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When men are pure, laws are useless; when men are corrupt, laws are broken.

~ Benjamin Disraeli
(1804 – 1881)

TELECOMMUNICATIONS

CRTC provides clarity about scope of MDU access condition

Stephen Zolf,
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Timely access under the CRTC’s MDU access condition will be satisfied if a CSP is able to negotiate access terms at a suitable time during the construction phase of a project.

The Canadian Radio-television and Telecommunications Commission (“CRTC”) continues to oversee disputes between competitive tele-

communications and broadcasting communications service providers (“CSPs”) and building owners for access to high-density, multi-dwelling units (“MDUs”). MDUs are important new revenue sources for CSPs seeking new customers, given the competitive distribution environment.

Disputes often centre over timely access to MDUs, particularly at the construction or development stage of a project. A recent dispute before the CRTC involving Bell Canada and a developer over access to an MDU illustrates the importance of this competitive arena.

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EMPLOYMENT LAW

Employee on indefinite suspension constructively dismissed

Andy Pushalik,
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Revisiting the test for constructive dismissal, the Supreme Court has confirmed that an administrative suspension may trigger such a claim.

The law on constructive dismissal has received a bit of a facelift. On March

6, 2015, the Supreme Court of Canada released its decision in *Potter v. New Brunswick (Legal Aid Services Commission)*. The Court revisited the test that an employee must meet to establish constructive dismissal and confirmed that, in some instances, an administrative suspension will trigger such a claim.

Facts

On March 16, 2006, the Province of New Brunswick appointed David Potter as the Executive Director of

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WHITE COLLAR CRIME

Jim Patterson, *Bennett Jones LLP*

Telecommunications *continued from page 17***Bell Canada dispute**

Bell Canada had been discussing the terms and conditions of an access agreement with a residential developer that would allow Bell to install its communications facilities in a 526-unit MDU project. The project, located in the Yorkville area of Toronto, was in the construction stage at the time of the negotiations.

The developer had provided Bell with a draft Building Access Licence (“BAL”) for discussion purposes, to which Bell had provided comments and revisions. During the negotiations, the developer indicated that it was no longer prepared to proceed further, unless the parties could agree upon recoverable costs realized by the developer as a result of Bell Canada’s access to the MDU.

Negotiations terminated

Upon receiving the developer’s financial terms for cost recovery, Bell Canada immediately agreed to the proposal, conditional on receiving and reviewing a current site plan for the MDU and conducting a site inspection.

Subsequently, however, the developer advised Bell Canada that it had secured an access agreement with a second CSP, Beanfield Technologies Inc. (“Beanfield”).

Rogers Communications Partnership (“RCP”) had already installed communications facilities in the MDU. The developer stated that it no longer wished to continue negotiations with Bell. In view of this dispute, Bell Canada filed an application with the CRTC seeking interim and final relief regarding access to the MDU.

CRTC policy

The Bell application is but one of several disputes that have recently come before the CRTC over the scope of the CRTC’s policy relating to competitive access to MDUs by CSPs. The CRTC’s policy, established in

2003, provides for an “MDU access framework” that emphasizes the importance of facilitating competition and end-user choice for telecommunications and broadcasting services.

More specifically, the framework states that end-users should have the right to access the CSP of their choice, regardless of the type of dwelling they are in. Among the requirements of this policy is that competitive CSPs should specifically be able to access an MDU *during the construction stage*.

CRTC decisions since 2003 have affirmed that where competitive CSPs were not allowed access during the construction stage of an MDU, some residents effectively were denied their choice of CSP for their telecommunications services at the time they moved into the building.

For example, in a 2014 ruling, the CRTC found that obliging a CSP to wait several months for a condominium board to be elected before potentially being granted access to the MDU was contrary to the MDU access framework because it denied residents a choice of CSP at the time they took possession of their units.

Bell application

Bell sought interim and final relief from the CRTC. In its claim for interim relief, Bell asked the CRTC to prohibit Beanfield (or any other CSP) from installing any equipment in, occupying, or otherwise interfering with any of the equipment spaces that the developer offered for Bell Canada’s use, pending Bell’s review of updated site plans and inspection.

No harm

The CRTC denied Bell Canada’s claim for interim relief. Bell Canada had failed to demonstrate that it would incur harm, let alone irreparable harm, if a service provider was not prohibited from installing equipment in the MDU (while Bell reviewed the updated site plans and inspected the space).

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The CRTC cited the developer's statement that there was sufficient space in the MDU. Even if there were insufficient space, under the MDU access framework, the building owner may (among other things) permit the CSP to construct additional riser space in the MDU, or allow the CSP to upgrade or replace the existing in-building wire and related facilities to make more efficient use of the riser space available.

Therefore, the CRTC found that there were other options available to Bell Canada without having to prevent Beanfield, or any other CSP, from installing its equipment in the MDU.

Requested relief

In its application for final relief, Bell Canada requested a CRTC determination that the MDU access condition would only be satisfied if the developer took steps to make capacity in the equipment spaces available to Bell Canada immediately, at the rates that the developer had previously proposed.

In the event that the MDU access condition remained unsatisfied, Bell sought the following additional relief:

- an order requiring that it be granted immediate access to the main terminal room ("MTR") in the MDU, sufficient capacity in vertical conduits connecting the MTR to each communications closet, and access to each end-user suite in the MDU for the purposes of installing, operating, maintaining and replacing its communications facilities;
- a determination that other CSPs, including Beanfield and RCP, not be permitted to provide their respective telecommunications services in the MDU unless and until Bell Canada has been given timely access under reasonable terms and conditions;

- negotiation of all other terms and conditions of a formal BAL under commercially reasonable terms, with further recourse to the CRTC as may be required; and
- any other relief that the CRTC considered just and reasonable in the circumstances.

End-user choice

The Commission ultimately found that the developer's decision to terminate negotiations with Bell Canada was contrary to the principles of the MDU policy.

While the CRTC acknowledged that end-users in the MDU had, even without the presence of Bell Canada, the choice of two CSPs, one of the guiding principles of the MDU policy is that end-users in MDUs should have direct access to the CSP *of their choice*.

Access denial

This principle reflects the importance that the CRTC has placed on facilitating competition and maximizing end-user choice.

With regard to Bell Canada's conditional acceptance of the developer's proposed financial terms for recoverable costs, the absence of financial burden imposed on the developer with respect to the satisfaction of Bell Canada's conditions, and the fact that the record of the proceeding indicated that there was room available in both the MTR and the conduits of the MDU, the CRTC found that the developer's actions denied Bell Canada access to the MDU on reasonable terms and conditions, contrary to the MDU access framework.

The CRTC determined that Beanfield and RCP would not be permitted to provide telecommunications services in the MDU unless Bell Canada had been notified by the developer that it would be granted timely access

under reasonable terms and conditions, defined as follows:

- immediate access to the MDU for the purpose of extending Bell Canada's network from the street to the MTR; and
- once Bell Canada's network is inside the MTR, access to the MDU for the purpose of extending Bell Canada's network from the MTR to individual units (via the communications closets, if required) upon request by unit owners for services from Bell Canada.

Significance

The CRTC's ruling should be seen as providing more clarity to the scope of the MDU access condition. Based on this and earlier determinations, it can be inferred that timely access under the MDU access condition will be satisfied if a CSP has the opportunity to negotiate access terms at a suitable time during the construction phase.

REFERENCES: *Telecommunications Act*, S.C. 1993, c.38; Telecom Decision CRTC 2014-42, *Bell Canada – Request for access to Plaza Corporation's York Harbour Club multi-dwelling unit building project*, February 5, 2014; Telecom Decision CRTC 2003-45, *Provision of telecommunications services to customers in multi-dwelling units*, June 30, 2003; Telecom Decision CRTC 2014-669, *Bell Canada–Application for interim relief to ensure timely access on reasonable terms to Edenshaw Homes Limited's Chaz Yorkville multi-dwelling unit project*, December 19, 2014; Telecom Decision CRTC 2015-148, *Bell Canada–Application for timely access on reasonable terms to Edenshaw Homes Limited's Chaz Yorkville multi-dwelling unit project*, April 16, 2015.

Legal Aid. The appointment was for a seven-year term that was to expire on December 12, 2012. However, by the spring of 2009, the employment relationship had ruptured, leading Potter and the New Brunswick Legal Aid Services Commission to commence negotiations for a buyout of the remainder of Potter's contract.

In October 2009, Potter commenced an approved medical leave of absence. While he was originally expected to return to work in one month's time, Potter subsequently extended his leave to January 18, 2010.

In the meantime, and unbeknownst to Potter, the Commission's Board of Directors decided that if the buyout negotiations were not resolved by January 11, it would ask the Lieutenant-Governor in Council to terminate Potter's employment for cause.

Termination for cause

January 11 came and went without an agreement. As a result, the Chair of the Board wrote to the Minister of Justice recommending that Potter's employment be terminated for cause. On the same day, the Commission's counsel sent a letter to Potter advising him that he was not to return to work "until further notice."

Potter was not provided with any further details regarding the reasons for the suspension or its planned duration. Absent this information, on March 9, 2010, Potter started an action for wrongful dismissal in which he alleged that he had been constructively dismissed.

Resignation

At trial, the judge dismissed Potter's claim, ruling that his indefinite administrative suspension with pay did not constitute a constructive dismissal. The judge further ruled that by commencing litigation, Potter had effectively resigned his employment. This decision was unanimously upheld on appeal.

Supreme Court

Almost five years to the day after Potter commenced his action, the Supreme Court of Canada granted his appeal, overturning the lower courts' decisions and granting damages for wrongful dismissal. In so doing, the Court provided detailed reasons regarding the test that must be met to trigger a constructive dismissal.

Contractual breach

Writing for the majority, Justice Wagner noted that two branches of the test have emerged. Under the first branch, the court must determine whether there has been a breach of the employment contract. This part of the analysis will require the court to determine if the employer has unilaterally changed the contract.

If the answer to this first question is "yes," the court must then consider whether a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being *substantially* changed.

Employer conduct

Under the second branch, the court must consider the employer's conduct and whether it would lead a reasonable person to conclude that an employer no longer intended to be bound by the terms of the contract.

It is not necessary for the employee to point to a specific contractual breach by the employer; rather, the focus of this particular analysis is on whether the employer's conduct demonstrates an intention not to be bound by the employment contract.

Applying the first branch of the test set out above, the Court ruled that Potter's indefinite suspension constituted a constructive dismissal. In Justice Wagner's view, the indefinite duration of the suspension, coupled with the Commission's failure to provide Potter with any valid business reasons for the suspension and its secret intention to

terminate Potter's employment for cause, represented a serious breach of the employment contract that amounted to a substantial and unilateral change in the essential terms of the contract.

Significance

While the Supreme Court's guidance on the proper test to be applied when determining whether an employer's conduct has triggered a constructive dismissal will certainly be of interest to the employment law community, the Court's comments on when a suspension will constitute a constructive dismissal are equally important.

Employer lessons

In all cases of administrative suspensions, an employer must establish that the suspension was reasonable and justified. Such an analysis will require a consideration of a number of relevant factors, including the duration of the suspension, whether the suspension is with pay, and whether the employer has behaved in good faith by demonstrating legitimate business reasons for the suspension.

Accordingly, when considering whether to suspend an employee, an employer should ensure that it has legitimate business reasons which support such a decision and set clear limits on how long the suspension will last.

Employers may also want to consider whether they want to expressly indicate their right to suspend an employee by including a specific clause in their employment contracts. Ultimately, the employer must satisfy the court that it has behaved honestly and in good faith.

REFERENCES: *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 CSC 10, 2015 SCC 10, 2015 CarswellNB 87, 2015 CarswellNB 88, 21 C.C.E.L. (4th) 1, 381 D.L.R. (4th) 1 (S.C.C.).