date to its customers by various means.[12] For most of the class period, the expiry date was independent of the active period. For example, using the case of $15 top-ups with an active period of 30 days, for most of the class period, Bell assigned and communicated an expiry date

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[8] Affidavit of Celia Sankar affirmed November 25, 2014 ("**Sankar Affidavit**"), ABC, Tab 12, pp. 126-127, para. 14.

[9] Affidavit of Maria Ferranti sworn December 1, 2014 ("**Ferranti Affidavit**"), ABC, Tab 13, p. 128-129, para. 14.

[10] Ferranti Affidavit, ABC, Tab 14, p. 130, para. 9.

[11] Consumers Council of Canada, "Changing Landscapes of Wireless Plans: 2009 Review of Prepaid and Postpaid Wireless Plans and Consumer Concerns," Sankar Affidavit, Exhibit "G," ABC, Tab 15, p. 131.

[12] Affidavit of Maria Ferranti sworn November 29 2012, Sankar Affidavit, Exhibit "E," ABC, Tab 16, pp. 133-145, paras. 34-45; Top up Payment Screenshots, Sankar Affidavit, Exhibit "E," ABC, Tab 17, pp. 136-158; Transcript of Cross-Examination of Maria Ferranti dated February 7, 2013,Sankar Affidavit, Exhibit "F" ABC, Tab 18, pp. 159-163.

on the 31st day. In contrast to Virgin, the Bell/Solo terms of service do not explicitly refer to an "active period."

B. Bell was Contractually Prohibited from Seizing Credits Until After the Expiry Date

15. For all but the final month of the class period, Bell imposed the following terms and conditions on class members regarding its purported right to seize unused wireless credits:

> *Virgin Mobile* – "All Top Ups (excluding those used for prepaid mobile Internet stick accounts) have **specified active periods and an expiry date**. The **active period** starts on the date you place the Top Up on your account. Any Top Up balance left on your account **after the expiry date is forfeited and non-refundable**."[13] [emphasis added]
>
> *Bell / Solo* – "Value deposited into your prepaid account is available as prepaid credits for your Service and such credits are non-refundable, non-transferable, and **will expire after a specified time period**."[14] [emphasis added]

16. On November 17, 2013, after this action was certified, the terms were amended, removing the above language respecting the expiry of prepaid credits (across all three brands), and inserting the following:[15]

> Prepaid funds are valid for a specified number of days starting from the time on the day they are added to your account ("**Active Period**"). **Unused funds will expire at the end of the Active Period**. Expired Prepaid funds will be restored if you Top Up your account within 7 calendar days of their expiry. … [emphasis added]

17. It has been judicially determined that Bell had no right to forfeit any balances until the day after the "expiry date" in the case of Virgin customers, or until after the "specified time period" in the case Bell/Solo customers. Common Issue A1(a) which sought to determine this point was decided in favour of the appellant, and the respondent has not cross-appealed.[16] As a

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[13] Sankar Affidavit, ABC, Tab 19, pp. 164-166, para. 22; Virgin Mobile Terms and Conditions, Sankar Affidavit, Exhibit "M," ABC, Tab 20, p. 170.

[14] Sankar Affidavit, ABC, Tab 19_, pp. 164-166, para. 22; Bell Mobility Terms and Conditions, Sankar Affidavit, Exhibit "M," ABC, Tab 21, p. 171.; Solo Mobile Terms and Conditions, Sankar Affidavit, Exhibit "M," ABC, Tab 22, p. 173.

[15] Ferranti Affidavit, ABC, Tab 23, p. 174, para. 26; Amended Terms and Conditions, Ferranti Affidavit, Exhibit "D," ABC, Tab 24, p. 175.

[16] Reasons, ABC, Tab 3, p. 21, para. 30. Common issue 1(A) states "Do the terms of the contracts between the defendant and class members require the defendant to wait until after the expiry of prepaid credits before the prepaid credits can be seized?"

result, the principal dispute in respect of the contract claim on appeal concerns whether the Motion Judge erred in his findings regarding the meaning of these terms. As further discussed below, the Motion Judge found, on Bell's urging, that "expiry date" in the Virgin contract and "specified time period" in the Bell/Solo both meant "at the end of active period."[17] In other words, the Motion Judge took the explicit language in the post-certification, amended contract, and read it in to the pre-certification contracts.

C. Evidence Regarding the Meaning of Expiry Dates

18. The basic background facts were not in dispute: Bell's systems assigned expiry dates to its customers' accounts at the time that the top-ups were made.[18] It communicated those dates to its customers via text, publication on its website and customers' phones and/or by interactive voice response ("**IVR**"). The form and content of these communications, including text messages, voicemail messages, and other communications (the "**expiry date communications**")[19] are summarized in charts below. The appellant alleged that the expiry date assigned by Bell's systems and communicated to Bell's customers was the "expiry date" referred to in the Virgin contract and the "specified time period" referred to in the Bell/Solo contract.

19. On the other hand, Bell urged the Motion Judge to ignore both Bell's conduct in assigning these expiry dates and the expiry date communications. Instead, it asked the Motion Judge to focus on what it called the "surrounding circumstances" regarding the formation of the contract. These were marketing materials (brochures, pamphlets, retail displays and website

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17 *Ibid*. at p. 19, para. 22.

18 Affidavit of Maria Ferranti sworn November 29 2012, Sankar Affidavit, Exhibit "E," ABC, Tab 16, pp. 133-145, paras. 34-45; Top up Payment Screenshots, Sankar Affidavit, Exhibit "E," ABC, Tab 17, pp. 136-158; Transcript of Cross-Examination of Maria Ferranti dated February 7, 2013,Sankar Affidavit, Exhibit "F" ABC, Tab 18, pp. 159-163.

19 Ferranti Affidavit, ABC, Tab 25, pp. 176-177, para.102.

materials) as well as small-print receipts issued after customers had purchased top-ups.[20] According to Bell, these materials indicated that credits would expire after the active period.

20. The Motion Judge accepted Bell's argument and found that "at the time of contracting the defendant **intended** and the subscribers **understood** that the top-up agreement and any unused funds would expire at the end of the active period"[21] (emphasis added). He relied on his analysis of the surrounding circumstances to conclude that there was "no ambiguity in the contractual language or in the intentions or understandings of the parties at the time of contracting – 'expiry date' was intended and understood to mean 'at the end of the 30 day active period.'"[22]

21. The legal flaws in the Motion Judge's analysis are explained in detail in the next section of this factum. In addition, however, there are serious factual flaws. For example, while the Motion Judge cited evidence of PIN receipts issued by retailers that stated "$15 valid 30 days," he did not recognize other language contained in the receipts and marketing material which stated that they were "subject to terms and conditions" (*i.e.* the very same contractual terms and conditions relied on by the class members in this case), as well as specific language in the Bell/Solo receipts that stated that "the […] expiry date will be updated within 48 hours."[23] In addition, prepaid cards purchased at retailers also stated that "your new balance and expiry date will be reflected on your account within 48 hours of adding the funds" and "subject to terms of

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[20] Virgin Mobile Website Printout – "Ways to Pay Your Bill," Ferranti Affidavit, Exhibit "E," ABC, Tab 26, pp. 178-179; Virgin Mobile – "Topping Up," Ferranti Affidavit, Exhibit "F," ABC, Tab 27, pp. 180-181; Bell Mobility – "How to top up the funds in my prepaid phone account," Ferranti Affidavit, Exhibit "G," ABC, Tab 28, pp. 182-183; Solo Mobile – "Topping up your prepaid account," Ferranti Affidavit, Exhibit "H," ABC, Tab 29, pp. 184-185; Examples of Prepaid Cards sold during the Class Period, Ferranti Affidavit, Exhibit "I," ABC, Tab 30, pp. 186-197; Sample PIN Receipts for Bell, Solo and Virgin Mobile, Ferranti Affidavit, Exhibit "J," ABC, Tab 31, p. 198; Bell Mobility Information Pamphlet, Ferranti Affidavit, Exhibit "K," ABC, Tab 32, pp. 199-200.

[21] Reasons, ABC, Tab 3, pp. 18-19, para 21.

[22] *Ibid*., at pp. 18-20, paras. 21 and 27.

[23] Sample PIN Receipts for Bell, Solo and Virgin Mobile, Ferranti Affidavit, Exhibit "J," ABC, Tab 31, p. 198.

service."[24] In other words, Bell's receipts expressly told its customers that, if they wanted to know when their balances were going to expire, they should check online or on their phone. To the extent that this "surrounding circumstance" evidence was relevant to the contractual analysis, it supported the appellant's interpretation, not the respondent's.

22. The Motion Judge inferred that Bell's customers understood and intended that their credits would expire at the end of the active period. However, this was in the face of direct evidence that Bell's customers understood their "expiry date" to be the one that Bell told them. Indeed, the Motion Judge himself made the following observations in his certification decision on evidence that was also before him on the summary judgment motion:

> [3] The expiry date issue **has been the subject of consumer complaints for some time**. According to a recent study more than one-half of phone card consumers were concerned about the expiry of their cell phone credits and **nearly a third said they experienced a loss of their prepaid credits on a monthly basis**. The complaints tend to focus on two things: one, the apparent practice of some phone card suppliers to seize any unused balance **one day sooner than expected** […]." [25] (Emphasis added)
>
> [14] According to the plaintiff, the complaints about the defendant's "expiry date" practices appear to be widespread. One particular website included the following user comments:
>
> - My wife has a Virgin pay as you go phone; puts the new card on her phone **the day it's expiring**… Around 8:00 PM when she tried topping up all her carryover minutes were gone!
> - **Their expiry date is a day earlier than the stated expiry date**.
> - Virgin sends a text informing you that your account balance will expire on a staid (sic) time and date. But SURPRISE **they expire/remove/take the funds earlier.**
> - After nearly four years of service **Virgin just ripped me off nearly $30 by zeroing my balance with nearly an hour and a half left b4 expiry**…
> - Not happy as **they stole $80 from my phone before the due date.**
> - The expiry on pre-paid phone card is robbery. There should be no expiry on these cards unless the minutes are used. This is stealing. [26]
>
> (Emphasis added)

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[24] Examples of Prepaid Cards sold during the Class Period, Ferranti Affidavit, Exhibit "I," ABC, Tab 30, pp. 186, 191, 195.

[25] Certification Decision, ABC, Tab 7, pp. 71-72, para. 3.

[26] *Ibid*., at p. 73, para. 14. Bell did not dispute this evidence. To the contrary, it relied on it in support of its motion for leave to appeal the certification decision to the Divisional Court, arguing that that matter was of sufficient public importance to warrant leave to appeal, arguing that "the expiry date issue has been the subject of consumer complaints for some time and of a recent study involving phone card consumers." (see Endorsement of Justice Moore dated December 16, 2013, ABC, Tab 9 p. 110, para. 30.)

D. Bell Seized Unused Credits *on* not *after* the Expiry Date For Most of the Class Period

23. Bell's practices regarding assigning and communicating expiry dates are not in dispute and are summarized in the first four columns of the charts below. The fifth and sixth columns summarize the appellant's position regarding whether the seizure of funds took place after the expiry date at particular times during the class period and whether, as a result, the contracts were breached.

Virgin

Relevant Period	Active Period	Expiry Date Assigned by Bell and Communicated to Class Members	When Funds Seized	Seizure After Expiry Date?	Breach of contract?
May 4, 2010 – September 9, 2010	30 days	**Text Notification**: 31st day **Website/Mobile Phone**: 31st day **IVR**: 30th day	32nd day between 12 am – 4 am	Yes	No
September 10, 2010 – February 29, 2012	30 days	**Text Notification**: 31st day **Website/Mobile Phone**: 31st day **IVR**: 30th day	31st day at 10 a.m.	**No**	**Yes**
March 1, 2012 – July 29, 2012	30 days	**Text Notification**: 31st day **Mobile Phone**: 31st day **Website**: 31st day at 10 a.m. **IVR**: 30th day	31st day at 10 a.m.	**No**	**Yes**
July 30, 2012 – November 24, 2012	30 days	**Text Notification**: 31st day at 10 a.m. **Website**: 31st day at 10 a.m. **Mobile Phone**: 31st day **IVR**: 30th day	31st day at 10 a.m.	**No**	**Yes**
November 25, 2012 – January 27, 2013	30 days	**Text Notification**: 31st day at 10 a.m. **Website**: 30st day at 10 a.m. **Mobile Phone**: 30st day at 10 a.m. **IVR**: 30th day	31st day at 10 a.m.	**No**	**Yes**
January 28, 2013 – November 23, 2013	30 days	**Text Notification**: 30th day **Website**: 30th day at 10 a.m. **Mobile Phone**: 30th day at 10 a.m. **IVR**: 30th day	31st day at 10 a.m.	Yes	No

November 24, 2013 – December 16, 2013	30 days	**Text Notification**: 30th day at midnight **Website**: 30th day at 11:59:59 p.m. **Mobile Phone**: 30th day at 11:59:59 p.m. **IVR**: 30th day	31st day at 10 a.m.	Yes	No

Bell Mobility / Solo

Relevant Period	Active Period	Expiry Date ("specified time period") Assigned by Bell and Communicated to Class Members	When Funds Seized	Seizure After Expiry Date ("specified time period")?	Breach of contract?
May 4, 2010 – January 31, 2011	30 days	**Text Notification**: 31st day **Website**: 31st day **Mobile Phone**: 31st day **Whisper Message**: 31st day **IVR**: 30th day	31st at 11:59:59 p.m.	No	Yes – but *de minimis*
February 1, 2011 – November 30, 2013	30 days	**Text Notification**: 31st day **Website**: 31st day **Mobile Phone**: 31st day **Whisper Message**: 31st day **IVR**: 30th day	31st day at 10 a.m.	**No**	**Yes, *except for the period after November 17, 2013, when T&C amended*[27]**
December 1, 2013 – December 16, 2013	30 days	**Text Notification**: 30th day at 23:59:59 p.m. **Website**: 30th day at 11:59:59 p.m. **Mobile Phone**: 30th day at 11:59:59 p.m. **Whisper Message**: 30th day at 11:59:59 p.m. **IVR**: 30th day at 11:59:59 p.m.	31st day at 10 a.m.	Yes	No (see also above for amendment info)

[27] For clarity, any seizures after November 17, 2013 in respect of top-ups that were made prior to November 17, 2013 should be subject to the original Terms.

24. Using the first row of the first chart as an example, the appellant agreed there was no breach of contract because Virgin's practice between May 4, 2010 and September 9, 2010 was to tell its customers that credits would expire on the 30th or 31st day, and Virgin's practice at this time was to forfeit the credits on the 32nd day between 12 a.m. and 4 a.m. This was a seizure "after" the expiry date, resulting in compliance with the contract. However, beginning September 10, 2010, Virgin changed its practices and began forfeiting credits at 10 a.m. on the 31st day. As the chart indicates, this is not a seizure "after" the expiry date and therefore is a breach of the contract. Similarly, between February 1, 2011 and November 30, 2013, Bell and Solo forfeited credits "on" the expiry date that had been specified to its customers.

PART IV - ISSUES AND LAW

25. This factum addresses the following issues:

(a) What is the applicable standard of review?

(b) What are the applicable principles of contractual interpretation?

(c) Did the Motion Judge err in his contractual analysis of the Virgin agreement?

(d) Did the Motion Judge err in his contractual analysis of the Bell/Solo agreements?

(e) Did the Motion Judge err in his analysis of the Regulation?

A. The Standard of Review

26. The Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp.*[28] addresses the applicable standard of review in contract interpretation decisions. The Court held that contractual interpretation generally involves issues of mixed fact and law which are subject to review on a standard of palpable and overriding error. However, contractual

[28] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633, BOA, Tab 3 ("***Sattva***").

interpretation may result in "an extricable question[s] of law from within what was initially characterized as a question of mixed fact and law," including the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor.[29] These are errors of law and are reviewable on a standard of correctness.

27. The interpretation of the Regulation is a pure question of law, reviewable on a standard of review of correctness.[30]

B. Applicable Principles of Contractual Interpretation

28. This Court recently summarized principles of contractual interpretation as follows:

> In interpreting the contractual arrangements between the parties, including their arrangements for insurance, we apply the principles of contract interpretation set out in *Bell Canada v. The Plan Group*, 2009 ONCA 548 (CanLII), 96 O.R. (3d) 81 at paras. 37-38. These include: (a) interpreting the contract as a whole, with a view to giving meaning to all its terms; (b) determining the intentions of the parties in accordance with the words they have used; (c) having regard to the factual matrix; and (d) interpreting the contract in a manner that accords with sound commercial principles and good business sense.[31] [Emphasis added]

29. In *Sattva*, the Supreme Court of Canada held that the interpretation of contracts

> has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine 'the intent of the parties and the scope of their understanding' […] To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract."[32]

30. The decision also states: "[t]he interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract."[33] Moreover, as stated by this Court, in *Martenfeld v. Collins Barrow Toronto LLP*,[34] following *Sattva*, "[…] while the

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29 *First Elgin Mills Developments Inc. v. Romandale Farms Limited*, 2015 ONCA 54, at para. 4, BOA Tab, 4, citing *Sattva supra* note 28 at paras. 50 and 53.

30 *Gyorffy v. Drury*, 2015 ONCA 31, at para. 29, BOA, Tab 5 ("***Gyorffy***").

31 *De Beers Canada Inc. v. Ootahpan Company Limited*, 2014 ONCA 723, at para. 3, BOA, Tab 6.

32 *Sattva, supra* note 28 at para. 47.

33 *Sattva, supra* note 28 at para. 57.

34 *Martenfeld*, *supra* note 4.

circumstances surrounding the formation of the disputed contract are relevant as an interpretive aid, they cannot overtake the written words used by the parties."[35]

C. Interpretation of the Virgin Contract Was Flawed

31. The Motion Judge allowed the "surrounding circumstances" in this case to overtake clear contractual language regarding the imposition of an expiry date.[36] As described above, the Virgin contract draws a clear distinction between the "active period" and "expiry date" and explicitly states that only the amounts left in the account "after the expiry date" are forfeited and non-refundable. In addition, the Motion Judge relied on a factually flawed analysis of generic marketing materials and small print receipts, but made no reference in his analysis of "surrounding circumstances" to any of Bell's direct and specific communications to customers, or to the language of the contract itself. In other words, the Motion Judge reasoned that, despite Bell explicitly and individually telling its customers what the expiry date was, neither it nor its customer intended or understood that to be the actual expiry date.[37]

32. With respect, this analysis is untenable. It meant that Bell's customers were expected to ignore a clear and direct statement of an expiry date made individually to each of them in favour of an unstated one that could only be deduced by calculation (i.e. by adding the length of the active period to the date of the top-up). It ignored the fact that the documents concerning the "surrounding circumstances" contained qualifying language referring back to the contract.

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35 *Ibid.* at para. 40.

36 *Virgin Mobile* – "All Top Ups (excluding those used for prepaid mobile Internet stick accounts) have **specified active periods and an expiry date**. The **active period** starts on the date you place the Top Up on your account. Any Top Up balance left on your account **after the expiry date is forfeited and non-refundable**." [emphasis added] (See Sankar Affidavit, ABC, Tab 19, pp.164-166, para. 22; Virgin Mobile Terms and Conditions, Sankar Affidavit, Exhibit "M," ABC, Tab 20, p. 170).

37 Reasons, ABC, Tab 3, pp. 18-19 at paras. 21-22.

Moreover, it contradicted the evidence in the record that customers intended and understood the expiry date to be the date that they had been told.[38]

33. Furthermore, the Motion Judge's analysis merged two distinct concepts into one: the "active period" (*i.e.* how long the customers can use the services) and the "expiry date" (*i.e.* the date on which Bell can forfeit and seize any credit balance in the account). Merging these concepts went against the explicit language in the Virgin agreement that drew a clear distinction between them:

> All Top Ups [...] have *specified active periods* **and** an *expiry date*. The active period starts on the date you place the Top Up on your account. Any Top Up balance on your account **after the expiry date is forfeited** and non-refundable.[39]

34. Later, after certification, Bell revised the contract to link together the two concepts by providing that "unused funds will expire at the end of the Active Period." But that is plainly not what the previous contract stated. The effect of the Motion Judge's contractual interpretation was to retroactively impose the new contractual terms, by implication, over the express language in the former contract. This was contrary to the well-settled principle of contractual interpretation that implied terms cannot overtake the express terms of a contract.[40]

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[38] The Motion Judge also found at para. 24 that the representative plaintiff "acknowledged that as a Virgin Mobile subscriber her January 19, 2012 top-up would expire on February 18, 2012," concluding that she understood that her balance would expire at the end of the active period." The Motion Judge's finding is not supported by the record and is another example of a palpable and overriding error. The Reasons fail to mention that the representative plaintiff's submission to the CRTC also stated that Bell displayed an expiry date of February 19, and that she stated to the CRTC that dates communicated to customers "would lead Bell's customers to believe – as any reasonable person would – that they had until midnight of the stated expiry date to use or top up and preserve their account balance." This caused her to form the opinion that "Bell Mobility operates with two expiry dates" (p. 202) and further that she was "shock[ed]…when [she] discovered the company had confiscated [her] balance ahead of the end of the promised expiry date…" (p. 201) (see Submission to CRTC re: Telecom Notice of Consultation CRTC 2012-557-1 by Celia Sankar, dated December 3, 2012, Ferranti Affidavit, Exhibit "L," ABC, Tab 33, pp. 201-202).

[39] Sankar Affidavit, ABC, Tab 19, pp. 164-166, para. 22; Virgin Mobile Terms and Conditions, Sankar Affidavit, Exhibit "M," ABC, Tab 20, p. 170.

[40] See *e.g. Rankin Construction Inc. v. Ontario*, 2014 ONCA 636 at para. 29, BOA, Tab 10. ("Any implied terms must fit and be the necessary implication of the express terms; if there is any evidence against the proposed term, it cannot be implied" (citations omitted)).

35. The failure to give meaning to the distinct concept of an "expiry date" in the Virgin agreement was an error of law. The Motion Judge's analysis of the surrounding circumstances (which focused on a factually flawed analysis of receipts and marketing material and did not refer to any of Bell's actual communications to its customers) led him to overlook the express wording of the agreement. Under the *Sattva* approach, the goal is to give meaning to words in an agreement that is consistent with the surrounding circumstances, not to alter express obligations given by contract, like the contractual right in this case to retain credits until "after the expiry date."

36. Furthermore, it is questionable whether the *Sattva* "surrounding circumstances" analysis (which was developed by the Supreme Court of Canada in a case involving two sophisticated parties) should even apply to contracts of adhesion.[41] In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*,[42] the Alberta Court of Appeal held that it was realistic to explore the "surrounding circumstances" in cases "where the parties had a real hand in negotiating the contract," but "in many cases (particularly involving contracts of adhesion) any search for the intention of the parties in the "context" is merely a legal fiction. If the parties did not actually negotiate the terms of the contract, and were not even present when those terms were set, the process is artificial. Interpreting the contract comes back to an application of legal rules and presumptions about the meaning of particular wording."[43] Similarly, for analogous reasons, the Ontario Superior Court of Justice also declined to apply *Sattva* in a review of an arbitration

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41 See *e.g. Vallieres v. Vozniak*, 2014 ABCA 290 at para. 13, BOA, Tab 7. ("It is a standard form contract developed by the Alberta Real Estate Association […] Attempting to inject the circumstances surrounding the formation of the contract into the analysis, or any attempt to identify the intention of the parties, is nothing but a legal fiction. These parties were content to adopt the standard form agreement prepared by the Association, and essentially it is the intention of the committee that drafted it that prevails.")

42 *Ledcor Construction Limited v Northbridge Indemnity Insurance Company*, 2015 ABCA 121, BOA, Tab 8.

43 *Ibid.*at para. 14.

decision involving an "imbalance of expertise and bargaining power" rather than parties with commercial knowledge and equal power.[44]

37. The Motion Judge disregarded the explicit communications of expiry dates to class members because, in his view, they could only be relevant to claims of promissory estoppel or misrepresentation, neither of which could be determined in a class action because they depended on proof of reliance.[45] This was wrong for at least two reasons. First, the Motion Judge took an inconsistent approach to the evidence. He ignored the evidence of Bell's direct communications because he believed that they would only be relevant if there was "proof of individual reliance." Yet he relied on Bell's statements to class members, in its marketing materials and small print receipts, notwithstanding that there no evidence that these were relied upon.[46] Second, and more fundamentally, no aspect of the appellant's claim turned on reliance. Indeed, Bell had argued at the certification motion that the case could not be certified because the communications to class-members were inherently individual, but the Motion Judge rejected the argument,[47] as did the Divisional Court.[48]

38. Insisting on proof of individual reliance in a contract class action claim is also contrary to this Court's decision in *Hickey-Button v. Loyalist College of Applied Arts & Technology*.[49] *Hickey-Button* was a class action brought on behalf of college students who alleged that they were promised a university degree after four years. Certification was refused at first instance and on appeal to the Divisional Court on the basis that the breach of contract claim required

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44 *90 George Street Ltd. v. Ottawa-Carleton Standard Condominium Corp. No. 815,* 2015 ONSC 336 at paras. 39-45, BOA, Tab 9.

45 Reasons, ABC, Tab 3, p. 21, para. 28.

46 *Ibid.*, at pp. 18-19, para. 21, citing brochures and language of the prepaid cards.

47 Certification Decision, ABC, Tab 7, p. 87 para. 73.

48 Endorsement of Justice Moore dated December 16, 2013, ABC, Tab 9, p. 109, paras. 26-28

49 *Hickey-Button, supra* note 3.

individual proof of reliance on the promise.[50] This Court reversed, finding that "reliance is not a prerequisite to recovery in the breach of contract claim…."[51]

D. Analysis of the Bell and Solo Contracts Was Equally Flawed

39. The Motion Judge's interpretation of "specified time period" in the Bell/Solo contracts was similarly in error. As with the Virgin contract, he improperly ignored the evidence of the only time period that was actually specified – the expiry dates that were assigned to customers' accounts and directly communicated to them. It ought to have been an inescapable inference from the evidence on the record, as well as a matter of common sense, that this was the "specified time period" referred to in the contact. Moreover, both Bell/Solo cards and PIN receipts explicitly told customers that their expiry dates would be updated within 48 hours,[52] effectively telling them to check online or on their phone in order to learn when their balance expired.

40. However, even if the statements in the marketing materials and small print receipts made the meaning of "specified time period" uncertain, the ambiguity in this contract of adhesion had to be resolved to the benefit of the class by virtue of the doctrine of *contra preferentem*.[53] In addition, the Bell/Solo customers were entitled to the benefit of s. 11 of the *Consumer Protection Act*, *2002*, which mandates that "any ambiguity that allows for more than one reasonable interpretation of a consumer agreement […] shall be interpreted to the benefit of the consumer."

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50 *Ibid*., at paras. 34, 39.

51 *Ibid.*,at para. 43.

52 Sample PIN Receipts for Bell, Solo and Virgin Mobile, Ferranti Affidavit, Exhibit "J," ABC, Tab 31, p. 198; Examples of Prepaid Cards sold during the Class Period, Ferranti Affidavit, Exhibit "I," ABC, Tab 30, pp. 186, 191, 195.

53 See *e.g. 1230995 Ontario Inc. v. Badger Daylighting Inc.*, 2011 ONCA 442 at para. 6., BOA, Tab, 11.

E. The Motion Judge's Interpretation of the Regulation was Incorrect

41. This Court recently explained the applicable principles to be applied in interpreting a statutory regulation, holding:

> …the guiding principle of statutory interpretation applies, with appropriate modification, to the interpretation of a regulation. Thus, the wording of s. 4.3(5) must be read in its entire context, and in its grammatical and ordinary sense, harmoniously with the scheme and object of the regulation and its enabling statute (*the Insurance Act*), and with the intention of the Lieutenant Governor-in-Council.[54]

42. Consumer protection regulation is also subject to special rules of interpretation. Its main objective is to protect consumers and must be interpreted in a manner that furthers this objective.[55] The law is an expression of a social purpose, meant to establish more ethical trade practices calculated to afford greater protection to the "consuming public,"[56] and must be approached from the perspective of an average and unsophisticated consumer.[57] In addition, the *Legislation Act, 2006* requires that the Act be interpreted as being remedial and be given "such fair, large and liberal interpretation as best ensures the attainment of its objects."[58] Relevant excerpts from the Regulation are reproduced at Schedule "B."

a. Application of the Regulation to "Top-ups"

43. The appellant argued that a broad and purposive interpretation of the Regulation made it applicable to "top-ups" for the following reasons, all related to a number of definitional requirements prescribed in the Regulation:

(a) "*Gifts*": there is nothing in the definition of "gift card" that limits the protection of the Regulation to "gifts" *per se*. That is, the Regulation does not require that any of the

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54 *Gyorffy, supra* note 30 at para. 30.

55 *Richard v. Time Inc.*, 2012 SCC 8 at para. 50, [2012] 1 S.C.R. 265, BOA, Tab 12 ("***Richard***"); *Weller v. Reliance Home Comfort Limited Partnership*, 2012 ONCA 360 at para.15, 110 OR (3d) 743, BOA Tab 13.

56 *Richard*, *supra* note 55 at para. 43.

57 *Ibid*., at para. 65.

58 *Legislation Act, 2006*, S.O. 2006, c. 21, Sch F, s. 64.

legal requirements of a "gift" be present such as an intention to donate without consideration, acceptance, and a sufficient act of delivery.[59]

(b) "*Gift Card"*: cards acquired at retail locations (and the associated PIN numbers assigned) meet the definition of "gift card" because they are "vouchers in any form" or "written certificates," and amounts directly added by debit or credit cards to a consumer's account are "electronic credits."[60] Once credited to the account, these amounts can be used to purchase a variety of wireless services, including talk time, texts, ring tones, games, etc.,[61] making them able to be applied "towards purchasing goods or services covered by the voucher," in accordance with the statutory definition of "gift card";

(c) "*Gift card agreement"*: a "gift card" must also be a "gift card agreement." This is defined to mean "a future performance agreement under which the supplier issues a gift card to the consumer and in respect of which the consumer makes payment in full when entering into the agreement."[62] Reading the definitions of "gift card" together with "gift card agreement," the *Consumer Protection Act, 2002* targets activity in which a consumer gives the supplier money and receives a voucher or electronic credit of some form; and

(d) "*Future performance agreement*": the Motion Judge held that he was "satisfied that the top-up agreements are, at the very least, 'future performance agreements'."[63] "Future performance agreement" is defined by s. 1 of the *Consumer Protection Act, 2002* as "a consumer agreement in respect of which delivery, performance or payment in full is

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59 *McNamee v. McNamee*, 2011 ONCA 533 at para.24, 106 OR (3d) 401, BOA, Tab 14.

60 Affidavit of Maria Ferranti sworn November 29 2012, Sankar Affidavit, Exhibit "E," ABC, Tab 34, p. 203, paras. 17-18.

61 Ferranti Affidavit, ABC, Tab 35, pp. 204-205, paras. 9-12.

62 *General, O Reg 17/05*, s. 23.

63 Reasons, ABC, Tab 3, p. 22, para. 36.

not made when the parties enter into the agreement."[64] In the context of this case, a consumer receives the voucher or electronic credit that can be applied to services and products in the future, thereby delaying delivery or performance. The usage of services and purchases of goods are entirely at the discretion of consumers. The contractual terms state that customers obtain credits that can be applied in the future, at their discretion, to purchase a variety of services.

b. The Reasoning of the Motion Judge

44. The Motion Judge concluded the Regulation did not apply. His reasoning can be summarized as follows:

(a) "*Gifts*": the Regulation was intended to apply only to things "that are purchased or acquired as gifts for third parties and not for personal use";[65] "the vast majority" of credits at issue did not qualify under the Regulation because "they are purchased for personal use only and not as gifts for third parties";[66]

(b) "*One specific good or service*": in the alternative, the Regulation did not apply because the prepaid credits covered only "one specific good or service," an exemption under the Act. In this case, the judge held, the "one specific good or service" was "access to Bell's network";[67] and

(c) Expiry dates: in addition, with respect to credits specifically purchased as "PIN receipts," the motions judge concluded that these were not subject to the Regulation because PIN receipts do not have an expiry date.

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64 *Consumer Protection Act, 2002*, SO 2002, c 30, Sch A, s. 1.
65 Reasons, ABC, Tab 2, p. 24, para. 42.
66 *Ibid*., at p. 24, para. 43.
67 *Ibid*., at p. 25, para. 46.

45. As set out below, the Motion Judge's reasoning in respect of all three conclusions was in error.

i. There is no basis in the legislation to infer a requirement to prove an intention to gift to be entitled to protection of the regulation

46. There is nothing in the language and context of the Regulation, including the mischief targeted, to suggest that the Regulation requires an intention to prove a gift to be entitled to its protection. If this Court endorses this limitation, it would neutralize much of the curative power of the Regulation, as well as make its application impossible to predict in practice. For example, if the Motion Judge's interpretation were to be upheld, a pre-paid card purchased for a child by a parent and given as a birthday gift could not expire, but one given as an allowance could expire. If a card was given as a gift, but later traded to another, the original gift would qualify but the trade would not. No merchant could predict in advance when an expiry date would be lawful and when it would not.

47. The Motion Judge also erred in basing his "gift" finding on two excerpts of *Hansard* that generally described gift cards as purchased for "family" or "friends."[68] The reliance on *Hansard* was misplaced. As stated by the Supreme Court in *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*,[69] *Hansard* "may or may not reflect the parliamentary intention to be deduced from the words used in the legislation [….] no single participant in the legislative process can purport to speak for the legislature as a whole."[70] Indeed, there were other portions

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[68] *Ibid*., at pp. 23-24, paras. 39-40.

[69] *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, 2007 SCC 42, [2007] 3 SCR 217, BOA, Tab 15.

[70] *Ibid.* at para 12. See also *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, at para. 39, [2006] 1 S.C.R. 715, BOA, Tab 16.

of *Handsard*, not cited in the Motion Judge's reasons, that supported the opposite interpretation.[71]

ii. There was no basis in the record to find that "top-ups" were not gifts

48. The Motion Judge further found that "the vast majority" of credits at issue did not qualify under the Regulation because "they are purchased for personal use only and not as gifts for third parties."[72] There was no evidence in the record to support this finding. The Motion Judge also concluded that it was only "PIN receipts" that could potentially "fairly and correctly be described as a 'gift card agreement'."[73] Again, there was no absolutely no evidence in the record as to whether or not PIN receipts are given as gifts.

49. The Motion Judge also did not consider many other possible scenarios involving the purchase of credits as gifts that are not restricted to only PIN receipts. For example, his reasoning excludes the likely scenario of a parent using his or her credit card to top-up a son or daughter's account online.

iii. The Motion Judge erred in relying on the Ministry website

50. The Motion Judge appeared to rely on a comment published on the Ministry of Consumer Affairs website that the Regulation did not cover pre-paid phone cards.[74] However, the only evidence in the record for this belief was the statement of a Minister that the province believed, as a matter of constitutional law, that only federal law could apply to phone cards. The parties

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71 When the question arose as to whether the Regulation should apply to "true" gifts given to third parties only, a MPP lampooned the very notion that this could be seen as a valid distinction, stating as follows: "The business about third party – come on – If I choose to go out and buy myself – because I'm a lonely guy with very few friends – my own Christmas gift by way of a gift card, that doesn't make it any different than Mr. Dhillon because all of a sudden he has found a liking for me" (see Official Report of Debates (Hansard) No. SP-36, dated November 28, 2006 (Excerpts), Affidavit of Lisa Hagglund sworn November 24, 2014 ("**Hagglund Affidavit**"), Exhibit "D," ABC, Tab 36, p. 212.

72 Reasons, ABC, Tab 3, p. 24, para. 43.

73 *Ibid.*

74 *Ibid*., at p. 24, para. 41.

agreed to postpone submissions in respect of the constitutional issue. Therefore, there was no basis in the record for the Motion Judge to conclude that unattributed, unexplained comments on a Ministry website provide assistance to interpret the statute or Regulation in this case.[75]

iv. The Motion Judge Erred in Finding that the "Top-Ups" were for a "Single Service"

51. The Motion Judge concluded, in the alternative, that top-up payments were exempt from the Regulation. Section 25.1 states that it does not apply to gift cards that "cover only one specific good or service." Analyzing the issue in one short paragraph, the Motion Judge found that the gift cards in this case cover only one specific good or service – namely, "access to Bell's wireless network."[76]

52. This determination was in error, first, because there was no evidence in the record that demonstrated that the offer made by Bell to pre-paid consumers was for a single service referred to as "access to the network." Second, the Motion Judge's determination was in error because it was contrary to the clear and unequivocal wording in the contractual documents that repeatedly stated that Bell was providing different services to its wireless customers. Bell's contracts state that Bell can unilaterally set and update its rates for "Services" provided and defined the word "service" to mean "mobile voice, data and content services and plans and related internet and member support services (collectively, the Services)."[77] Further, Bell's customers are warned that non-compliance with Bell's provisions could lead to a limitation or suspension of "some or

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[75] *Ibid*. at pp. 22-24, para. 37 ("One can also consider statements on government websites [in the statutory interpretation exercise]") & para. 41 ("I also note that the Ontario Ministry of Consumer Affairs' website states that the rules on expiry dates for gift cards do not apply to pre-paid phone cards.").

[76] *Ibid*. at p. 25, para. 46.

[77] Virgin Mobile Terms and Conditions of Service, Sankar Affidavit, Exhibit "H," ABC, Tab 37, p. 213.

all of your Services";[78] and told that "certain Services require registration, including our electronic billing system."[79]

53. The terms of service for each brand also explain the variety of services that pre-paid customers can buy with their top-ups. For example:

a. *Virgin*: "we offer mobile voice, data and content and plans, and related Internet and member support services […] available for use in conjunction with the devices purchased from us or one of our authorized retailers […]."[80]

b. *Bell / Solo*: "Services" [are] any wireless voice, data or other services provided by or through Bell, including […] plans, airtime, data usage, 911 services, voicemail, call display, long distance, roaming, text, picture, video or other messaging, content, downloads, applications, streaming, browser usage, [and] internet access […]."[81]

54. The "single service" exception was never intended to cover the multi-faceted operations at issue in this litigation. An example of a "specific good or service" exempt under the Regulation is a gift certificate for a massage at a spa.[82] The purpose of this exception is that it would be unfair to require a supplier to provide a particular service or good at a specific price, indefinitely.[83]

55. "Access to the network," in and of itself, provides no value whatsoever to Bell's customers. Rather, Bell's pre-paid customers are buying a variety of electronic goods and

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78 *Ibid*. at p. 217.

79 *Ibid.* at p, 218.

80 *Ibid*. at p. 213.

81 Sankar Affidavit, ABC, Tab 38, p. 219, para.12; Bell Mobility Terms and Conditions of Service, Sankar Affidavit, Exhibit "I," ABC, Tab 39, p. 221; Solo Mobile Terms and Conditions of Service, Sankar Affidavit, Exhibit "J," ABC, Tab 40, p. 222.

82 "Buying or using gift cards," printed from http://www.ontario.ca/consumers/gift-cards, November 18, 2014, Hagglund Affidavit, Exhibit "F," ABC, Tab 41, p. 223.

83 This rationale is explained in government statements of numerous provinces with the same "specific good or service" exemption. For example, British Columbia's FAQs for Prepaid Purchase Cards states:

> Q. Why are cards issued for specific goods or services allowed to have expiry dates?
> A. It is not expected that a business would make the same product or service available indefinitely, and at the same price. An example of a card issued for a specific service is a card good for a hair cut in a salon. (see Government Statements re: Gift Card Rules, Hagglund Affidavit, Exhibit "G(i)," ABC, Tab 42, p. 224 .

services with their credits.[84] The Legislature did not intend for the single service exemption to apply to a single service having no value.

v. The Motions Judge erred in finding that PIN receipts did not expire

56. The Motion Judge concluded that PIN receipts were also not subject to the Regulation because they did not have an expiry date. He determined that "they could be redeemed, *i.e.*, activated, at any time without limitation."[85] However, this analysis misconceived both the nature of the PIN receipts and the meaning of the regulatory terms.

57. While the Motion Judge drew a distinction between PIN receipts and other ways of paying for top-up credits, PIN receipts are no different than credit card or debit top-ups. All of these transactions (regardless of the particular method of payment) are simply the means by which Bell receives payment for top-ups.[86] In all cases, Bell imposes an expiry as part of the transaction. The Motions Judge erred by fixating on the form of the transaction involving PIN receipts, which is a distinction without a difference.

58. In the case of PIN receipts, there are two transactions. The first, in which the customer pays money to the third-party merchant in exchange for a PIN receipt is not subject to an expiry date and is not part of this action. The second transaction occurs when the customer exchanges the PIN receipt in exchange for Bell's services.[87] The Motion Judge failed to appreciate that it is the second transaction, not the first that is the subject of this action.

59. Further, the Motion Judge misconstrued the meaning of the operative terms of the Regulation. A "gift card agreement" involves an agreement in which the consumer makes

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84 Indeed, Bell made clear in its evidence on this motion that "Subscribers pay for their Wireless Service for voice calls, text messages or data use at specified rates. Bell deducts charges from subscribers' Prepaid Account balances for Wireless Service as it occurs;" Ferranti Affidavit, ABC, Tab 14, p. 130, para. 12(a).

85 Reasons, ABC, Tab 3, p. 24, para. 44.

86 See Ferranti Affidavit, ABC, Tab 13, pp. 128-129, para. 14.

87 *Ibid.*

payment in full when entering into the agreement, and where the consumer is entitled to apply credits paid in advance towards purchasing goods or services covered by the gift card.[88] The services at issue (involving a consumer handing money to Bell, Bell recording the money as electronic credits, and the customer drawing down on credits as the customer makes calls and uses data) plainly fall within the statutory definition.

60. Section 25.3(1) of the Regulation states that "no supplier shall enter into a gift card agreement that has an expiry date on the future performance of the agreement."[89] The Motion Judge failed to appreciate that here, "future performance" includes a right for the consumer to continue buying Bell's electronic goods and service until the balance in his her account is gone. The seizure of those credits before they could be used creates an expiry date on future performance. Bell does not perform its obligations under the agreement until it provides the goods and services for which the consumer gives Bell funds in advance. Under the Regulation, if otherwise, applicable, there can be no expiry of Bell's obligation to perform those obligations.

61. By finding that the prohibition against expiry dates only restricted the time limits on the activation of the cards, rather than the supply of goods and services by the merchant, the Motion Judge failed to take into account the mischief that the Regulation was meant to address. Under the Motion Judge's analysis, any gift card that requires activation before use would be immune from the Regulation providing there is no specific time limit on activation. The logical extension of this determination is that a $1,000 retail gift card could lawfully expire five minutes after activation, providing that there is no time limit for activation. This was plainly not the legislature's intention in passing the Regulation. To the contrary, the legislature intended to protect consumers from having their cash-equivalent credits seized before receiving the goods or

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88 *General, O Reg 17/05*, s. 23.

89 *Ibid*., s. 25.3(1).

services for which they give funds to merchants in advance. The Motion Judge erred by not interpreting the Regulation in a manner consistent with this purpose.

PART V - ORDER REQUESTED

62. The appellant requests that the appeal be allowed and that common issue (A)(1) (breach of contract) and (B)(1) (gift card regulation) be answered "yes."

63. The appellant requests that the costs order below be reversed, and that she be awarded her costs of the summary judgment motion and this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 27, 2015

_____
Louis Sokolov

_____
Jean-Marc Leclerc

_____
Jordan Goldblatt

Court File No. C60176

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CELIA SANKAR

Plaintiff (Appellant)

- and -

BELL MOBILITY INC.

Defendant (Respondent)

Proceeding under the *Class Proceedings Act, 1992*

CERTIFICATE

Counsel for the appellant certifies that:

(i) An order under subrule 61.09(2) (original record and exhibits) is not required.

(ii) Two hours are estimated as required for the appellant's oral argument, not including reply.

Date: April 27, 2015

_____

Louis Sokolov (LSUC No.: 334483L)

SCHEDULE "A" –

1. *Hickey-Button v. Loyalist College of Applied Arts & Technology*, 2006 CanLII 20079, 267 DLR (4th) 601 (ON CA).

2. *Martenfeld v. Collins Barrow Toronto LLP*, 2014 ONCA 625, 116 OR (3d) 401.

3. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633.

4. *First Elgin Mills Developments Inc. v. Romandale Farms Limited*, 2015 ONCA 54.

5. *Gyorffy v. Drury*, 2015 ONCA 31.

6. *De Beers Canada Inc. v. Ootahpan Company Limited*, 2014 ONCA 723.

7. *Vallieres v. Vozniak*, 2014 ABCA 290.

8. *Ledcor Construction Limited v Northbridge Indemnity Insurance Company*, 2015 ABCA 121.

9. *90 George Street Ltd. v. Ottawa-Carleton Standard Condominium Corp. No. 815*, 2015 ONSC 336.

10. *Rankin Construction Inc. v. Ontario*, 2014 ONCA 636.

11. *1230995 Ontario Inc. v. Badger Daylighting Inc.*, 2011 ONCA 442.

12. *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265.

13. *Weller v. Reliance Home Comfort Limited Partnership*, 2012 ONCA 360, 110 OR (3d) 743.

14. *McNamee v. McNamee*, 2011 ONCA 533, 106 OR (3d) 401.

15. *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*, 2007 SCC 42, [2007] 3 SCR 217

16. *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715.

SCHEDULE "B" – STATUTES

Consumer Protection Act, 2002, SO 2002, c 30, Sch A

Interpretation

1. In this Act,

"consumer" means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes; ("consommateur")

"future performance agreement" means a consumer agreement in respect of which delivery, performance or payment in full is not made when the parties enter the agreement; ("convention à exécution différée")

Ambiguities to benefit consumer

11. Any ambiguity that allows for more than one reasonable interpretation of a consumer agreement provided by the supplier to the consumer or of any information that must be disclosed under this Act shall be interpreted to the benefit of the consumer. 2002, c. 30, Sched. A, s. 11.

General, O Reg 17/05

Definitions

23. In the Act and this Part,

"gift card" means a voucher in any form, including an electronic credit or written certificate, that is issued by a supplier under a gift card agreement and that the holder is entitled to apply towards purchasing goods or services covered by the voucher; ("carte cadeau")

"gift card agreement" means a future performance agreement under which the supplier issues a gift card to the consumer and in respect of which the consumer makes payment in full when entering into the agreement; ("convention de carte cadeau")

"open loop gift card agreement" means a gift card agreement that entitles the holder of a gift card to apply it towards purchasing goods or services from multiple unaffiliated sellers. ("convention de carte-cadeau universelle") O. Reg. 187/07, s. 1; O. Reg. 202/08, s. 1.

Application of sections

25.1 Sections 25.2 to 25.5 apply to every gift card agreement entered into on or after the day this section comes into force and to every gift card issued under that agreement, but do not apply to,

(a) a gift card that a supplier issues for a charitable purpose; or

(b) a gift card that covers only one specific good or service; or

(c) the gift card agreement under which a gift card described in clause (a) or (b) is issued. O. Reg. 187/07, s. 3.

No expiry dates

25.3 (1) No supplier shall enter into a gift card agreement that has an expiry date on the future performance of the agreement. O. Reg. 187/07, s. 3.

(2) A gift card agreement with an expiry date on its future performance shall be effective as if it had no expiry date if the agreement is otherwise valid. O. Reg. 187/07, s. 3.

Legislation Act, S.O. 2006, C. 21, SCH F.

Rule of liberal interpretation

64. (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Sched. F, s. 64 (1).

Same

(2) Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act. 2006, c. 21, Sched. F, s. 64 (2).