F ederal Court		Cour fédérale

Date: 20100427

Docket: T-1647-07

Citation: 2010 FC 455

BETWEEN:

T-MOBILE USA, INC.

Plaintiff

and

TELUS CORPORATION, TELE-MOBILE COMPANY,
TELUS COMMUNICATIONS COMPANY
AND TELUS COMMUNICATIONS INC.

Defendants

REASONS FOR ORDER

GIBSON D.J.

Introduction

[1] These reasons follow the hearing of an appeal by motion under Rule 51 of the *Federal Courts Rules*[1] from an Order of Madam Prothonotary Milczynski dated the 15th of April, 2010, insofar as the Order dismissed the Plaintiff's application seeking that the representative of the Defendants, Mr. J. J. Hochrein, be required to re-attend on his examination for discovery on behalf

of the Defendants and answer questions 187, 210, 212, 213, 217, 218, 219, 225, 226, 227, 229, 234, 238, 270, 273 and 276, (the "discovery questions at issue") as posed to him on behalf of the Plaintiff on his examination for discovery on the 11th and 12th of August, 2009.

[2] In the written representations on behalf of the Plaintiff, the issues on the motion were described in the following terms: first, what is the appropriate standard of review on an appeal from the order at issue; second, are the discovery questions at issue vital to the final issue in the case; third, if so, are the discovery questions at issue relevant to an unadmitted allegation of fact in the pleading filed by the Defendants or by the Plaintiff; and finally, if the discovery questions at issue are not vital to the final issue in the case, is the order appealed from clearly wrong in the sense that the exercise of discretion by the Prothonotary in declining to order the questions answered, is based on a wrong principle.

Background

[3] The original statement of claim herein was filed on the 11th of September, 2007. The third amended statement of claim was received by the Court on the 9th of February, 2009. Prothonotary Milczynski has, in effect, been case-managing this proceeding since October, 2007, notwithstanding the fact that she was only formally appointed as case-manager on the 23rd of March, 2009. Prothonotary Milczynski has been active in her role as case-manager. She has heard and decided two pleadings motions and, prior to the 17th of February last, she had presided over three case-management conferences. Prothonotary Milczynski presided over the motion giving rise to the

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[1] SOR/98-106.

Order here under appeal for almost a full day on the 17th of February, 2010. Thus, it is fair to say that Prothonotary Milczynski is much more familiar with this action than is this Deputy Judge.

Analysis, Deference and the Standard of Review

[4] In *Apotex Inc. v. The Wellcome Foundation Limited et. al.*[2], Justice Evans of the Court wrote:

> Despite the apparently mandatory nature of Rule 240 of the Federal Courts Rules, 1998, [the Rule dealing with the scope of examination for discovery,] ordering questions to be answered on discovery involves an exercise of discretion. A party is not entitled to discovery merely by showing that the answer might be relevant to prove material facts. The generality and breadth of a question, the extent of the burden that would be imposed by requiring an answer, the degree of relevance of the requested information and the availability of other potential evidence of the facts in question, are among the factors to be considered in the exercise of discretion. …
>
> As the case management prothonotary of this complex and protracted litigation, including an extensive discovery involving thousands of questions, Prothonotary Lafrenière was best placed to determine whether, in all the circumstances, it was appropriate to require the question in dispute to be answered. Accordingly, despite the absence of reasons (and we note here that the Prothonotary was asked to rule on 225 questions in this and related motions), the Prothonotary's decision is entitled to considerable deference: …and should be set aside on appeal only if it was based on an erroneous principle of law or was plainly wrong on the facts. Justice Hugessen regarded the broad and general nature of the question as a sufficient basis for upholding the exercise of the Prothonotary's discretion. [Citations omitted, underlining added.]

I am satisfied that much the same might be said here. In particular, Justice Evans' reference to the fact that Justice Hugessen regarded the broad and general nature of the question there at issue as a

[2] 2008 FCA 131, April 9, 2008.

sufficient basis for upholding the exercise of the Prothonotary's discretion is equally applicable here. The discovery questions here at issue, taken generally, can be described as indeed broad and general in their nature.

[5] In *Astrazeneca Canada Inc. et. al. v. Apotex Inc.*[3], Justice Hughes restated the position taken by Justice Evans in the following terms:

> Prothonotaries of this Court are burdened, to a large extent, with motions seeking to compel answers to questions put on discovery. Often hundreds of questions must be considered. Hours and often days are spent on such motions. It appears that in many cases the parties and counsel have lost sight of the real purpose of discovery, which is directed to what a party truly requires for trial. They should not slip into the *"autopsy"* form of discovery nor consider discovery to be an end in itself.
>
> A determination made by a Prothonotary following this arduous process ought not to be disturbed unless a clear error as to law or as to the facts has been made, or the matter is vital to an issue for trial. Where there has been an exercise of discretion, such as weighing relevance against onerousness, that discretion should not be disturbed. The process is not endless. The parties should move expeditiously to trial.

Once again, I am satisfied that the same might be said here. Counsel for the Plaintiff Applicant failed to satisfy me that there was here a clear error as to law or as to the facts, or that the answers that he urged be required are vital to an issue for trial. Rather, the discovery questions at issue demonstrate all of the characteristics fundamental to a discovery in the nature of a "fishing expedition".

[3] 2008 FC 1301, November 20, 2008.

Conclusion

[6] For the foregoing brief reasons, the Plaintiff's motion will be dismissed.

Costs

[7] I am satisfied that it is appropriate that costs should follow the event. Counsel for the Defendants urged that costs be fixed at $1,500 and be paid to the Defendants forthwith and in any event of the cause. My order will provide that the Defendants are entitled to their costs in the sum of $1,500, all inclusive, payable in any event of the cause, but not forthwith.

"Frederick E. Gibson"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1647-07
STYLE OF CAUSE:	T-MOBILE USA, INC. v. TELUS CORPORATION, TELE-MOBILE COMPANY, TELUS COMMUNICATIONS COMPANY AND TELUS COMMUNICATIONS INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 26, 2010
REASONS FOR ORDER BY:	GIBSON D. J.
DATED:	APRIL 27, 2010

APPEARANCES:

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SOLICITORS OF RECORD:

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