Citation:	International Brotherhood of Electrical Workers, Local 213 and 258 etal v BCT Telus Communications etal 2000 BCSC 380	Date:	20000606
		Docket:	S002427
		Registry:	Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Mr. Justice Owen-Flood
June 6, 2000

BETWEEN:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCALS 213 AND 258, DAN OLSON, DAVID THOMPSON, WAYNE BRAZEAU, RON DICKSON, AND LESTER BUSS

PLAINTIFFS

AND:

BCT. TELUS COMMUNICATIONS INC., JOHN DOE, AND JANE DOE

DEFENDANTS

Counsel for the Plaintiffs:	F.G. Potts
Counsel for the Defendant BCT. Telus Communications Inc.:	A.H. Narod
Counsel for the Defendants John Doe and Jane Doe:	D.W. Bobert

[1] **THE COURT:** BCT. Telus Communications Ltd., John Doe, and Jane Doe are the defendants in an action commenced by the International Brotherhood of Electrical Workers Local 213 and 258, Dan Olson, David Thompson, Wayne Brazeau, Ron Dickson, and Lester Buss. BCT. Telus Communications Ltd. (hereinafter referred to as “Telus”), and the other defendants are being sued by the plaintiffs for wrongful interception of telephone calls, wrongful diversion of e-mail and files.

[2] The plaintiffs allege that these tortious acts which, if proven, constitute serious criminal offences, were perpetrated by employees of Telus, some known and some unknown. The plaintiffs claim that Telus is liable for the acts of its defendant employees, not only vicariously but also on account of alleged negligence in the selection and supervision of its employees. The plaintiffs claim that these wrongful acts of interception and diversion occurred over a significant period of time on a frequent basis.

[3] Not only have the plaintiffs sued Telus and the unnamed employees, they have also filed a complaint with the Royal Canadian Mounted Police, which is under ongoing investigation, with a view to the laying of charges, including serious charges under the ***Criminal Code of Canada***.

[4] The defendant, Telus, has not as yet filed a statement of defence in response to the lawsuit. The defendant, Telus, has investigated the allegations of the plaintiffs in disciplinary proceedings. So far, that investigation has resulted in two employees each receiving a 24-hour suspension. Because it is known that the RCMP are investigating the same fact pattern involved in the alleged interceptions and diversions, the defendant Telus is finding that it is hamstrung in its investigation, necessitating as it does the interviewing of diverse employees as to who had or was in a position to participate in either the alleged interceptions and diversions or the prevention of unlawful interceptions and diversions.

[5] In the statement of claim, the plaintiffs allege:

> 5. The Plaintiffs say that as at December 1999, there was a union representation

vote being considered among the employees of BCT. Telus. The Plaintiffs say that BCT. Telus is aware that accessing the records and other information available in the records of BCT. Telus by BCT. Telus employees for improper and unauthorized purposes occurs on a frequent basis. In the circumstances aforesaid, BCT. Telus knew or ought to have known that a union representation vote would cause certain employees of BCT. Telus to have an interest in the activities of the Plaintiffs, in particular the telephone communications of the Plaintiffs. The Plaintiffs say that BCT. Telus had a duty to ensure that its employees did not breach their privacy rights by accessing their telephone records for an improper or unauthorized purpose.

6. The Plaintiffs say that on or about December 10, 1999, the personal Plaintiffs carrying on business on behalf of the trade union and seeking legal advice from the Plaintiff, Ron Dickson, arranged a telephone conference call between various offices of the union locals and personal and cellular telephones of the other Plaintiff individuals. The purpose of the telephone call, inter alia, was for the Plaintiff union and the various other individual Plaintiffs participating in the call to obtain legal advice from the Plaintiff, Ron Dickson.

7. The Plaintiffs say that the Defendants:

(a) Obtained information from the Plaintiffs' telephone records about this certain telephone conference call which occurred on December 10, 1999;

(b) Used the Plaintiffs' telephone records to identify the participants in said telephone conference call;

(c) Publicized information to others which could only have been obtained from accessing the home telephone records of certain of the Plaintiffs;

8. The Plaintiffs say that the Defendants wilfully and without a claim of right violated their common law and statutory right to privacy pursuant to the ***Privacy Act***, R.S.B.C. 1996, c. 373.

9. The Plaintiffs say that the Defendants breached their common law right to solicitor/client privilege in that the purpose of the telephone call, inter alia, was for the various other participants in the call to obtain legal advice from the Plaintiff, Ron Dickson.

10. The Plaintiffs say that at other times on other occasions currently unknown to them, the Defendants violated their privacy by accessing the telephone and/or e-mail and/or fax records of the Plaintiff union locals and officials in order to obtain information for an improper purpose.

11. The Plaintiffs say that BCT. Telus was negligent in its hiring, training, supervision, and investigation of John and Jane Doe and its other employees and the breaches of the Plaintiffs' right to privacy and the Plaintiffs' right to a solicitor-client privilege arose from BCT. Telus' negligent hiring, training, supervision and investigation of its employees.

12. The Plaintiffs say BCT. Telus had a duty of care to ensure that the accessing of personal telephone records and other information available in the records of BCT. Telus by BCT. Telus employees for improper and unauthorized purposes did not occur during the process of a union representation vote. The Plaintiffs say BCT. Telus has no policies and procedures in place to prevent a breach of privacy rights or in the alternative, has inadequate policies in place. The Plaintiffs say that BCT. Telus either does not discipline employees at all for these breaches of privacy rights or the discipline imposed is so negligible as to be a tacit acceptance of these breaches. The Plaintiffs say that in the circumstances aforesaid that BCT. Telus acquiesced in the breaches of the Plaintiffs' right to privacy and right to a solicitor-client privilege.

13. In the alternative to paragraphs 11 and 12, the Plaintiffs say that the Defendant, BCT. Telus, is vicariously liable for the conduct of its employees, John and Jane Doe, and that it knew or ought to have known that its employees were accessing the Plaintiffs' telephone records for an improper purpose.

[6] Morley Short, Q.C., counsel for the two defendants named as John Doe and Jane Doe, has, by letter dated 17 May 2000, notified Telus:

Recently there have been discussions between Telus, TWU and John and Jane Doe with respect to Telus's ongoing investigation of this matter. We are further instructed that the Burnaby RCMP are conducting a criminal investigation.

There is the possibility that any such investigation could lead to criminal charges. In the circumstances we are taking the same position that the union adopts when a grievance arbitration matter is under way and criminal charges are a possibility. The civil matters are held in abeyance pending conclusion of the criminal case in order to protect the individual's right not to incriminate himself. Accordingly, we are instructed to advise you that the individuals we represent will not assist Telus

> in investigating this matter nor will they make any statements or give any evidence in respect to the matter until all possible criminal charges are out of the way.

[7] Because of the matters set out by Mr. Short, Q.C. in his letter, employees of Telus have refused to co-operate with the in-house investigation in light of the ongoing RCMP investigation.

[8] The defendant Telus moves for a stay of the civil action of the plaintiffs for a period of 12 months, subject to the right of Telus to apply for a further extension, with liberty to the plaintiffs to apply to vary or discharge the stay at any time on the ground of a change in circumstance.

[9] The defendant Telus cites ***Rule 19(24)*** as authority for its application for the stay. The germane parts read:

> (24) *Scandalous, frivolous or vexatious matters* – At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> ...
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[10] The defendant Telus also cites ***Rule 1(5)***:

> (5) *Object of rules* – The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

[11] The defendant, Telus, also refers to the provisions of section 8(3) of the ***Law and Equity Act***, R.S.B.C. 1996, c. 253. Section 8(3) in its pertinent parts reads:

> Any person, whether or not a party to a cause or matter pending before the court, who would have been entitled, but for this Act, to apply to the court to restrain the prosecution of it, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in the cause or matter may have been taken, may apply to the court, by motion in a summary way, for a stay of proceedings in the cause or matter, either generally or so far as may be necessary for the purposes of justice and the court must make any order that is just.

[12] Counsel for Telus cites the decision in ***Canadian Pacific Railway Co. v. Sheena M (The)*** [2000] F.C.J. No. 467 (Q.L.) (F.C.T.D.), a decision by the Prothonotary Hargrave. In that decision, having reviewed the jurisprudence prior to the ***R.J.R. MacDonald Inc. v. Canada***, [1994] 1 S.C.R. 311, the learned prothonotary at paragraph 26, writes:

> The principle set out in this line of cases, based on pre-RJR MacDonald cases, that a stay must not be unjust to the plaintiff and that continuation would cause prejudice to the defendant, has been applied in various fact situations, including where there was similar litigation in another court, where there were two action [*sic*] involving different litigants and where an appeal was pending. This test is, in a sense, a balance of inconvenience test. Yet I must also consider the test for a stay set out by the Supreme Court of Canada in RJR MacDonald.

[13] The learned prothonotary then went on to hold, at paragraph 28:

> My initial reaction to these two lines of cases, the first involving a general purpose sort of stay, balancing injustices of imposing a stay and the second, an assessment of the merits, demonstration of irreparable harm and a balance of inconvenience, to use a term from Metropolitan Stores (supra) at page 129, was that the three part test might be one more appropriately used to stay the proceedings of a tribunal, or to stay the effect of legislation pending the outcome of litigation, or to stay an order, <u>with a two part test</u>, <u>involving prejudice or injustice</u>, <u>being appropriate in other instances</u>.

And, further, at paragraph 32:

> In summary, that the two part test is appropriate where a stay of the Court's own proceeding is at issue, while the three part RJR MacDonald test is appropriate where the stay is that of proceedings before some tribunal or an order of the Court pending an appeal. In the present instance the stay of the liability action is thus governed by whether a continuation of the action would cause prejudice or injustice, and not merely inconvenience or additional expense, to the Sheena M. Interests, as Defendants and whether a stay would be unjust to the CPR, as Plaintiff, in the liability action.
>
> (Emphasis added.)

[14] In other words, the learned prothonotary has said that a two-part test is the appropriate

test to use. At bar, what is sought is a judicial stay of an action in this court pending the completion of an investigation of the same fact pattern by another, non-judicial, authority, to wit, the RCMP.

[15] The appropriate two-part test involves, first, a consideration of whether or not there is a prejudice to the party seeking the stay if the proceedings in court continue in the ordinary manner and, if so, if the stay is granted, whether it would amount to an injustice to the other party in the proceedings opposing the stay.

[16] The three-part test that would ordinarily apply to an injunction in circumstances other than those at bar involves three factors, namely, whether there is a serious question to be tried, whether there will be irreparable damages, and whether the balance of convenience favours the applicant. At bar, the Court is concerned with the two-part test, notwithstanding the matters of prejudice and injustice.

[17] The pertinent law is set out by Zuber, J. in ***Stickney v. Trusz*** (1973), 16 C.C.C. (2d) 25 (Ont. H.C.), aff'd (1974), 17 C.C.C. (2d) 478 at 478 (Ont. D.C.). Zuber, J. writes at p. 29:

> Enlarging somewhat on that language, it is my opinion that the mere fact that there are both criminal and civil proceedings pending against a person arising out of the same facts is not a sufficient ground to qualify as an exceptional case in which the civil proceedings should be stayed. It is incumbent upon the applicant to show some specific or particular way in which he will be prejudiced in his criminal trial. In this case the applicant has not done so and the application will be dismissed with costs in the cause.

[18] I digress to observe that in the ***Stickney v. Trusz*** case, Zuber J. had before him a defendant in a civil action who was an accused person in criminal proceedings arising out of the same facts. Zuber J. held that that defendant had no right to a stay of the civil action until the disposition of the criminal proceedings.

[19] The law as enunciated by Zuber J. was quoted with approval by McKenzie J. of this Court in ***Cansulex v. Perry*** (16 March 1979), Vancouver Registry, C785837 (B.C.S.C.).

[20] Telus argues that to permit the action to proceed without it being stayed at least temporarily would be prejudicial to Telus, and that it would be unfair to compel Telus to file a statement of defence in these circumstances. Telus urges this must be so as its suspended employees and its other employees, not being witnesses within the meaning of the statutes, cannot make any statements that are protected by either the Provincial or the Canadian Evidence Acts. In the result, the fact that a criminal investigation is ongoing, argues Telus, effectively shuts the door to any real investigation by Telus of the matters forming the basis of the action against it.

[21] Telus further submits that the prejudice to it is exacerbated by the fact that the torts of interception and diversion are so serious that they strike at the very heart of the confidence that the public must have in its telephone service. As a significant licensee, Telus submits it has a paramount duty to protect the privacy of the public.

[22] In its argument, Telus puts it thus:

> From this viewpoint the Defendant's reputation and consequent competitive position is in jeopardy if it is unable to deliver a substantive defence which is based on a full and complete investigation of all the facts.

[23] Telus further claims that there would be no injustice to the plaintiffs from a stay. The plaintiffs seek only damages, as opposed to an injunction. Telus further submits that when the Court weighs the fact that there would be no injustice to the plaintiffs at bar if the stay were granted against the prejudice that there would be to the defendant if the action were not to be stayed, it is only appropriate that the Court should grant Telus' application.

[24] The plaintiffs point to section 11 of the ***Criminal Code of Canada***. Section 11 reads:

> No civil remedy for an act or omission is suspended or affected by reason that the act or omission is a criminal offence. R.S., c. C-34, s. 10.

[25] The plaintiffs rely on the law enunciated by Macfarlane J.A. in ***Haywood Securities Inc. v. Intertech Resource Group Inc.*** (1985), 68 B.C.L.R. 145. At page 152, Macfarlane J.A. considered whether a potential witness or witness has a right to refuse to answer questions. Macfarlane J.A. held:

> The common law right of a witness to refuse to answer a question on the ground that his answer might tend to incriminate him was abolished by the Canada Evidence Act, 1893, c. 31: see ***De Iorio v. Montreal Jail Warden***, [1978] 1 S.C.R. 152, 35 C.R.N.S. 57, 8 N.R. 361. The common law right was replaced by s. 5(1), which compels the witness to answer. Section 5(2) provides that, upon an appropriate objection having

been taken to a question, the answers shall not be used or received in evidence against the witness in any subsequent criminal trial or proceeding. Section 4 of the Evidence Act, (British Columbia) is to the same effect.

The common law right was a right not to testify if the answers might tend to incriminate the witness. Canadian law has recognized *the right of an accused* not to testify, and that right has been enshrined in s. 11(c) of the Charter. Canadian law has recognized *the right of a witness* not to be incriminated by evidence he has been compelled to give in another proceeding. That right has been enshrined in s. 2(d) of the Canadian Bill of Rights. Section 13 of the Charter has given that protection constitutional status. But neither Canadian law nor the Charter has recognized the right of such a witness not to testify (except in those rare cases where the evidence will be so prejudicial that a stay of the proceedings is justified until criminal proceedings are concluded).

[26] At page 153, Macfarlane J.A. went on to note:

I agree that if the sole aim and purpose of the proceeding was to obtain evidence to support a charge or to assist the criminal prosecution of the witness, it might be arguable that the witness ought not to be compelled to divulge information which might lead to his conviction. But, in my view, such a result would follow only if the proceedings in which such evidence was given were so devoid of any legitimate public purpose and so deliberately designed to assist the prosecution of the witness that to allow them to continue would constitute an injustice. In such circumstances, the continuance of the proceedings could be said to constitute a violation of the principles of fundamental justice.

[27] The same position was also enunciated by the British Columbia Court of Appeal in ***Summa Corporation v. Meier*** (1981), 127 D.L.R. (3d) 238.

[28] The question I have to decide is whether Telus has discharged the onus of satisfying the Court that not only is it prejudiced by the action proceeding, but it is prejudiced to such an extent that it can be said that the prejudice is exceptional or extraordinary.

[29] In what way is it prejudiced? Obviously, as it demonstrated, certainly in the case of John Doe and Jane Doe and no doubt in other cases of other employees, the employees are not prepared to answer any questions at all pending the completion of the criminal proceedings. The investigation which it is incumbent upon Telus to make, if it is to make full answer and defence, must include interviews of the employees whose duties or misfeasances could be relevant to the crimes and torts alleged. The investigation must also include following the electronic spoors or clues left by the wrongdoers, whoever they may be, if they exist at all, which led to the alleged interception of the phone calls, the faxes, and the e-mail.

[30] However, while I understand the difficulties this results in for the Telus investigators, I am not of the view that it amounts to prejudice so extraordinary and exceptional that it would be appropriate to grant a stay. If I were to endorse the view urged upon me by the defendant Telus, it might lead to employees who had engaged in wrongdoing simply refusing to answer any questions, even though they had a duty to answer, on the grounds that the answers might be incriminating.

[31] I understand the problems Telus faces but that is not a ground, in my view, for ordering a stay. There are, as counsel for the plaintiffs have said, other remedies. Telus can file a defence pleading, in the alternative, that if the actions were perpetrated, which is not admitted but denied, they were carried out in circumstances outside the scope of the employees' authority. Telus can third-party the employees or cross-examine them as witnesses adverse in interest. It is not for me to speculate on the various alternatives that remain open under the ***Rules of Court*** to Telus.

[32] Suffice it to say that I endorse and apply the *dicta* of Zuber J. in ***Stickney v. Trusz,*** *supra*, that the mere fact there are both criminal and civil proceedings pending arising out of the same facts is not a sufficient ground to qualify as an exceptional case in which the civil proceedings should be stayed.

[33] In this case, the trouble caused for the defendant Telus is brought about by the circumstance that the employees are asserting a legal right that has no foundation in law. Namely, the purported right of an employee to refuse to answer questions pertaining to employment on the grounds that to do so might be self-incriminating. There is no such legal right.

[34] Persons who give such statements in certain circumstances are protected from the statements being used against them, but nevertheless, they may still be, in certain circumstances, as they are at bar with Telus, under an obligation to answer the questions. Therefore, the application for a stay is dismissed.

[35] The plaintiffs shall have their costs on Scale 3.

"D.D. Owen-Flood, J."
The Honourable Mr. Justice D.D. Owen-Flood