Court Rejects the Position that “Factual Matrix” Should be Considered in Consumer Protection Case

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The Court of Appeal recently held that materials external to a standard form consumer agreement, including websites, brochures and receipts, may be considered in interpreting the underlying agreement where they form part of the "contractual relationship" between the parties.

*Sankar v. Bell Mobility Inc.*1involved the appeal of a summary judgment decision on common issues wherein Justice Edward Belobaba held that the action against the defendant, Bell Mobility, should be dismissed. The class action arose out of prepaid cellphone services and the expiry of unused "top-up" payments. A key issue facing Justice Belobaba related to when the phone cards expired pursuant to the standard contract; either one day or two days after the end of the "active period". The active period ran from the date of the card's activation for a specified number of days that varied based on the amount of credit purchased. For example, a $15 credit was valid for 30 days, a $20 credit was valid for 45 days, etc. Customers could preserve unused credit by "topping up" their account prior to the expiration of the active period.

Chief Justice Strathy of the Court of Appeal ultimately agreed with the decision of Justice Belobaba, who held that the totality of the contractual documents provided for the expiration of prepaid cards on the day after the expiry of the active period and not two days later as the plaintiffs alleged. This was evident not only in the wording of the initial Terms of Service agreement but also in extrinsic materials, including personal identification number (PIN) receipts, websites, and the phone cards themselves. These materials, which customers used to add additional credit to their accounts, contained contractual terms that were interrelated to the initial agreement. In the result, Bell was entitled to collect the unused balance of prepaid cards after the last day of the active period.

In taking into account materials external to the initial agreement, Chief Justice Strathy held that he was not considering the "factual matrix" in which the contracts were formed since the documents considered made up part of the contract itself. These documents were standard form and their terms were common to all class members. The standard of review was therefore "correctness" and not "palpable and overriding error" in interpreting Bell's standard Terms of Service as well as the standard terms of the phone

cards and PIN receipts. According to Chief Justice Strathy, if the factual matrix in which each contract was formed played any role in interpreting the contracts, their interpretation would not be a suitable common issue.

Chief Justice Strathy moreover rejected the position that prepaid phone cards are subject to the *Gift Card Regulation* enacted pursuant to the *Consumer Protection Act*. The purpose of that regulation, according to Chief Justice Strathy, is to prevent the expiry of an agreement before the seller has delivered the goods or services promised and paid for and is not intended to prohibit an agreement from being time-limited. Purchasing cellular phone service that was time-limited once the service period was activated, which could be done by the customer at any time, was therefore not a breach of the regulation. When the service was activated, Bell was required to perform the agreement by providing wireless service for the time period set out in the contract.

Sankar is significant in that Chief Justice Strathy found that he was able to rely on documents and materials external to the underlying Terms of Service without consideration of the factual matrix in which the contract was formed, as the Supreme Court did in *Sattva v. Creston Moly Corp*(*Sattva*).2

Based on the outcome of *Sankar*, courts in future consumer contract-based claims may more easily find they are able to consider materials extrinsic to contract, such as brochures, websites and other written representations, to assist in the interpretation of a standard form contract, without reference to the factual matrix in which the contract was formed. As the applicable scope of the factual matrix principle and *Sattva* has been the subject of much debate since its release,3the avoidance of this issue while still considering evidence outside the four corners of the contract may serve as a valuable precedent.

1*Sankar v. Bell Mobility Inc.*, 2016 ONCA 242 (CanLII)

22014 SCC 53 (CanLII)

3For example, see *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842 at paras. 24-41.

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