SUPREME COURT OF NOVA SCOTIA
Citation: ***Bell Aliant Regional Communications v Cabletec Ltd.*** , 2013 NSSC 3

Date: 20130104
Docket:
Hfx No 307920
Registry: Halifax

Between:

Bell Aliant Regional Communications,
Limited Partnership by its General Partner,
Bell Aliant Regional Communications Inc.

Plaintiff

v.

Cabletec Limited

Defendant

-and-

Between: Hfx No 307917

Bell Aliant Regional Communications,
Limited Partnership by its General Partner,
Bell Aliant Regional Communications Inc.

Plaintiff

v.

J. Clair Callaghan

Defendant

Judge:	The Honourable Justice Gregory M. Warner
Heard:	November 5 to 7, 2012, in Halifax, Nova Scotia
Final Written Submissions:	December 24, 2012
Written Decision:	January 4, 2013
Counsel:	**Joseph M. Herschorn**, counsel for the plaintiff, Bell Aliant Regional Communications

J. Clair Callaghan, self-represented, and representing
Cabletec Limited

By the Court:

Overview

[1] **Cabletec Limited** ("Cabletec") is a telecommunication service provider; that is, it sells, installs and services telephone and related services to businesses. It leases telephone lines, internet and cellular access, and other products at wholesale prices from Aliant. It installs and services its own hardware, and repackages and sells access to Aliant's communication system.

[2] **Bell Aliant Regional Communications** ("Aliant") claims $1,697,115.22 from Cabletec as of December 31, 2008, plus interest at 1% per month to October 31, 2012, for a total of $2,682,220.82.

[3] The claim relates to the provision of wholesale telecommunication services from 1989 to January 2, 2009.

[4] On January 3, 2008, Aliant disconnected Cabletec's access to Aliant's telecommunication system, including its trunk lines and internet service. The reason was Cabletec's failure to keep its account up-to-date and make an arrangement satisfactory to Aliant for the payment of arrears.

[5] In a separate action, Aliant claims against **J. Clair Callaghan** ("Callaghan") on his personal guarantee of Cabletec's liabilities to Aliant, which guarantee was likely executed (the year is not on

the document) on January 23, 2004, in the amount of $200,000.00, including interest from the date of demand.

[6] Cabletec defends and counterclaims that repeated representations by Aliant officials, that it would compensate for, or seek a reduction of, the uncompetitive regulated wholesale rates charged Cabletec, to reflect the new competitive landscape that made Cabletec, Aliant's largest wholesale customer, uncompetitive, constituted a collateral agreement, or alternatively were reneged upon and constitute negligent misrepresentations.

[7] Cabletec also counterclaims that Cabletec suffered loss and damage by the manner in which Aliant disconnected Cabletec's lines and effectively stole Cabletec's customers. Cabletec and Callaghan claim that Aliant acted unlawfully and not in good faith in how it terminated service.

[8] Cabletec's relationship with Aliant, and its predecessors, was with its Wholesale Carrier Services Group ("Wholesale Group"). Aliant also has a retail or direct sales division. It was a competitor of Cabletec. Cabletec submits that immediately after terminating access to telecommunication services (without reasonable notice), Aliant ported or transferred Cabletec's telephone numbers to a competitor, and, through its retail division, solicited Cabletec's customers.

[9] Paul Pothier, the current head of the Wholesale Group, testified that Aliant operated separate divisions. The Wholesale Group operated separately from the retail or direct sales division, and had no involvement in causing Cabletec's number(s) to be "ported", and its' customers to be solicited

by the retail division.

[10] Aliant's claim is in debt. It has the onus of proving, on a balance of probabilities:

i) the existence of agreements between Aliant and Cabletec;

ii) the terms of any contracts or agreements; and,

iii) the quantum of the debt claimed.

[11] The quantum of the debt involves a substantial claim for interest (called "late payment charges").

[12] Cabletec and Callaghan admit the existence of contracts between Cabletec and Aliant, but dispute the terms of the contracts. Cabletec and Callaghan plead and state that they have no knowledge as to whether the amounts claimed by Aliant are correct. Cabletec and Callaghan claim that representations by officials of Aliant have the effect of reducing Aliant's claim. Cabletec and Callaghan have the onus of proving any collateral contracts, negligent misrepresentation, and wrongful termination of its access to telecommunication services by Aliant.

[13] The Telecommunications Services Agreement of July 29, 2003, the only comprehensive written agreement put in evidence, provided for a "loyalty bonus" or rebate to Cabletec of 13.5 % for all non-tariff services (services not regulated by CRTC). Callaghan states that at various times after the market became competitive Aliant officals, and specifically in the fall of 2008, Gilles Volpe, the Wholesale Group sales manager, advised him that Aliant was going to apply to CRTC

for a rate revision that would reduce Cabletec's 'Centrex'(regulated) rates, and in the meantime would pay to Cabletec a commission on its 'Centrex' service accounts. Volpe ceased employment with Aliant abruptly in or about November 2008. He was on Aliant's list of witnesses, but did not testify. Pothier says that a senior vice-president, and the marketing and regulatory divisions, would have to approve any such change, and no such change to Cabletec's agreement was ever approved.

[14] This decision deals with the issues in four parts: (1) Has Aliant proven its agreements with Cabletec and their terms? (2) Has Aliant proven the quantum of its claim? (3) Have Cabletec and Callaghan proven that collateral agreements existed or that negligent misrepresentations were made, or that Aliant acted unlawfully or not in good faith in the manner in which it terminated Cabletec? (4) Has Aliant proven entitlement to payment from Callaghan on the guarantee?

The Evidence

The agreements between Aliant and Cabletec

[15] The oral evidence consisted of three witnesses for Aliant: Paul Pothier, director of the Wholesale Group since February 2008; Bill Hanson, an account executive with the Wholesale Group, responsible for Cabletec's accounts from 2000; and Trevor Holman, the financial analyst responsible for the financial operations of the Wholesale Group. J. Clair Callaghan was the only witness for the Defendants. The only documents tendered were tendered by Aliant.

[16] None of the witnesses, except Callaghan, had personal knowledge of the agreements

between Cabletec and Aliant before 2000. The oldest document in evidence respecting the relationship between a predecessor of Aliant and Cabletec is an agreement dated December 15, 1999.

[17] Because Aliant's claim is contract, and based on written agreements, it is relevant that Aliant's claim relates to services provided originally by three separate telecommunication companies: Maritime Tel & Tel in Nova Scotia; NB Tel in New Brunswick and PEI Tel in Prince Edward Island. At some point before 2003, these three corporations somehow merged into a single corporation, Aliant Telecom Inc, which in turn, at some point before these actions were commenced, morphed in Bell Aliant Regional Communications Limited Partnership, whose general partner was Bell Aliant Regional Communications Inc. (called "Aliant").

[18] The services provided by Aliant and its predecessors to Cabletec included 'Centrex Business Service', long distance, internet, and related telecommunication services.

[19] The Centrex Business Service is regulated by the CRTC, meaning that the terms of any contracts between Aliant and resellers like Cabletec, were subject to approval by CRTC on application of Aliant. It appears that Centrex is a PBX-like service, but differs from PBX in that the telephone service provider, not the end user, owns and manages the communication equipment and software that enable a business to organize and operate a unique telecommunication system of lines and extensions.

[20] In the matrix of this case, instead of Aliant providing a direct PBX-like service to business

customers (which it does through its retail or direct sales division), it contracted with a reseller, Cabletec, to supply the reseller a number of telecommunication lines for an agreed period of time, and the reseller owns, services and updates telecommunication service to business customer. The reseller solicits and contracts with the end user. CRTC approves, as 'General Tariff', the terms and rates of agreements for regulated services between "telcos" like Aliant and resellers. In theory, the approved tariff gives the reseller a sufficient margin to resell telecommunication services to its customers at a profit reflective of the services the reseller provides to its customers.

[21] With respect to Centrex, service providers like Cabletec sign agreements with telecos like Aliant to lease a fixed number of lines for a minimum term and, in return, receive a reduced monthly line rental based on the total number of lines and length of the term in years. The more lines and/or the longer the term of the lease in years, the lower the monthly line rate for each leased line. Because the terms and rates are applied for by Aliant and approved by CRTC, the agreements between Aliant and resellers like Cabletec were standardized short fill-in-the-blank contracts, wherein the reseller simply elects to buy Centrex services from Aliant in accordance with the CRTC-approved General Tariff, which tariff contains the detailed terms and rates, and which tariff is periodically revised.

[22] Aliant produced two such agreements, the first between MTT (the Nova Scotia predecessor to Aliant Telecom) and Cabletec dated December 15, 1999, and the second between Aliant and Cabletec covering the Nova Scotia Region, dated January 8, 2007. In addition, Aliant tendered portions of CRTC-approved General Tariff. As noted, Aliant Telecom, predecessor to the Plaintiff, and Cabletec signed a Telecommunications Services Agreement dated July 29, 2003 covering

regulated and unregulated services; it is significant that the appendices containing the schedules for various services (and rates) are missing.

[23] These three written agreements and portions of the Tariff constitute Aliant's documentary evidence of its agreements with Cabletec.

[24] As noted above, service providers like Cabletec purchased telecommunication services other than regulated Centrex services. These included cellular access, long distance access and internet lines. These unregulated services were called by the parties "forborne" services and were, according to the witnesses, the subject matter of separate agreements between Aliant and Cabletec. Other than reference to these services in the (incomplete) Telecommunications Services Agreement of July 29, 2003, no documentary evidence of terms and rates for these services was tendered.

[25] The evidence is that Cabletec purchased almost all of its telecommunication services from Aliant's Wholesale Group since 1989.

[26] No documents were tendered respecting the terms and conditions of the agreements for either the regulated (Centrex), or unregulated 'forborne' services between Aliant and Cabletec for New Brunswick and Prince Edward Island.

[27] As noted, the oldest of the three documents is a one-page fill-in-the-blank form entitled "Election of Centrex Service" dated December 15, 1999, whereby Cabletec Business Comm. Ltd.

elected to subscribe for between 500 - 1499 “accesses” (lines) from MTT(Nova Scotia), for a minimum term of five years, starting August 20, 1999 and ending August 19, 2004 “in accordance with MTT’s General Tariff” (as approved by CRTC).

[28] The second is a one-page fill-in-the-blank form, entitled “Election of Centrex Service-NS Region” signed January 8, 2007, between Cabletec and Aliant for between 1,501 and 5,000 accesses for a minimum term of five years, beginning August 20, 2004 and ending August 20, 2009.

[29] Tendered as evidence of the General Tariff were four exhibits containing several items from the General Tariff approved at various times by CRTC for Centrex services by MTT, PEI Telecom Inc and Aliant Telecom Inc. No “election” agreements were tendered for Centrex services in New Brunswick or Prince Edward Island.

[30] The tendered pages from the General Tariff show the effective dates for various versions of the terms, conditions and rates approved by CRTC. One exhibit outlined the general terms with effective dates as old as August 27, 1993, and as recent as June 10, 2008; other pages show approved rates with effective dates as old as November 8, 1993, and as recent as January 15, 2009. Two other exhibits show Centrex terms, conditions and rates as of 2008. A fourth exhibit contains as Item #1.1.5 authorization of “late payment charges”, which appears to have been initially authorized effective May 16, 2002, and last revised effective November 20, 2007.

[31] The only contract-like document respecting services was the Telecommunications Services

Agreement executed as of July 29, 2003 between Cabletec and Aliant Telecom Inc. The agreement appears to be intended to cover both the CRTC-regulated Centrex service, and the other non-regulated or forborne services. The appendices to the agreement containing the agreed rates for services are missing. There is no evidence before the court as to the agreed terms and rates for non-regulated or forborne services.

[32] Aliant's only documentary presentation of the quantum of its claim is Exhibit 1, Tab 31, a one-page summary prepared for this litigation by Trevor Holman, the Aliant accountant responsible for the financial reporting of the Wholesale Group. Attached to the summary is a computer printout requested by him of persons working under him of monthly aged account records for various Cabletec accounts for Nova Scotia, New Brunswick and PEI, beginning on November 15, 2003 for Nova Scotia and PEI accounts, and January 15, 2006 for New Brunswick accounts.

Analysis of the quantum of Aliant's claim

[33] Analysis of Aliant's quantification of its claim is in two parts: the pre-October 15, 2003 claim, and the post October 15, 2003 claim.

What was the debt owing by Cabletec to Aliant as of October 15, 2003?

[34] In his summary of the accounts (first page, Exhibit 1, Tab 31), Mr. Holman listed on the seventh line the "Past Due" amount owed by Cabletec to Aliant as of October 15, 2003, as $614,942.83. Neither he nor any Aliant witness produced any business record or other document

that would show where that figure came from and whether it was part of the regulated (Centrex) service or part of the non-regulated (forborne) services and, if so, in what proportion. No document was tendered to show how it was calculated.

[35] Nothing in the computer printout, requisitioned by Mr. Holman from his staff and attached to the summary, sets out this claim or showed how it may have been calculated. Mr. Holman testified that he took the figure from Aliant records but he had no personal knowledge of its composition, and could not provide any specific information as to how the amount was arrived at. The summary page prepared by him for this litigation is not a business record. In effect, he was asking the court to trust that whatever records he may have used to calculate line seven were true.

[36] The December 19, 1999 agreement "Election of Centrex Services" and the portions of MTT's CRTC-approved General Tariff, tendered into evidence, do not assist in establishing the amount claimed by Aliant as past due as of October 15, 2003.

[37] Aliant submits that Cabletec and Callaghan 'have not taken issue with the calculation of arrears', and 'did not challenge it' in their defences or Callaghan's evidence.

[38] In the defences filed, Cabletec (paragraphs four and six) and Callaghan (paragraphs five and seven) deny what they do not specifically admit. They do not admit the amount of the debt claimed by Aliant and its predecessors.

[39] In his evidence, Callaghan acknowledged that Cabletec owed Aliant money as of October 15, 2003, but he did not calculate the amount owed and did not verify the amount claimed.

[40] In 2003, Cabletec was in arrears in its accounts with the predecessors of Aliant. Aliant threatened to terminate its agreement to provide regulated and non-regulated services to Cabletec on the basis of the arrears.

[41] Aliant agreed "to put in a box" (a term used by Aliant) the debt owed by Cabletec and not charge interest to Cabletec on its past due account on three conditions: (a) Cabletec would arrange for a third party guarantee of the payment of any future services provided by Aliant to Cabletec in the amount of $200,000; (b) Cabletec would pay for, and remain current, respecting all post-October 15, 2003, services; and, (c) Cabletec would enter into a reasonable repayment plan to clear up the past due amount.

[42] Cabletec accepted Aliant's conditions, and Callaghan agreed to sign a guarantee.

[43] Aliant prepared a Guarantee Agreement ("guarantee"). Callaghan signed the guarantee prepared by Aliant's lawyer in the presence of Bill Hanson, his Aliant account manager, on the same date Hanson presented it and asked him to sign. It appears that Callaghan executed the guarantee immediately and without independent legal advice. Callaghan does not contest the validity of the

guarantee.

[44] The guarantee is dated January 23; the year is not shown on the document. Both Bill Hanson and Callaghan agree that it would have been executed on or about January 23, 2004. The guarantee, and an e-mail dated January 27, 2004 from Callaghan to Bill Hanson and Brock Samson (then director of the Wholesale Group) contain the best and most reliable evidence of the amount owed on October 15, 2003.

[45] The guarantee prepared by Aliant in January 2004 included the following recitals and terms:

> AND WHEREAS Cabletec has failed to keep current in terms of payment for the Services resulting in excess of $420,000 in payments being past due as of October 15, 2003;
>
> AND WHEREAS Cabletec has failed to maintain payments toward past due amounts and the Creditor has provided notice to Cabletec that in order to secure the continued provisioning of Services Cabletec would have to (1) pay for all Services provided after October 15, 2003 when due, (2) enter into and comply with a reasonable payment plan ... that will pay down the past due amounts relating to the Services provisioned on or prior to October 15, 2003 prior to December 31, 2005 (collectively the "Prior Debt") and (3) have a third party guarantee continued payment of all Services provided to Cabletec from the date of October 15, 2003;

[46] As stated, this Guarantee, prepared by Aliant with the date of the 23rd day of January (year omitted but agreed by the witnesses to be 2004), suggests that, on or about January 23, 2004, approximately $420,000 was determined to be owing by Cabletec as of October 15, 2003.

[47] A March 27, 2004 e-mail, prepared in draft by Callaghan for Brock Samson, and forwarded

by Callaghan to William Hanson for his approval, contains 14 paragraphs dealing with the past due account. The third, fifth, seventh, eighth and fourteenth paragraphs read as follows:

> [3] I had a further relationship with Aliant. In 1994 I acquired Quality Connections Limited in response to a proposal from Aliant. This Company had a major "account payable" of approximately $500,000.00 to Aliant at the time. I entered into an agreement to pay this payable from profits over the next 5 year. This commitment was fully met and on time.
>
> [5] The payable to Aliant as of April 2003 was: $591,963.47. In April 2003, Cabletec and Aliant entered an agreement to deal with the payable. Aliant agreed to place $591,963.47 in a special account without interest. Cabletec agreed to make three lump sum payments; one in April of $92,255.18 and one in May of $75,000.00 and one in September of $75,000.00, plus payments of $15,000.00 per month beyond "current billing". The residual amount of $319,708.29 was to be paid out in December.
>
> [7] I made the $100,00.00 loan to Cabletec. Cabletec made the April and May lump payments of $92,255.47 and $75,000.00 respectively and 4 of the $15,000.00 monthly payments beyond paying the current invoices. However, the Bank of Montreal reduced the line of credit by another $150,000.00 and the Federal Business Bank did not agree to provide an operating loan. The discussions with both the Bank of Montreal and Federal Bank were bedevilled by the potential problem represented by the Aliant payable. Cabletec did not make the lump sum payment of $75,000.00 scheduled for September and had slipped a further one month payment as of November.
>
> [8] You and I with Bill discussed the matter in late November. I provided Cabletec's financial statements to Aliant. As I understood our concluding conversations, Aliant, as well as I, deemed that the best approach was to keep Cabletec in operation with the understanding that the payable problem would not grow. I agreed to guarantee that the problem would not become worse for Aliant. We, Aliant and I, entered an Agreement in January 2004 to support this commitment. The burden of the agreement is set out in the preamble of the Agreement. I personally guaranteed to fund up to $200,000.00 of any current payables beyond the amount of aged debt of $422,000.00.
>
> [14] In the long term, the aged debt of $422,000.00 can be paid from Cabletec earnings. The rate of payment that would be realistic will be known as time progresses. It seems to me that it would only be fair that in any further agreement that Cabletec commits to Aliant that any Cabletec profits be used to reduce the payable to Aliant.

[48] My reading of this email, tendered by Aliant, is that Cabletec acknowledged a debt of $591,963.47 as of April 2003, and made payments on that debt of $227,255.18, of which at least $167,255.18 was paid by May 2003, and a further $60,000.00 ($15,000.00 per month beyond "current billing") was paid before the March 27, 2004 e-mail.

[49] In summary, as of March 27, 2004, the past due amount acknowledged by Cabletec was $364,708.29. This is consistent with the guarantee, prepared by Aliant on or about January 23, 2004, showing a past due account in January 2004 of about $420,000.00, reduced by the monthly payments beyond current billing between June 2003 and March 2004.

[50] Aliant has not discharged the evidentiary onus of proving that $619,942.83 was owed by Cabletec as of October 15, 2003. My conclusion that the best evidence respecting the October 15, 2003 debt differed so greatly from the unsubstantiated claim for $619,942.83, causes me reservations respecting the reliability of Aliant's evidence as to the quantum of the post October 15, 2003 debt.

[51] Based solely on the acknowledgment of Cabletec, contained in the guarantee prepared by Bell Aliant in or about January 2004, and the March 27, 2004 Callaghan e-mail, I find that, despite the absence of the written terms of the agreements between Aliant and Cabletec and the absence of business records or accounting of the quantum of the past due account as of October 15, 2003, on or about March 27, 2004, Cabletec owed Aliant $364,708.29 respecting the pre-October 2003 debt.

[52] This debt was owed without interest, based on the only evidence before the Court, that the past due account was "placed in a box" by Aliant, a phrase intended to reflect that interest would not be charged on that debt.

[53] No agreement, or CRTC-approved General Tariff, was produced respecting regulated or non-regulated services by which it could be established that interest was payable on the past due account acknowledged by Cabletec ($364,708.28). Section 5.2 of the Telecommunications Services Agreement provides for interest at the rate specified in Aliant's invoices from time to time. No invoices have been tendered. The CRTC-approved General Tariff (Exhibit 5) gave Aliant "the right and privilege to charge a surcharge" on overdue accounts at rates set out in the Tariff. The Tariff did not require a surcharge. I presume that is why Aliant was able to offer to put Cabletec's past due debt "in a box" in 2003. The oldest Tariff authorizing interest on overdue accounts tendered was effective May 16, 2002.

[54] Aliant relies on the oral evidence of Paul Pothier and Trevor Holman to the effect that invoices would have been sent. In the circumstances, absent evidence of an agreement to pay interest on regulated services in Nova Scotia, New Brunswick and Prince Edward Island, or unregulated services anywhere, and absent evidence of a CRTC-approved tariff authorizing interest for regulated services in Nova Scotia before May 16, 2002, Aliant has not met the civil standard of proof of the quantum of its claim.

[55] In summary, Aliant has proven only a pre-October 15, 2003 debt, which as of March 27,

2004, was outstanding in the amount of $364,708.29. No entitlement to interest on that debt has been proven.

What debt accrued after October 15, 2003?

[56] Aliant's predecessors provided regulated services pursuant to the "Election of Centrex Services" document dated December 15, 1999, for the period to August 19, 2004 and pursuant to the "Election of Centrex Services - Nova Scotia Region" dated January 8, 2007, for the period beginning August 20, 2004. These agreements relate to Centrex services in Nova Scotia only. Aliant also provided non-regulated services pursuant to the "Telecommunication Services Agreement" of July 29, 2003.

[57] On its face, the Telecommunication Services Agreement appears to cover both regulated and non-regulated services. By paragraph 1.2, the regulated service schedule (Toll Plan) was attached as Appendix A and the non-regulated service schedule ("Miscellaneous - Rental Sets, High Speed Internet, Cellular") was attached as Appendix B. Neither Appendix A nor Appendix B are attached to the Exhibit. As a result, no evidence of the agreement with respect to the charges for the non-regulated services (Appendix B) exists, and the only evidence of agreement with respect to charges for regulated service are the portions of the CRTC-approved General Tariff tendered in Exhibits 2 to 5.

[58] The summary of accounts prepared by Mr. Holman (Exhibit 1, Tab 31, and Exhibit 7)

supported by the computer records extracted at Mr. Holman's request from Aliant's records, show Cabletec's accounts for Nova Scotia, New Brunswick and Prince Edward Island for the period of October 15, 2003, to December 31, 2008, which I summarize as follows.

[59] Total billings to Cabletec (Line 1) of $6,010,460.36, less adjustments (Line 2) of $262,363.78, less payments (Line 5) of $4,671,901.11 for a total, including late payment charges, of $1,697,195.50. Mr. Holman "estimated" (his word) that of this amount, $243,275.01 constitute late payment charges, incurred at the interest rate set out in Aliant's accounting system (presumably the rate approved by CRTC for regulated services per Exhibit 5). There was no document or record tendered showing how Mr. Holman "estimated" the late payment charges. There is no breakdown of the total billing of about six million dollars as between the regulated (CRTC-approved Centrex service) and non-regulated services. The summary sheet does not show how much of the late payment charges relates to Nova Scotia Centrex services, the only region for which Aliant and Cabletec signed "election" forms.

[60] While the CRTC-approved General Tariff authorized interest on charges for regulated services for Nova Scotia (MTT from August 20, 1999, Exhibit 1, Tab 1, and Aliant-NS Region, Exhibit 1, Tab10), no agreement to pay interest for non-regulated services, or evidence of invoices charging interest, were put in evidence by Aliant.

[61] Normally interest is not chargeable unless there is an agreement to pay interest. The General Tariff authorized, but did not mandate, late payment charges. No invoice was put in evidence that

gave notice to Cabletec that interest was chargeable or at what rate it was chargeable.

[62] The only agreement for non-regulated services is the Telecommunications Services Agreement of July 29, 2003.

[63] By paragraph 4.1 of that agreement, Cabletec agreed to pay charges set out in each Appendix. The Appendices have not been produced. By paragraph 5.2, Cabletec agreed that charges not paid on the due date would bear interest at the rate specified in Aliant's invoices from time to time under the heading LPC (late payment charges). No invoices were produced.

[64] I conclude that Aliant has not proven entitlement to interest for non-regulated services, nor interest it was entitled to charge for the CRTC-approved Centrex services in New Brunswick or Prince Edward Island, absent evidence that it invoiced late payment charges in accord with the authorization contained in the General Tariff.

[65] While Aliant is entitled to interest on regulated services in accordance with the CRTC-approved General Tariff for Centrex service in Nova Scotia, there is no evidence before the Court as to what portion of the charges between October 15, 2003, and December 31, 2008, were for regulated services in Nova Scotia (or New Brunswick and Prince Edward Island) as opposed to non-regulated services, and no invoices or other evidence that Aliant invoiced Cabletec for late payment charges that the Tariff authorized it to charge.

[66] Therefore, from the claim for services after October 15, 2003, in the net amount of $1,076,195.47, I deduct Mr. Holman's "estimate" of the portion of that due account, claimed as late payment charges in the amount of $243,275.01(line 3, page 1, exhibit 31).

[67] In summary, subject to any defence and the counterclaim, Aliant has proven Cabletec owed Aliant $364,708.29, without interest, as of March 27, 2004 (for pre-October 15, 2003 accounts). With respect to services after October 15, 2003, Aliant has proven that Cabletec owes it $832,920.46 as of December 31, 2008, without interest. The proven total debt of Cabletec as of December 31, 2008 is $1,197,628.75.

[68] To repeat, Aliant agreed with Cabletec that the pre-October 15, 2003, debt would be "placed in a box" or interest free. While one might infer that Aliant would not have intended to continue that debt on an interest-free basis after it sued in February 2009, there is no evidence of an agreement or notice that the pre-October 15, 2003, would bear interest at any time before Aliant sued.

[69] Absent evidence before this Court proving an agreement to pay interest on the post-October 15, 2003 account or interest for non-regulated services, and absent evidence as to what portion of the debt is for regulated versus non-regulated services, Aliant has not proven its claim for interest.

[70] Aliant also claims interest at the CRTC-approved General Tariff rate from the date it terminated services to Cabletec to October 31, 2012, totalling $985,105.57. Absent proof, on a balance of probabilities, as to what portion of the debt is regulated versus non-regulated and absent

proof of an agreement to pay interest, Aliant has failed to establish its claim for pre-judgment interest on the basis of a contract or agreement.

[71] While Aliant has not proven that it is entitled to interest by contract, there remains other potential statutory sources of entitlement to interest.

[72] *Section 3* of the *Interest Act*, RSC 1985, c. I-15, provides:

> 3. Whenever any interest is payable by the agreement of the parties or by law, and no rate is fixed by the agreement or by law, the rate of interest shall be five per cent per annum.

[73] This provision was considered by the Supreme Court of Canada in ***Prince Albert Pulp Company Ltd v Foundation Company of Canada Ltd*** [1977] 1 SCR 200, where the unanimous court said:

> ... s. 3 is intended to apply where parties to an agreement have stipulated for the payment of interest, but no rate has been provided for, or where by law it is directed that interest be paid, but no rate has been set.

[74] Section 3 only applies if the party claiming interest proves it has a right to interest but the rate was left ambiguous or unspecified. Section 3 does not create an entitlement to interest. (See ***Bank of Montreal v Stephen***, (1990) 81 DLR (4th) 421 (NBCA)).

[75] Section 41 of the *Judicature Act* is relevant. Section 41(i) provides that:

> ... the Court shall include in the sum for which judgment is to be given interest thereon

> at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial ...

[76] Section 41(k) provides that:

> the Court in its discretion may decline to award interest under clause (i) or may reduce the rate of interest or the period for which it is awarded if
>
> (i) interest is payable as of right by virtue of an agreement or otherwise by law,
>
> (ii) the claimant has not during the whole of the pre-judgment period been deprived of the use of the money now being awarded, or
>
> (iii) the claimant has been responsible for undue delay in the litigation.

[77] The object of s. 41(i) has been considered by our Court of Appeal at least twice, in ***KW Robb & Associates v Wilson*** (1998), 169 NSR (2d) 201, at para 103, and ***Bush v Air Canada*** (1992), 109 NSR (2d) 91 at para 38.

[78] The discretion of the Court with regards to prejudgment interest cannot be exercised arbitrarily.

[79] With respect to the claim against Cabletec, I am satisfied, based on the reasoning of Justice Moir in ***Giffin v Soontiens,*** 2012 NSSC 2, that Aliant is entitled to simple interest at the rate of five percent per annum, non-cumulative, from the 2nd day of January, 2009, to the date of this judgment.

[80] This conclusion does not apply with respect to my analysis of the liability of Callaghan under the guarantee, dealt with separately in this decision.

Cabletec's Defences and Counterclaim

[81] The Defendants appeared to advance, as their defence during the trial, existence of a collateral agreement to offset the uneconomic rates charged and seek approval of lower rates from CRTC. In its post-trial brief, Cabletec instead argues that officials of Aliant negligently misrepresented that Aliant could and would reduce the rates it charged and/or pay Cabletec an administrative fee to create the same result, when it knew or ought to have known that the senior officers had no intention to do so. Cabletec argues that the evidence establishes the five factors for succeeding in a claim as set out in ***Queen v Cognos*** [1993] 1 SCR 87.

[82] Respecting its counterclaim, Cabletec submitted that Aliant's termination of services to Cabletec was effected without proper notice and in bad faith, and caused Cabletec loss and damages.

[83] Respecting the negligent misrepresentation claim, Aliant notes that neither fraudulent or negligent misrepresentation were pleaded, and is therefore not an available defence, as per ACJ Smith's decision in ***Gesner v Ernst***, 2007 NSSC 146. It further argues that Callaghan's vague references to promises made at various times by officials in the Wholesale Group never amounted to definitive promises to do more than to try to find a solution that would require the approval of 'higher-ups' in Aliant. No such approvals were ever given, and Cabletec knew this. No

misrepresentations were made.

[84] To create a basis for any claim against Aliant, the discussions between Aliant and Cabletec had to meet the strict standard of clear evidence of a definitive collateral agreement as described by Lord Moulton in ***Heilbut, Symons & Co v Buckleton***, [1913] AC 30 (HL). Aliant submits that Callaghan's vague evidence, including his evidence of what Mr. Volpe allegedly told him in 2008, does not meet this threshold.

[85] Respecting the alleged improper termination, Aliant simply says that the one month notice was sufficient. It left services in place for the benefit of Cabletec's customers without contracts.

Analysis

[86] Aliant account executives acknowledged that because of the increasing competitive nature of the business, Cabletec, a loyal customer of Aliant, would benefit from a better deal on rates for Centrex service, or line access. Rates for line access were regulated by CRTC. Aliant account executives in the Wholesale Group, agreed at various times to ask senior executives to consider approval of an application to CRTC for a revised schedule that would result in Cabletec having a lower monthly rate for line access. Callaghan testified that Gilles Volpe advised him that 'it was in the works'. Paul Pothier testified that the Executive Vice President and marketing department did not agree to a request for CRTC approval to reduce the line access rate for Cabletec. Cabletec has failed to prove, on a balance of probabilities, that Aliant agreed to a reduced line access rate.

[87] Cabletec further argues that, pending a rate reduction, Aliant's then Wholesale Group sales manager, Gilles Volpe, discussed an administrative fee of 16%, to offset part of Cabletec's cost for CRTC-regulated Centrex services that would have the effect of reducing the rate charged for lines. The 16% administrative fee was not dissimilar to the 13.5% loyalty bonus paid to Cabletec by Aliant for non-regulated services pursuant to para 6 of the Telecommunication Services Agreement. While there were likely discussions, at Callaghan's initiative, for relief in the form of an administrative fee between him and Volpe, the 16% figure was Callaghan's proposal, and Callaghan was clearly advised that Aliant's bosses did not approve of Callaghan's proposal.

[88] Cabletec argues that the court should draw an adverse inference against Aliant with respect to its late decision not to call Mssrs. Volpe and Kemball, both of whom worked in the Wholesale Group and had dealings with Cabletec, and whom Aliant had on its List of Witnesses. Aliant properly replies that it was Cabletec that gave notice at the time of the Summary Judgment hearing that it intended to call them. It was not reasonable for Cabletec to rely to Aliant to call witnesses whom Cabletec stated, at an early date in the litigation, it intended to call. In these circumstances, I conclude that it is no more appropriate to draw an adverse inference against Aliant than against Cabletec.

[89] The evidence of Bill Hanson, and the many e-mails in Exhibit 1, support Cabletec's statement that the Wholesale Group of Aliant was aware of Cabletec's financial difficulties and sympathetic to Cabletec's request for a better financial arrangement respecting line access for

Centrex services. However, it is equally clear that the Aliant vice president, who had to approve any request by the Wholesale Group for an application by the regulatory department to the CRTC for a more favourable rate, did not approve an application to change General Tariff for Centrex services, and that this information was communicated to Cabletec.

[90] Cabletec has failed to establish that a collateral agreement existed to either prospectively or retroactively alter the General Tariff, or pay Cabletec an administrative fee for Centrex services.

[91] Cabletec has failed to establish a misrepresentation or failure by Aliant to act in good faith respecting its non-approval of a reduction in the line access rate.

[92] If I am wrong, I agree with Aliant that because the defence of negligent misrepresentation was not pleaded, and no notice that it would be relied upon was given before trial, it is too late to raise it in the Defendants' post-trial brief.

[93] The last defence, and also the basis of the counterclaim, relates to the manner in which Aliant terminated its services to Cabletec.

[94] Cabletec claims that Aliant acted in bad faith. Aliant's notice of termination is contained in the letter dated December 2, 2008 from the director of the wholesale carrier services group. It reads:

> Over the past several years Cabletec and Aliant have been mutually attempting to resolve the issue of CableTec's significant unpaid debt for services provided by Aliant. After repeated efforts by both parties to reach a mutually agreeable repayment plan, the debt

> remains unpaid. For these reasons Aliant is re-initiating the official disconnection notice letter and disconnection process that was originally issued to Cabletec in November, 2007.
>
> As of Nov 27, 2008, Cabletec's accounts with Bell Aliant are past due in an amount of $1,578,610.70. For this reason, Bell Aliant gives notice that your service will be terminated on or about January 2, 2008.
>
> As we have previously advised you, a reasonable deferred payment agreement can be entered into.
>
> You can contact bill Hanson at 902-486-8202 to discuss any dispute, or to discuss a repayment agreement. Any unresolved disputes may be referred to a senior Bell Aliant manager.
>
> Service requests will not be processed until your account is current without the prior approval of an authorized manager at Bell Aliant.

[95] Callaghan testified that he received similar notices in the past and, on each occasion, Aliant had negotiated a payment schedule or other terms that lead to the continuation of their business relationship. On none of the prior occasions were lines disconnected. There is some corroboration of this evidence in, for example, the acknowledgement notice of the withdrawal of services effective February 9, 2005, contained in Exhibit 1, Tab 6, and Exhibit 7.

[96] Callaghan testified that upon receipt of the ambiguous letter of December 2, 2008, he immediately attempted to negotiate a resolution with the director (Paul Pothier) and his account executive (Bill Hanson). He effectively states that he was given the run around.

[97] Callaghan submits that Aliant's December 2, 2008 letter was not clear. If it had been more clear that services would be terminated on January 2, 2009, he would not have spent his time

attempting to negotiate a payment plan. Rather, he would have spent his time moving his business to another carrier. He further states that thirty days notice of disconnection was not reasonable notice to make other arrangements.

[98] Callaghan testified that on January 2, 2009, Aliant abruptly cut off Cabletec's telephone number and assigned it immediately to a competitor. He notes that Aliant's direct sales group contacted his customers to solicit them as customers, and as part of that process, either reconnected their lines or allowed them to remain connected despite disconnecting Cabletec. Callaghan testified that each of his customer lines had value and could be sold to other carriers or wholesalers. He stated that the market value or going price of each line was $450. He claims that the manner in which Aliant terminated his contract resulted in loss to his business of $450 per line.

[99] Aliant replies that its letter, giving about thirty days notice of termination of services, was in accordance with CRTC regulations. No evidence was tendered of any CRTC regulation or approved process for cutting of service to a reseller. Item 770 in MTT's approved tariff (Exhibit 4) provides that during the MSP (Minimum Service Period), subscribers 'shall be subject to a termination liability'. This statement is not explained, and no other tariff item dealing with termination of service was tendered. Aliant further replies that, in accordance with CRTC regulations, it was obligated to reassign Cabletec's phone number, on the request of a third party, and denies that it did so on its own initiative. No regulation to this effect was tendered.

[100] The termination in this case was before the expiration date of the last agreement (Exhibit 1,

Tab 10), which provided for termination on August 20, 2009.

[101] I agree with Cabletec that, in the context of the relationship between Aliant and Cabletec over the years and how earlier defaults in payment of accounts had been handled, the December 2, 2008, letter is not clear. It states that: "Aliant is re-initiating the official disconnection notice letter and disconnection process that was originally issued to Cabletec in November 2007." Because of the past due account, "Bell Aliant gives notice that your services will be terminated on or about January 2, 2008. [Parties acknowledge that January 2, 2008 was an error and should have read January 2, 2009.] As we have previously advised you, a reasonable deferred payment agreement can be entered into. ... Service requests will not be processed until your account is current ..."

[102] Ignoring the typographical error, the letter says termination will occur "on or about", and that a reasonable deferred payment agreement can be entered into. The letter clearly suggests that the termination or disconnection is: (a) not firm as to date and (b) conditional on a reasonable deferred payment agreement not being reached.

[103] Bill Hanson delivered the notice personally. In a memo to Paul Pothier (Exhibit 1, Tab 27) reporting on his meeting with Callaghan, and confirmed by his oral evidence, Hanson says that he asked Callaghan whether Cabletec would work with Aliant to migrate its customers to Aliant if they were not able to work out a repayment plan, and whether Cabletec would provide Aliant with a list of his customers by mid-December. Hanson's memo says that Callaghan replied "yes" to both requests.

[104] In a December 17, 2008 e-mail reply to Cabletec, Paul Pothier reiterated Aliant's willingness to enter into a repayment agreement, failing which service termination would occur on January 2, 2009.

[105] The evidential onus is on Cabletec to establish the facts that support its defence and counterclaim. While the court has considerable reservations about the manner in which Aliant terminated Cabletec's service and immediately took away it main number and contacted its customers, Cabletec has failed to discharge the burden of showing that the notice was contrary to any standards applicable to the matrix that existed, or how Aliant's subsequent contact with its customers was unlawful.

[106] While Callaghan's evidence that the going price for lines was $450 per line, there was no evidence that he would or could have sold these lines to another carrier or wholesaler or the number of lines that he was leasing from Aliant at the relevant time. Cabletec did not establish how many customers it had on January 2, 2009, or how many it lost. If Cabletec had discharged the burden of proving a wrongful termination, it failed to prove its damages; therefore, the counterclaim cannot succeed.

The Guarantee

[107] Aliant claimed $200,000, plus prejudgment interest at the rate of 12.7% from the date of

demand, both before and after judgment, against Callaghan pursuant to the Guarantee dated January 23, [2004].

[108] Callaghan did not pursue the pleaded defence that the guarantee was unenforceable because he executed it while under economic duress. I am satisfied that he executed the Guarantee voluntarily, for the purpose of causing Aliant to continue doing business with Cabletec. I accept that he signed it when first presented to him by Bill Hanson and would not have understand the implications of every word or phrase, but he did understand the import of the guarantee.

[109] For the proper interpretation of the guarantee, Aliant points to paragraphs 1 and 6 of the guarantee where Callaghan "irrevocably and unconditionally guarantees the due and punctual payment and performance of all ... obligations of Cabletec ... from the date of October 15, 2003 up to $200,000 ..., however or wherever incurred."(para 1), and wherein "the liability ... shall be absolute and unconditional irrespective of: ...(d) any other circumstance which might otherwise constitute ... a defence..."(para 6).

[110] It argues that this make Callaghan's liability concurrent with Cabletec's, and makes the terms in the guarantee requiring a formal demand for payment irrelevant to Callaghan's liability, except in respect of interest. It asks the court to adopt and apply ***Alberta Opportunity Co v Schinner*** [1991] 2 WWR 624 (ABCA), and to distinguish ***Bank of Montreal v Balsom*** (1994) 119 Nfld&PEIR 354, and ***Caribou Hotels(1980) Inc v 5857 Yukon Ltd*** [1990] YJ 124 (YTCA). Aliant further argues that Callaghan cannot rely on the absence of a demand for payment as a defence because CPR 38.05(b)

required Callaghan to "specifically plead non-performance or nonconcurrence of a condition to a right or obligation" in his defence, and he did not do so.

[111] Three paragraphs or sections of the guarantee are particularly relevant to this analysis: paras 4, 8 and 18. They read as follows:

> **4.Payment on demand**
>
> The liability of the Guarantor shall be payable immediately upon written demand by the Creditor and such demand shall be conclusively deemed to have been effectually made and given when an envelope containing such demand, addressed to the Guarantor, is delivered to the attention of the Guarantor at the address of the Guarantor set forth in this agreement or at such other address as the Guarantor may from time to time designate to the Creditor in writing. The liability of the Guarantor shall bear interest from the date of such demand and both before and after judgment at the rate of twelve point Seven percent (12.7%) per annum.
>
> **8. Liability as principal Cabletec**
>
> The Guaranteed Obligations shall be recoverable from the Guarantor as principal debtor (in place of Cabletec) upon demand and with interest, calculated and payable as provided in this agreement.
>
> **18.Limit of Guarantee**
>
> Notwithstanding any other provisions of this Guarantee, the liability of the Guarantor pursuant to this Guarantee shall be limited to the sum of $200,000.

[112] There is no evidence of a demand made on Callaghan pursuant to the provisions of the Guarantee Agreement and in particular according to para 4. Paul Pothier was asked if a written demand was made for payment on the Guarantee, and his answer was: "I don't believe so."

[113] In my view, the condition precedent to Aliant's entitlement under the guarantee to payment

of the principal sum or interest is a demand for payment. Absent evidence of a demand for payment in accord with the guarantee agreement, neither the principal nor interest is payable.

[114] Commencing an action on a guarantee is not a demand for payment that accords with the terms of the guarantee prepared by Aliant. Commencement of an action is a legal proceeding based on a default. The guarantor in this case had not defaulted until a formal demand for payment in accordance with the guarantee has been effected.

[115] *Canadian Contractual Interpretation Law*, by **Geoff R. Hall** [Markham, LexisNexis, 2007] beginning at p. 168, describes how the rules for the interpretation of a guarantee deviate slightly from the normal rules for contract interpretation. Mr. Hall notes that while the interpretation of a guarantee is for the most part an application of the normal rules of contract interpretation, the Supreme Court of Canada in ***Manulife Bank of Canada v Conlin*** [1996] 3 SCR 451 sets out four ways in which the interpretation of a guarantee differs from other types of contracts. First, the *contra proferentem* rule is more apt to apply; second, the interpretation recognizes that courts lean toward guarantors when considering any doubt or ambiguity; third, contracting equitable protection out of common law requires clear language; and, fourth, the guarantee must be interpreted in the context of the entire transaction.

[116] The law is succinctly set out in ***Bank of Nova Scotia v Williamson,*** 2009 ONCA 754, at paras 11 to 13 and ***Burin Peninsula Community Business Development Corp v Grandy,*** 2010 NLCA 69, at paras 39 to 41. For the Ontario Court of Appeal, Feldman J.A. wrote, at paras 11 to

13 in ***Williamson***:

> [11] A document that states it is payable "on demand" does not always require a demand before it can be enforced. It depends on the nature of the obligation and the construction of the document.
>
> [12] A promissory note that is payable "on demand" is in fact payable from the moment the money is loaned because the debt is owed from that moment: ***Hare v Hare*** (2006), 83 O.R. (3d) 766 (CA), at para 11. Therefore, it has been held that the words "on demand" add nothing to the obligation. The same rule applies to a demand mortgage: ***Mortgage Insurance Company of Canada v Grant***, 2009 ONCA 655, at para 19.
>
> [13] However, the courts have long held that this rule does not apply to a collateral obligation such as a guarantee or collateral mortgage given by a third party to secure the debt obligation of the primary debtor. Where the obligation of a third party guarantor is to pay on demand, then demand is a condition precedent to that obligation. The rationale is that where the guarantee obligation is made on demand, the third party guarantor is given an opportunity to marshal the funds before the obligation is due: ***In Re: Brown's Estate***, [1893] 2 Ch. 300, at pp. 304 to 305.

[117] The law set out in these decisions is not new. It evolved from English common law enunciated by Chitty, J in ***In Re: Brown Estate*** [1893] 2 Ch. 300, and approved by the English Court of Appeal in ***Bradford Old Bank Limited v Sutcliffe*** [1918] 2 KB 83.

[118] It is the clear conclusion of Kevin Patrick McGuinness in two texts: his seminal text, *The Law of Guarantee*, Second Edition (Scarborough; Carswell, 1996), c. 6, especially sections 6.26 to 6.38, and *Halsbury's Laws of Canada - Guarantee and Indemnity*, (Markham; LexisNexis, 2010), topics HGI-99 and HGI-187.

[119] The guarantee in this case is collateral obligation of a third party. The guarantee clearly

required a written demand for payment before it became payable.

[120] I dismiss Aliant's claim on the personal guarantee against the defendant, J. Clair Callaghan, both for the principal sum and interest.

[121] If I am wrong with respect to my conclusion that a written demand was a precondition to the entitlement of Aliant for the principal sum, I would still deny interest on the principal sum of $200,000 for other reasons.

[122] Paragraph 4 of the guarantee provides that the guarantor's liability "shall bear interest from the date of demand" at 12.7% per annum. These words cannot be ignored. They make entitlement to interest conditional on a written demand.

[123] Furthermore, paragraph 18 provides that: "Notwithstanding any other provision of this guarantee, liability of the guarantor pursuant to this guarantee shall be limited to the sum of $200,000." Paragraph 18 does not provide that liability is limited to $200,000 plus interest from demand. Said differently, this paragraph suggests that the total liability - the principal debt guaranteed and interest from the date of demand, is limited to $200,000.00.

[124] If I am wrong respecting Callaghan's liability for the principal debt, I would disallow interest to the extent that interest would cause Callaghan's total liability to exceed $200,000.00.

[125] It is significant that the action against Callaghan, Hfx No. 307917, constitutes a separate action by Aliant on the guarantee. Applying the logic of Cromwell J.A. (as he then was) in ***Hoque v Montreal Trust,*** 1997 NSCA 153, the doctrine of 'cause of action estoppel' should constitute an impediment to a proper demand and new action on the same guarantee.

Summary

[126] Aliant shall have judgment against Cabletec, in its action, Hfx 307920, in the amount of $1,197,628.75, with simple interest at five percent per annum from January 3rd, 2009.

[127] Cabletec's counterclaim against Aliant is dismissed.

[128] Aliant's claim against J. Clair Callaghan, in its action, Hfx 307917, on the guarantee is dismissed.

[129] Failing agreement, the Court will hear the parties on costs.

J.