Anderson v. *Bell Mobility Inc.*, 2010 NWTSC 65

Date: 2010 07 30
Docket: SICV2007000247

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JAMES DOUGLAS ANDERSON and SAMUEL ANDERSON
on behalf of themselves, and all other members of a class
having a claim against Bell Mobility Inc.

Plaintiffs

AND

BELL MOBILITY INC.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Keith M. Landy and Samuel Marr — Counsel for James Douglas Anderson and Samuel Anderson

Robert J.C. Deane and Brad W. Dixon — Counsel for Bell Mobility Inc.

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the Andersons for certification of their action against Bell Mobility Inc. ("Bell Mobility") as a class action. Certification as a class action permits the Andersons to represent a larger class of claimants rather than proceeding as two individual claimants.

[2] Although the Northwest Territories does not have a class action statute, the case of *Western Canadian Shopping Centres Inc.* v. *Dutton*, 2001 SCC 46 ("*Western Canadian Shopping Centres*"), provides the procedure and conditions for a class action pursuant to Rule 62 of the *Rules of the Supreme Court of the Northwest Territories*.

[3] Bell Mobility charges a monthly 911 fee to the Andersons. The Andersons claim that Bell Mobility is, expressly or impliedly, contractually required to provide a live 911 emergency operator for the service fee. Bell Mobility responds that this is a misapprehension, and that their obligation is to provide a national wireless network to receive and route 911 calls in the manner designated by local governments.

[4] The detailed application is attached as Schedule A, with typographical errors corrected. In order to proceed as a class action, the court must be satisfied that:

1. the proposed class is capable of clear definition;
2. there are issues of fact or law common to all class members;
3. success for one class member must mean success for all; and
4. the proposed representatives adequately represent the interests of the class.

[5] The court also has a residual discretion to deny certification even if the conditions are met, if there are countervailing factors that outweigh the benefits of proceeding by class action (para. 42, *Canadian Western Shopping Centres)*.

THE FACTUAL CONTEXT

[6] Bell Mobility charges 75 cents each month to the Andersons which is described on their monthly bill as the "911 Fee" pursuant to their service agreement for cell phones. Bell provides a variety of mobile service agreements, generally written in a plain English format, which I will discuss below.

[7] The particular service agreement signed by James Anderson contains the following:

> **"What we'll provide you**
>
> We will not increase your monthly access fees or your airtime rates … Fees for … 9-1-1 emergency access may … increase on … 30 days notice.

Your Obligations ...

Your monthly bill is payable on receipt ...

Your monthly charges included ... 911 emergency services fees."

[8] Samuel Anderson's service agreement provides:

"**What we'll provide you**.

We will not increase your monthly access fees or your airtime rates ... Fees and charges for features or services ... 9-1-1 emergency service fees ... may increase during the Term at our discretion after giving you at least 30 days notice.

Your Monthly Bill

Your monthly charges will include: ... 911 fees are recurring monthly charges"

[9] Bell Mobility indicates that the 911 fee "assists, among other things, in recovering the costs incurred by Bell Mobility".

[10] In Yellowknife, when 911 is called, there is a recorded answer as follows:

> There are no 911 services in this area. Please hang up and dial the emergency number for your area, or hang up and dial 0 to reach an operator.

[11] In Whitehorse, Yukon, when 911 is dialled, there is a live emergency operator to direct calls to the appropriate emergency service. Outside Whitehorse, there is no live operator. While mobility service agreements may differ, many customers pay a 911 fee regardless of whether there is a live 911 operator or a recording.

[12] Bell Mobility advises that the amount of the 911 fee has changed over time and differs by type of customer, the customer's plan and the customer's home jurisdiction:

> "In all areas served by Bell Mobility except the Northwest Territories and New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador (the later, collectively, "Atlantic Canada"), most Post-Paid Customers under the Bell Mobility brand were charged a 911 Fee of $0.25 from March 1, 2001 to June 30, 2005. Post-Paid Customers in the Northwest Territories became responsible for paying a 911 Fee in the amount of $0.25 when Bell

> Mobility acquired NorthwesTel Mobility Inc. in 2003. From July 1, 2005 to the present, such Post-Paid Customers have been charged a 911 Fee of $0.75 (subject to the introduction of the New Plans on November 20, 2009, which are discussed below)". (Pre-Hearing Brief of Bell Mobility Inc., para. 45)

[13] On the other hand, most pre-paid customers who purchase a certain number of minutes of phone time have not been charged a 911 fee, although as I understand it, they would have access to 911 services wherever the customer might be in the national network.

[14] Similarly, there are corporate customers who pay the full 911 fee, a discounted fee or no fee at all.

[15] I am not going to set out the multitude of differing 911 fees paid across the country except to confirm what Bell Mobility confirmed: that 911 fees vary according to jurisdiction, type of customer and type of plan.

[16] To further complicate the matter, Bell Mobility, effective November 20, 2009, has a new wireless service plan for monthly paying customers that does not include a 911 fee. Bell Mobility denies the allegation of the Andersons that their litigation caused this, explaining that there are frequent rate changes in the wireless communication industry for competitive and other reasons.

[17] Bell Mobility has different 911 services depending upon the local authority, which may be municipal, territorial or provincial. Bell Mobility says that its obligation is to provide "trunk line" access on its network without toll even when a customer's account is inactive or in default. Depending upon the local government providing the service, Bell Mobility says that customers may access a recording, basic 911 live operator, enhanced 911 service, which identifies the particular cell phone tower that picked up the call, or phase 2 enhanced 911 service, which provides the precise location of the cell phone caller.

[18] Bell Mobility says that its obligation is to provide the switches on the network and network software to provide access to its local and national networks.

[19] With respect to the Northwest Territories, Bell Mobility has put in place all the necessary infrastructure and software to trunk 911 calls to a live answering service as soon as such service is established by the local government. When the Andersons travel in the rest of Canada, they have 911 access to whatever particular service is provided by the local government.

[20] Bell Mobility also points out that James Anderson was aware that there was no live operator emergency service when he applied for his cell phone, and that he knew there was a 911 fee. He has also called the local RCMP phone number for emergency assistance. He swore in his affidavit that others have phoned 911 in an emergency only to discover there is no 911 live operator.

[21] There are approximately 20,000 Bell Mobility customers in the Northwest Territories. The number of customers in other jurisdictions that do not provide a 911 operator is unclear at this time. There may be customers in Yukon communities outside Whitehorse and certainly more in Nunavut. There may be more customers in certain areas of Nova Scotia, Quebec, Ontario, Alberta and British Columbia outside the major cities where 911 live operators are provided. There are no potential class members in Newfoundland and Labrador, New Brunswick, Prince Edward Island, Manitoba and Saskatchewan.

[22] To summarize, the Andersons say they are paying a 911 fee but not receiving the corresponding 911 live operator emergency service. Bell Mobility refused to answer questions relating to its costs of service and no application was made to compel Bell Mobility to answer those questions.

LAW AND ANALYSIS

General Class Action Principles

[23] In this part, I will address the general principles set out in the *Western Canadian Shopping Centres* case. I will then discuss specific principles under each section setting out the conditions that must be met.

[24] Rule 62 of the *Supreme Court of the Northwest Territories* states:

> "Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all".

[25] *Western Canadian Shopping Centres* provides the guidance and conditions that must be met for an action to be certified as a class action. At paras. 27, 28 and 29, the Supreme Court of Canada, in a unanimous decision written by McLachlin C.J., sets out the advantages of class actions where there are multiple claimants:

1. Judicial economy is achieved by aggregating similar individual actions thereby avoiding unnecessary duplication in fact-finding and legal

analysis and reducing costs of litigation both for the plaintiff and defendants (para. 27);

2. Access to justice is improved by allowing fixed litigation costs to be divided over a large number of claimants, making economical the prosecution of claims that would otherwise be too costly (para. 28);

3. Efficiency and justice are served by ensuring that wrongdoers who cause widespread but individually minimal harm do not ignore their obligations because the cost of bringing individual suits would exceed the likely recovery (para. 29).

[26] However, to ensure that a class action is efficient and fair to all parties, McLachlin C.J. states at para. 44:

> "Where the conditions for a class action are met, the court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner, like the courts of equity of old. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness."

[27] While it is not suggested that class actions be approached "restrictively" (para. 46), the court must be satisfied that there are no "countervailing considerations that outweigh the benefit of allowing the class action to proceed" (para. 48).

[28] It is of interest in the case at bar that Bell Mobility raises the concern that individual claimants will be required to give evidence to establish certain legal issues.

[29] In *Western Canadian Shopping Centres*, it was argued that individual investors would have to show actual reliance. McLachlin C.J. found this argument unpersuasive on the facts of that case where there were 229 investors. At para. 55, she said this:

> "The defendants' contention that the investors should not be permitted to sue as a class because each must show actual reliance to establish breach of fiduciary duty also fails to convince. In recent decades fiduciary obligations have been applied in new contexts, and the full scope of their application remains to be precisely defined. The

fiduciary duty issues raised here are common to all the investors. A class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members. If it is determined that the investors must show individual reliance, the court may then consider whether the class action should continue."

1. The Class Definition

"... First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: ..." – *Western Canadian Shopping Centres,* para. 38

[30] Here, the proposed class is:

All persons who before April 13, 2010 (the date of the certification motion) were:

a) resident in Canada;

b) entered into an agreement with Bell Mobility to receive cellular phone services;

c) were charged 911 emergency access fees; and

d) have no Emergency 911 service available where they reside, nor associated with their telephone area code.

[31] The Andersons say that class members can be readily identified:

a) all Bell Mobility customers in the Northwest Territories, being approximately 20,160;

b) all Bell Mobility customers in Nunavut;

c) all Bell Mobility customers in Yukon, except those living in Whitehorse or having a Whitehorse cellular number;

d) Canadians who are Bell Mobility customers living in communities without access to a 911 emergency operator in Nova Scotia, Quebec, Ontario, Alberta and British Columbia.

[32] The Andersons say that the court, counsel, the parties and any individual can determine if they are a member of the class by asking the following questions:

a) Is the person a resident of Canada?;

b) Is the person currently, or have they been in the past, a Bell Mobility customer?;

c) Are there 911 charges on the person's Bell Mobility billing statements?;

d) If the answers to a, b and c are yes, can the person while sitting in their living room dial 911 and get a live emergency operator? If so, then they are NOT a class member, otherwise they are members of the class as proposed.

[33] Bell Mobility objects to this definition and says that it is ambiguous in several respects.

[34] First, in addition to their 911 fees, Bell Mobility collects and remits government-imposed fees relating to 911 services in several jurisdictions.

[35] Second, the term "Emergency 911 Service" is not a defined term and the Andersons are really focussed on what Bell Mobility describes as "Home District 911 Service".

[36] Finally, Bell Mobility states that the difficulty of defining the class is based on the fact that Bell Mobility provides "call routing services" and not the actual emergency dispatch services itself.

[37] I am not in agreement with Bell Mobility that the terms "Emergency 911 Service" or "911 Emergency Access Service" may be ambiguous. They are very similar to the wording in the service agreements mentioned above; wording which was drafted by Bell Mobility. However, I also agree that the precise words that identify the members of the class require mention of a "911 live operator" as distinct from a recording.

[38] Thus, I am satisfied that the following class definition is appropriate, subject to my comments below on the national class action:

All persons who before April 13, 2010 were:

a) resident in Canada;

b) entered into an agreement with Bell Mobility to receive cellular phone services;

c) were charged 911 emergency service fees; and

d) have no 911 live operator where they reside, or associated with their telephone area code.

2. Common Issues of Fact or Law

> "Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit." – *Western Canadian Shopping Centres,* at para. 39.

[39] The Andersons proposed the following common issues:

a) Do the service agreements between the class members and Bell Mobility expressly require Bell Mobility to provide 911 emergency access services to class members?

b) Do the service agreements between the class members and Bell Mobility impliedly require Bell Mobility to provide 911 emergency access services to class members?

c) Did Bell Mobility provide 911 emergency access service to class members?

d) Did Bell Mobility breach the contracts with the class members?

e) Has Bell Mobility been unjustly enriched?

f) Is Bell Mobility liable to the class members on the basis of waiver of tort?

g) At the common issues trial, is the Court able to determine the amounts due to each class member through the use of one expert witnesses utilizing Bell Mobility records to determine the individual amounts due based upon the monthly 911 fees paid?;

h) Was the conduct of the Defendant such that they ought to pay to the Class punitive or exemplary damages, and if so, the quantum of such damages?

[40] The Andersons say that the resolution of these issues is common to all class members because they paid 911 fees but were not connected to a 911 live operator. They submit that these issues meet the underlying question of whether the class action avoids duplication of fact-finding or legal analysis.

[41] Bell Mobility submits that some of the proposed common issues are not appropriate for a class action as they require evidence of individual circumstances to establish the factual matrix known to both parties at the time of entering the Bell Mobility Service Agreements. I will address each legal issue separately.

A) Express Contract Terms

[42] Do the service agreements between the class members and Bell Mobility expressly require Bell Mobility to provide 911 live operator services to class members?

[43] The point that Bell Mobility makes is that if resort to the factual matrix will require the evidence of individual class members, then there may not be sufficient commonality to justify a class action. For example, the Andersons and Bell Mobility in Yellowknife knew that a live 911 operator was not provided. However, this knowledge may not be attributed to other class members.

[44] Bell Mobility relied upon the trial decision in *Lam v. University of British Columbia,* 2009 BCSC 196, where certification was denied because the

interpretation of the standard contract required an examination of the factual matrices for the individuals involved (para. 34). This case involved the destruction of sperm samples when a freezer alarm system failed. The main issue was the interpretation of an exclusion of liability clause in the standard agreement when 25 of the 161 clients did not produce a signature page. The chambers judge, despite the common issue of negligence, refused to certify, because the issue related to the enforceability of the exclusion clause was not common to all class members. The British Columbia Court of Appeal reversed the chambers judge on the issues of enforceability of the exclusion clause against the defendant and being contrary to public policy (2010 BCCA 325). In doing so, the Court expressed agreement with para. 32 of *De Wolf v. Bell ExpressVu Inc.* (2008), 58 C.P.C. (6th) 110 (Ont. S.C.J.):

> "There can be a common issue about the interpretation of the Bell ExpressVu contract, and, in particular, there can be a common issue about the legal characterization of the administrative fee as "interest" or as "liquidated damages" provided that the external context is common or typical across the members of the class. In that situation, there is commonality in the standard contract and in the factual nexus in which that contract is to be interpreted and performed." (at para. 57, emphasis added by Finch J.A.)

[45] Finch J.A. concluded in a similar vein at para. 58:

> "...This is not a case in which individual assessments will be necessary in order to determine whether UBC is protected by the standard form contract. Contrary to what the respondent says at para. 80 of its factum, that interpretation does not depend on "the understandings of the individual clients". The subjective understanding of a client is irrelevant and inadmissible. What is relevant is what an objective bystander would say the parties intended the contract to mean. ..."

[46] On the other hand, the BCCA excluded from the class the parties who had not signed the standard agreement, as that would require individual evidence (para. 64) and excluded the issue of unconscionability on the same basis (para. 72). In the result, the BCCA overruled the chamber judge's finding that the contract issues had to be determined before the common negligence issue could proceed (paras. 82 and 83).

[47] In *Campbell* v *Flexwatt Corp.,* [1997] B.C.J. No. 2477, the British Columbia Court of Appeal stated at para. 53:

> "When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible."

[48] In my view, the words used in the billing statements and service agreements, all of which were drafted by Bell Mobility, can be interpreted without the necessity of receiving individual evidence from the class members. The external context, if necessary, may be established without requiring the evidence of every class member.

[49] I conclude that the express agreement issue is an appropriate common issue.

B) Implied Contract Terms

[50] Do the service agreements between the Class Members and Bell Mobility impliedly require Bell Mobility to provide 911 emergency access services to Class members?

[51] An earlier application brought by Bell Mobility to dismiss the Andersons' claim for failing to disclose a cause of action was dismissed. In doing so, the Court of Appeal stated in *Bell Mobility Inc.* v. *Anderson*, 2009 NWTCA 3:

> "One heading mentions breach of contract. Though there may be here no express contract to supply 911 services, an implied contract is clearly also pleaded. We cannot see why such a contract is not arguable on these very striking facts, especially if evidence of other circumstances and dealings is led at trial. It would be an unusual contract which let one party charge for doing nothing, and clear words would be needed." (para. 6)

[52] Bell Mobility focuses upon the wording "evidence of other circumstances and dealing" in the context of the three grounds on which contractual terms may be implied. The three grounds are set out in *M.J.B. Enterprises Ltd.* v. *Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 at para 27:

a) based on custom or usage;

b) as the legal incidents of a particular class or kind of contract; or

c) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed".

[53] In *M.J.B.*, there is further discussion at para. 29 on the meaning of "presumed intention" of the parties in (c), above, indicating that the court must focus on "the intentions of the actual parties" and if there is evidence of a contrary intention, then an implied term may not be found.

[54] Bell Mobility submits the following in its brief at para. 95:

> "There is no suggestion and no evidence adduced by the Plaintiffs that the alleged obligation to provide Home District Live 911 Service is implied based on custom or usage, or as a legal incident of a mobility phone service agreement. The Plaintiffs must therefore contend that such an obligation is implied based on the presumed intentions of the parties, and is necessary to give "business efficacy" to the Mobility Service Agreements."

[55] In effect, Bell Mobility says there is no evidentiary basis on which to proceed on the implied terms argument for a) and b) above, and further that the presumed intention category c) would require evidence from all members of the class and not just the Andersons.

[56] Bell Mobility relies on the decision of Hoy J. in *Matoni* v. *C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.CJ.), in which it was stated at para. 115:

> "Generally, it seems a term might be implied on either of the first two bases on a class-wide basis, depending on the nature of the term. The third basis, namely presumed intention, which focuses on the actual intentions of the parties, does not, however, appear in any event susceptible to determination on a class-wide basis."

[57] Cullity J. came to the same conclusion on an application to certify as a common issue whether contracts for video rentals contained an implied term that late fees and replacement fees would be reasonable in *Macleod* v. *Viacom Entertainment Canada Inc.* (2003), 28 C.P.C. (5th) 160 (Ont. S.C.J.), at para. 24.

[58] The Andersons respond that these are questions for trial and point out that in *Cassano* v. *TD Bank Imperial Tabacco*, 2007 ONCA 781, at para. 25, the Court of Appeal certified a common issue of whether certain credit card fees were a breach of express or implied contract:

> "The motion judge held that Issue 1 raised an acceptable common issue of whether there was a breach of contract. He observed that the resolution of this question depended on the interpretation of the documents provided by TD to cardholders, which is a question that could be determined on a class-wide basis. I agree with the motion judge's conclusion that this common issue is acceptable."

[59] I conclude that grounds (a) and (b) for implying a contractual term as set out in *M.J.B.* may proceed as a common issue. Ground (c), relating to "presumed intention", is not an appropriate common issue, as it requires evidence from individual class members. The wording of the common issue should read:

> Do the service agreements of Bell Mobility have an implied term, based on custom or usage or as the legal incident of a particular class or kind of contract, to provide 911 live operator service?

[60] I do not propose to go into great detail with respect to proposed common issues c) and d) as I read them as being corollary questions that flow from the express or implied terms decisions at trial.

C) The Claim for Unjust Enrichment

[61] Has Bell Mobility been unjustly enriched?

[62] As set out in *Jedfro Investments (U.S.A.) V. Jacyk,* 2007 SCC 55, at para. 30, a finding of unjust enrichment has three requirements:

1. an enrichment for the defendant;
2. a corresponding deprivation for the plaintiff; and
3. an absence of any juristic reason for the enrichment, such as "other valid common law, equitable or statutory obligations".

[63] Bell Mobility submits that individual issues are at the heart of the Andersons' claim on unjust enrichment and therefore it is neither fair nor manageable as a class action.

[64] I do not agree. The question of enrichment can be determined subject to Bell Mobility providing evidence of their legitimate expenses for the trunk line access. The deprivation of the plaintiffs requires an interpretation of the service they have received. By the same token, the absence of a juristic reason is a question of interpretation that does not require individual evidence of the class members.

[65] The Northwest Territories Court of Appeal in its decision in *Bell Mobilkity Inc. v. Anderson*, *supra*, dismissed the application to strike out the amended statement of claim, and suggested that unjust enrichment was arguable in the general form as well as in some nominal forms, such as mistake of fact or failure of consideration.

[66] I agree with Bell Mobility that the ground of mistake of fact requires evidence of a factual basis for each claimant. However, the issue could be resolved on an interpretation of the failure of consideration in the service agreements across the class.

[67] As a result, I find that the claim for unjust enrichment on the basis of no juristic reason and failure of consideration may proceed as a common issue. That does not prevent Bell Mobility from establishing that a benefit has been conferred, such as access to a live operator when the class member is in another jurisdiction that provides live operator assistance.

D) Waiver of Tort

[68] The Plaintiffs also claim under the novel doctrine of waiver of tort. This doctrine permits a plaintiff to recover from the defendant the amount by which a defendant has been enriched by its wrongful conduct, rather than receiving compensation damages for loss suffered by the plaintiff. See *Serhan Estate v. Johnson and Johnson* (2006), 269 D.L.R. (4th) 279 (Ont. Div. Ct.) at para. 50. Whether this is an independent cause of action or a remedy, Bell Mobility submits that there must be a finding of wrongful conduct.

[69] I do not consider this issue to be substantially different than other common issues such as unjust enrichment from a procedural perspective. It does not require individual evidence but an interpretation of the contract in its contextual setting. The doctrine of waiver of tort may proceed as a common issue.

E) Damages

[70] The final two common issues submitted by the Plaintiffs involve the question of using one expert to calculate individual damages and the claim for punitive and exemplary damages. To some extent, the issue of using one expert for damages is a procedural matter but conceptually it is appropriate to have one expert calculate the individual claims which may have some complexity based up on the variety of service agreements and the differing 911 charges over time. Clearly, decisions must be made in advance of the calculations in order to determine their bases. However, it does not require individual evidence as Bell Mobility has the documentation for each subscriber, although the calculation of damages would be on an individual basis. In any event, the concept of one expert is appropriate to ensure consistent calculations, but the expert evidence must await the liability and compensation determinations.

[71] In my view, the determination, if any, of punitive or exemplary damages would proceed as a common issue.

3. Success For One is Success For All

> Third, with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests. – *Western Canadian Shopping Centres,* at para. 40.

[72] Bell Mobility did not address this specific issue. I find that there are no conflicting issues between class members. All the class members would benefit from the successful prosecution of the action, but not necessarily to the same extent.

4. Plaintiffs' Capacity to Represent the Class

> Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class: – *Western Canadian Shopping Centres,* at para. 41.

[73] The Plaintiffs in this case are a father and son. While the father may be more engaged than the son, I do not find any basis to be concerned about their

motivation or the competence and capacity of their counsel to pursue the action and bear the costs.

5. The Balance Between Efficiency and Fairness

> While the four factors oulined must be met for a class action to proceed, their satisfaction does not mean that the court must allow the action to proceed. Other factors may weigh against allowing the action to proceed in representative form. The defendant may wish to raise different defences with respect to different groups of plaintiffs. It may be necessary to examine each class member in discovery. Class members may raise important issues not shared by all members of the class. Or the proposed class may be so small that joinder would be a better solution. Where such countervailing factors exist, the court has discretion to decide whether the class action should be permitted to proceed, notwithstanding that the essential conditions for the maintenance of a class action have been satisfied. – *Western Canadian Shopping Centres, at para. 42.*

[74] The additional factors that require consideration can be summarized as follows:

a) the defence may wish to raise different defences for different groups of plaintiffs;

b) it may be necessary to examine each class member in discovery;

c) class members may raise issues not shared by all class members;

d) the proposed class is so small that joinder is appropriate.

[75] None of these issues are relevant to this proceeding. Nevertheless, the court must take into account both the benefits to the class as well as any unfairness that may be caused and strike a balance between efficiency and fairness (*Western Canadian Shopping Centres,* para. 44).

[76] Bell Mobility submits that the predominance of individual evidence and issues will result in the disintegration of the class action into the examination of various class members' circumstances, which will not promote judicial economy and complicate the resolution of the claims.

[77] I do not agree with this assessment. The individual claims will necessarily be small, and the individuals will not be able to afford to proceed on an individual basis. To not certify would result in preventing access to justice. On the other hand, a determination of the common issues will provide judicial economy and

fairness. If the class members succeed in their liability claim, the damage claims can be calculated by one expert to ensure a consistent approach based upon the liability finding.

National Class Action

[78] The Plaintiffs seek to include in the class action persons who are not resident in the NWT but meet all the requirements of the class definition. Bell Mobility opposes this and submits that it would be preferable to have the ability to opt in for non-residents. Bell assumes that the number is relatively small.

[79] The Plaintiffs rely upon a number of recent Ontario precedents that permit certification of a national class action based upon the principle that the existence of common issues shared by both the residents and non-residents provides a "real and substantial connection" to the forum where the certification is sought: See *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.) at para. 123.

[80] Bell Mobility submits that the opt-in procedure provided for in British Columbia and Alberta legislation would be the appropriate resolution. In addition, Bell submits that the only link between residents and non-residents is that they allege similar causes of action, which are not to be confused with the commonality that is required.

[81] As I understand it, the parties are in agreement that the potential non-residents will only be found in the Yukon, Nunavut, Nova Scotia, Quebec, Ontario, Alberta and British Columbia. The parties are not in agreement about the numbers of non-residents that may be affected.

[82] I do not have sufficient evidence before me to decide the national class action issue. To a certain extent, the decision involves a consideration of the service agreements in the other jurisdictions, the numbers involved, and the degree of commonality of issues. As a result, I am adjourning this issue to be considered when there is more evidence provided by the Plaintiffs as to the identification and circumstances of the non-resident claimants. Failing such evidence being provided, the notification requirements for the opt-in procedure may be considered.

The Notice Plan

[83] I have concluded that this action should proceed as a class action, which requires notice being given to the potential members of the class.

[84] In *Western Canadian Shopping Centres*, the court stated at para. 19:

> Other procedural issues may arise. One is notice. A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.

[85] The Supreme Court of Canada has recently elaborated on the notice issue in *Canada Post v. Lépine,* 2009 SCC 16, at para. 43. The Plaintiffs propose that notice be given by one publication in each of the Globe and Mail and News/North newspapers, by ordinary mail and email to the last known address of the class members, by publication on the website of Plaintiffs' counsel, and by notice in Bell Mobility's monthly statements. In my view, the latter will be the most effective and least expensive form of notification.

[86] Bell Mobility submits that notification is not straightforward as its database may not identify all the members of the class since 2004. There is also a difficulty in identifying current addresses of customers who are pre-paid and have paid 911-associated fees, but have no reason to keep Bell Mobility notified of their current addresses.

[87] The Plaintiffs seek to have Bell Mobility bear the costs of notification as they will be prohibitive and a barrier to justice. There is some justification for such an order where the best and only source of information about the class members is in the possession of Bell Mobility and the company has regular billing procedures which could be utilized. However, both counsel requested that this issue be adjourned pending the decision on certification and brought back to case management.

The Litigation Plan

[88] The parties did not address the litigation plan upon certification in any detail. I order that those issues be addressed in case management following this decision.

CONCLUSION

[89] I therefore certify this case as a class action on the following terms:

1. The Class is defined as:

(i) all persons who before April 13, 2010 were:

a. resident in the Northwest Territories;

b. entered into an agreement with Bell Mobility to receive cellular phone services;

c. were charged 911 emergency access fees; and

d. have no 911 live operator where they reside or associated with their telephone area code;

2. James Douglas Anderson and Samuel Anderson are the representative Plaintiffs;

3. The following are the common issues for trial:

(i) Do the service agreements between the class members and Bell Mobility expressly require Bell Mobility to provide 911 live operator service to class members?

(ii) Do the service agreements of Bell Mobility have an implied term based on custom or usage or as the legal incidents of a particular class or kind of contract, to provide 911 live operator service?

(iii) Did Bell Mobility provide 911 live operator service to class members?

(iv) Did Bell Mobility breach the contracts with the class members?

(v) Has Bell Mobility been unjustly enriched for no juristic reason, or has there been a failure of consideration?

(vi) Is Bell Mobility liable to the class members on the basis of waiver of tort?

(vii) Was the conduct of the Defendant such that they ought to pay to the class punitive or exemplary damages, and if so, the quantum of such damages?

4. At the common issues trial, if and when the court has determined liability, one expert witness may calculate the individual damages due based

on the amount the individual paid for monthly 911 emergency access, in reliance on Bell Mobility's accounting records?

5. That a case management meeting be held to finalize the notification procedure and the procedure to determine whether there is a national class or opt in, and finally to determine the litigation plan.

[90] Costs may be spoken to at the case management meeting, if necessary.

VEALE J.

APPENDIX A

The Plaintiffs seek:

a) an Order certifying this action as a Class Action;

b) an Order identifying the class as:

(i) all persons who before April 13, 2010 (the date of the certification motion) were:

b. resident in Canada;

c. entered into an agreement with Bell Mobility Inc. to receive cellular phone services;

d. were charged 911 emergency access fees; and

e. have no Emergency 911 Service available where they reside or associated with their telephone area code;

c) an Order naming James Douglas Anderson and Samuel Anderson as the representative Plaintiffs;

d) an Order certifying the following common issues for trial:

(i) Do the service agreements between the Class members and Bell Mobility Inc. ("Bell Mobility") expressly require Bell Mobility to provide 911 emergency access services to Class members?

(ii) Do the service agreements between the Class Members and Bell Mobility impliedly require Bell Mobility to provide 911 emergency access services to Class members?

(iii) Did Bell Mobility provide 911 emergency access service to Class members?

(iv) Did Bell Mobility breach the contracts with the Class members?

(v) Has Bell Mobility been unjustly enriched?

(vi) Is Bell Mobility liable to the Class members on the basis of waiver of tort?

(vii) At the common issues trial is the Court able to determine the amounts due to each class member through the use of one expert witness who calculates the individual amounts due based on the amounts the individual paid for monthly 911 emergency access, based on Bell Mobility's accounting records;

(viii) Was the conduct of the Defendant such that they ought to pay to the Class punitive or exemplary damages, and if so, the quantum of such damages?

and any other common issues disclosed by the Statement of Claim

e) an Order requiring the Defendant to provide to Plaintiffs' counsel within 30 days of the certification of this action as a class action, the last known mailing address for each member of the class and email address (if available) and cellular and other phone numbers for each class member;

f) an order approving the Notice to the class members of the Certification of this action as a class action by way of the Notice found at Exhibit "H" of the Affidavit of the Plaintiff James Anderson, or in such other form as approved by the Court;

g) an Order specifying that all Class members shall be notified of the certification of the action in the following manner:

(i) publication on one occasion of a ¼ page Notice in both the *Globe and Mail* and *News/North* (a publication for communities in the Northwest Territories and Nunavut); and

(ii) a Notice sent by ordinary mail to the last known address of known Class members;

(iii) a Notice sent by email to the known class members' last known email address;

(iv) publication of a Notice on the website of Landy Marr Kats LLP; and

(v) notification to be published by mailing of the Notice in the Defendant's monthly billing statements (this request was not in the Notice of Motion)

h) an Order requiring the Defendant to pay forthwith to counsel for the Plaintiffs the costs of the Notification Program;

i) Orders giving directions as to the conduct of this Class Proceeding, including;

(i) delivery of a Statement of Defence within 30 days;

(ii) an Order requiring the parties to exchange Statements as to Documents and copies of the documents within sixty (60) days of the date of the hearing of the Certification Motion;

(iii) an Order requiring Examinations for Discovery of the Defendant followed by Examinations for Discovery of the Plaintiffs within one hundred and twenty (120) calendar days of the date of the hearing of the Certification Motion;

j) the costs of this motion, fixed, and payable forthwith in any event of the cause; and,

k) such further and other relief as counsel may advise and this Honourable Court may deem just.

S-1-CV2007-000247

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

JAMES DOUGLAS ANDERSON,
on behalf of himself, and all others having a claim
against Bell Mobility Inc.

Plaintiff

- and -

BELL MOBILITY INC.

Defendant

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE R.S. VEALE