Anderson v. *Bell Mobility Inc.*, 2011 NWTSC 27

Date: 2011 05 27
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:

Samuel Marr — Counsel for James Douglas Anderson and Samuel Anderson

Brad W. Dixon — Counsel for Bell Mobility Inc.

REASONS FOR JUDGMENT

INTRODUCTION

[1] These Reasons for Judgment cover several issues that arise out of the certification of this class action on July 30, 2010, in *Anderson v. Bell Mobility Inc.*, 2010 NWTSC 65 (the "certification decision"). The class action is based on a claim alleging that Bell Mobility charged for, but did not provide, the service of a live 911 operator for its cell phone customers. Bell Mobility disputes the

allegation. One of the bases on which it will defend the lawsuit is that it provides call-routing services while local governments are responsible for emergency dispatch. Bell Mobility is a subsidiary of Bell Canada and provides the infrastructure and software for wireless communication services to residential and business customers in the Northwest Territories, Nunavut and Yukon.

[2] The first issue to be considered is whether the class, which is presently limited to NWT residents, should be expanded to include potential claimants who are residents of Yukon and Nunavut. This also includes the issue of whether the non-resident members, if included, would be required to opt in or opt out.

[3] The second issue is the question of notice to the members of the class, which includes the issue of who pays for the costs of notice.

[4] The third issue relates to the decision to separate the liability and damage claims by deciding the common liability issues first. Counsel for the Andersons seeks direction on his right to conduct document and oral examination on damages at the same time as he pursues liability.

[5] The fourth issue is whether the trial of this matter set for May 2012 should be heard by a jury.

[6] The fifth issue is the determination of the litigation plan.

[7] I have heard oral submissions in addition to receiving written briefs on the issue of costs and whether it is appropriate to award costs payable within 30 days and in any event of the cause on the certification application. I will address the costs issue, including quantum, in a separate judgment.

A NORTHERN CLASS

[8] In the certification decision, at para. 89, I defined the class as:

> [A]ll 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.

[9] I also found the following 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?

[10] At that time, I adjourned the national class issue for more evidence to be presented. The Andersons now apply to have residents of Yukon (excluding Whitehorse, which has a 911 live operator) and residents of Nunavut included in the class so long as they otherwise meet the definition already certified.

[11] The total number of potential Bell Mobility customers in the three territories is determinable. The parties agree that as of January 2011, there were:

(a) 4,336 Bell Mobility customers with billing addresses in Nunavut;

(b) 1,405 Bell Mobility customers with billing addresses in Yukon, excluding Whitehorse;

(c) 24,071 Bell Mobility customers with billing addresses in the Northwest Territories.

[12] The Andersons seek to have the definition of the class revised to read:

(a) residents in the Northwest Territories, Nunavut and Yukon (excluding Whitehorse).

[13] Counsel for the Andersons submits that the fact that the non-residents share common issues previously certified for trial creates a real and substantial connection between the non-residents and the Northwest Territories jurisdiction. This is based on an expansive view of jurisdiction adopted in British Columbia and Ontario.

[14] Counsel for Bell Mobility Inc. submits that, while it may be possible for this court to have jurisdiction over the claims of non-residents, this is not an appropriate case. Counsel submits that it is not a question of convenience but rather whether the individual claims of the non-residents have a real and substantial connection to the Northwest Territories independent of the class action. In this case, Bell Mobility says the contracts of non-residents were not entered into in the Northwest Territories, the alleged wrongful acts did not take place in the Northwest Territories, and Bell Mobility's head office is not in the Northwest Territories. It submits that the only connection, if it is a connection at all, is that the issues are similar, and that is not sufficient to meet the real and substantial connection test.

[15] Bell Mobility's submission is partly based upon the analysis of Professors Hogg and McKee in an article entitled "*Are National Class Actions Constitutional*",(2010) 26 NJCL 279, where they conclude at p. 292:

> We see no escape from the conclusion that the jurisdiction of provincial courts over national class actions is restricted to a plaintiff class that includes only persons whose claims, judged individually, all have a real and substantial connection to the forum. This is by no means an unusual situation. Where the action has been brought in the province where the defendant resides and where the wrongdoing took place, it will be satisfied. And, even where the action has been brought in a province where the defendant does not reside, the material facts (a catastrophic accident for example) may still provide a real and substantial connection to the forum province for the claims of everyone in the plaintiff class. But, where the claims of some members of the

> class do not have a close connection to the forum, the convenience of a national class action cannot overcome the constitutionally prescribed territorial restriction on the jurisdiction of provincial courts. In our opinion, a national class action in the superior court of a province cannot include anyone in the plaintiff class whose claim, if brought individually, would not have a real and substantial connection to the forum province. (my emphasis)

[16] Professors Hogg and McKee's narrow view of jurisdiction is not the only academic view on the matter.[1] Professor Janet Walker in her article *Are National Class Actions Constitutional? – A reply to Hogg and McKee*, (2010) 48 Osgoode Hall L.J. 95, interpreted *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 ("*Dutton*"), a case that is the underpinning of the case at bar, as follows at p. 112:

> The Supreme Court of Canada's suggestion in *Dutton* that class actions could be developed through the inherent capacity of the courts is consistent with the view that the judicial jurisdiction of the provincial superior courts in Canada develops organically, and not merely as an application of fixed provisions in the text of the *Constitution Act*. The prospect that Canadian courts would be capable, with or without legislation, of fashioning a modern class actions procedure from the representative procedure found in Rule 10, suggests that the aspects that touch upon the courts' jurisdiction are amenable to development and refinement by the courts in accordance with the evolving needs of the judicial system. This is consistent with the provisions that the "Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario" and with an essentially tradition-based rather than text-based understanding of judicial jurisdiction. The idea that the superior courts of the provinces have *inherent* authority

[1] I note, however, that, in contrast to the case law, both academic articles are critical of treating common issues in a class action as the basis for jurisdiction, as it "conflates the test for certification with the test for jurisdiction".

> suggests that their authority is capable of evolving to meet the needs of the Canadian federation and is not circumscribed by the *Constitution Act.* (my emphasis)

[17] Counsel for Bell Mobility notes that the Supreme Court of Canada has not considered the issue of when national class actions properly include class members from outside the jurisdiction. However, the Court has opined in several cases that a class action is a procedural mechanism that does not alter the jurisdiction of provincial courts. In *Bisaillon v. Concordia University*, 2006 SCC 19, LeBel J. stated at para. 17:

> The class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights. It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so [citations omitted].

[18] At para. 19, LeBel J. was more explicit in saying that the class action "does not change the legal rules relating to subject-matter jurisdiction."

[19] Class actions were also considered by the Supreme Court in *Canada Post Corp. v. Lépine*, 2009 SCC 16, where actions had been certified against Canada Post in both Ontario and Quebec. Ontario's Superior Court of Justice certified the class proceeding and approved a settlement agreement against Canada Post which was binding on every resident of Canada except those in British Columbia. Canada Post sought to have the Ontario judgment recognized under article 3155 of the Civil Code of Quebec following the certification of a similar class action against Canada Post in that jurisdiction. While it was determined that the Superior Court of Justice had jurisdiction pursuant to the Civil Code of Quebec, the judgment was not recognized because the notice was not compliant with Quebec's notice provisions and failed to properly explain the impact of the Ontario judgment on Quebec residents.

[20] The Supreme Court of Canada also found that the Ontario judgment could not be recognized on the basis of the issue of *lis pendens*. However, what the Supreme Court said at paras. 56 about national classes is more pertinent to this case:

> [56] In addition to its conclusions of law, the Quebec Court of Appeal seems to have had reservations or concerns about the creation of classes of claimants from

> two or more provinces. We need not consider this question in detail. However, the need to form such national classes does seem to arise occasionally. The formation of a national class can lead to the delicate problem of creating subclasses within it and determining what legal system will apply to them. In the context of such proceedings, the court hearing an application also has a duty to ensure that the conduct of the proceeding, the choice of remedies and the enforcement of the judgment effectively take account of each group's specific interests, and it must order them to ensure that clear information is provided.

[21] While the Supreme Court of Canada has not directly addressed the issue of jurisdiction in national class actions, courts in Ontario, British Columbia and Saskatchewan have adopted the approach that the existence of common issues between the resident members and non-resident members provides a real and substantial connection to the court assuming jurisdiction.

[22] The British Columbia Court of Appeal so decided in *Harrington v. Dow Corning Corp.,* 2000 BCCA 605. In that case, a class action claim was brought against the manufacturers of silicone breast implants. The class action was certified under British Columbia's *Class Proceedings Act*. There was little doubt that the court had jurisdiction over any woman who purchased and was implanted with the breast implants in British Columbia, no matter where she resided (para. 71). The real issue was whether the British Columbia court had jurisdiction over non-residents who purchased the implants and had them implanted outside British Columbia. Section 16(2) of the *Class Proceedings Act* explicitly permits a non-resident to opt in to a British Columbia action if they would otherwise be a member of the class. Mackenzie J. in the trial court and Huddart J.A., for the majority in the Court of Appeal, were in agreement that "this procedural provision does not seek to extend the jurisdiction of British Columbia courts beyond their constitutionally recognized limits" (para. 85). In the opinion of both judges, the common issues provided the real and substantial connection necessary for jurisdiction.

[23] It is clear that the real and substantial connection test must be satisfied before a court can assume jurisdiction. In *Harrington,* Huddart J.A. stated clearly at para. 69 that jurisdiction is a question of law, whereas *forum non conveniens* is an exercise of discretion. She further clarified the application of the principles of order and fairness at para. 87:

> The justification for claiming or refusing jurisdiction rests upon the principles of order and fairness sometimes called comity. Comity, especially inter-provincial comity, calls for the meshing of the principles of *res judicata*, the rules for the recognition and enforcement of orders, the rules for the issuance of anti-suit injunctions, and the rules for the assumption of jurisdiction. Thus do Canadian courts respect each other's territorial jurisdiction while ensuring that good sense prevails in the commercial world. In Canada, this meshing requires a provincial court to place reasonable restrictions on its assertion of jurisdiction. A real and substantial connection is the test of that limit. If this test is met, constitutional limits will not be breached as Mr. Justice La Forest explained in *Hunt v. T & N PLC* [citation omitted]

[24] Huddart J.A. concluded that the existence of a common issue of fact constituted a sufficient connection to establish jurisdiction so long as the principles of order and fairness are respected (paras. 99 – 100). However, *Harrington* is based upon an opt-in process explicitly permitted by s. 16(2) of British Columbia's *Class Proceedings Act.* Huddart J.A. decided the following at para. 99:

> ... By opting-in the non-resident class members are accepting that their claims are essentially the same as those of the resident class members. To the extent the appellants can establish they are not, they can be excluded by order of the case management or trial judge upon application. So can a class certified in another province, as the Dow Settlement Order in this proceeding illustrates.

[25] Ontario has a line of authority similar to that in British Columbia. In *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.) (*Wilson* #1), a class action was launched alleging diet drug products were inherently defective and unsafe for human consumption. Servier Canada Inc. was a Canadian corporation with its head office in Quebec. The defendant Biofarma was the parent corporation of Servier and had its head office in France. Cumming J. listed previous national class certification decisions in Ontario at para. 75:

> National classes have been certified by Ontario courts on the principles in Morguard and Hunt: see *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R.

> (3d) 331 (Gen. Div.), ["*Nantais*"] application for leave to appeal to the Div. Ct. dismissed (1995), 129 D.L.R. (4th) 110 (Gen. Div.); *Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441 (Gen. Div.) ["*Bre-X*"]; *Webb v. K-Mart Canada Ltd* (1999), 45 O.R. (3d) 389 ["*K-Mart*"]. They have also been certified in British Columbia: see *Harrington v. Dow Corning Corp.* (1997), 29 B.C.L.R. (3d) 88, 8 C.P.C. (4th) 262 (B.C.S.C.) ["*Dow Corning*").

[26] The *Bre-X* decision by Winkler J., as he then was, is particularly instructive, because the *Class Proceeding Act* in Ontario is silent on the subject of non-resident claimants. Cumming J. summarized the *Bre-X* decision as follows:

> [80] In Bre-X, supra, the plaintiffs alleged they had been wronged by the promotion and sale of Bre-X shares in Canada. The proposed class included all persons--wherever they resided within Canada--who fell within the class definition, unless they affirmatively opted out of the class pursuant to the provisions of the CPA [*Class Proceeding Act]*. Some of the defendants objected to the proposed national class on the grounds that: 1) the CPA does not provide for a class which includes extra-provincial plaintiffs and that such a class conflicts with sections of the CPA; and 2) that it is unconstitutional and contrary to the presumption under the principle of territoriality that legislation operates extra-territorially.
>
> [81] In Bre-X, Winkler J. found that there was no merit to the argument that, since the CPA is silent with respect to non-resident plaintiffs, its application is limited to the residents of Ontario. On the contrary, the absence of a provision limiting its application to Ontario residents permits the inclusion of non-residents, subject to the constitutional considerations (p. 447). Winkler J. compared the CPA to the British Columbia Class Proceedings Act R.S.B.C. c. C.50 ("BCCPA") and adopted the reasoning in Dow Corning, supra, where MacKenzie J. stated that an opt-in provision like the one contemplated in the BCCPA makes the BCCPA more limiting and less far-reaching than the CPA. In Bre-X

> Winkler J. concluded that Nantais was correctly decided and adopted its reasoning.

[27] Ultimately, in *Wilson*, Cumming J. dismissed the application to disallow the certification of the national class on the basis that the defendants did not have a real and substantial connection to Ontario, finding that this was not the applicable test. He concluded that the proper test is whether there is a real and substantial connection between the subject matter of the claims and Ontario. (para. 90). In doing so, he relied upon a statement of Professor J-G. Castel in *Canadian Conflict of Laws* (4th ed.) (Toronto: Butterworths, 1997) at p. 55, where he wrote that "the test for determining whether a real and substantial connection exists is not demanding or rigid", in that the court needs only to find a real and substantial connection, not "the most" real and substantial connection, to assume jurisdiction (para. 92).

[28] In the course of *Wilson v. Servier Canada*, Cumming J. heard three different applications arguing that the certification of a national class was unconstitutional: See *Wilson* # 1, *supra*; *Wilson v. Servier Canada Inc.* (2002), 58 O.R. (3d) 753 (S.C.) (*Wilson* # 2) raising the issue of jurisdiction and *forum non conveniens*; and *Wilson v. Servier Canada Inc.* (2002), 59 O.R. (3d) 656 (*Wilson* # 3), where the plaintiff applied to include French defendants who objected again on the basis that the proposed class members residing outside Ontario had no connection to Ontario.

[29] In *Wilson* # 3, Cumming J. described the appeal of *Wilson* # 1 at para. 8:

> Biofarma unsuccessfully brought jurisdictional motions in *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.); leave to appeal refused, (2000), 52 O.R. (3d) 20; leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 88, [2001] S.C.C. Bulletin 1539 (hereafter, "*Wilson #1*") ...

[30] In the Divisional Court's refusal to hear the appeal of *Wilson* # 1 (*Wilson v. Servier Canada,* (2000), 52 O.R. (3d) 20), Lang J., after addressing the issue of the inclusion of non-Ontario residents, stated at para. 11:

> Accordingly, I cannot agree that Cumming J.'s decision raises new issues that bring into question its correctness or that merit the attention of the Divisional Court. Leave to appeal on this ground is refused.

[31] In *Wilson* # 3, Cumming J. summarized his findings about jurisdiction at paras. 25 and 26 as follows:

> [25] As will be discussed, there is a real and substantial connection between the alleged cause of action in tort by Ontario residents against the defendants. In my view, this court's jurisdiction is well-founded in respect of the claims of Ontario residents. (Indeed, this jurisdiction was not challenged by the defendant Servier Canada in *Wilson* #1.)
>
> [26] The CPA is merely a procedural statute. It neither permits nor prohibits the establishment of a class of persons that includes non-residents of Ontario. The CPA is not constitutionally required to prescribe territorial limits on class actions.

[32] Cumming J. specifically responded to the argument that a person who purchased the drugs in Manitoba would have no real and substantial connection to Ontario at para. 61:

> In my view, the CPA recognizes and affirms the court's inherent jurisdiction to include non-resident claimants within an Ontario action where jurisdiction in respect of that action is rooted constitutionally, as in the case at hand ie., where there is a real and substantial connection between the subject matter of the action and the representative plaintiff and Ontario class members. (my emphasis)

[33] Recent Ontario judgments, which include *Baxter v. Canada (Attorney General)*, [2005] O.J. No. 2165 (S.C.); *McCutcheon v. The Cash Store*, (2006), 80 O.R. (3d) 644 (S.C.) and *Silver v. Imax Corp*, [2009] O.J. No. 5585 (S.C.), continue this line of authority. In *Silver v. Imax*, the matter was succinctly put by Justice van Rensburg at para. 123:

> Even in cases where the only connection between a non-resident class member and the jurisdiction is the sharing of common issues with resident class members, jurisdiction may be assumed. In *McCutcheon v. The Cash Store Inc.*, Cullity J. certified a national class of claimants in a payday loan class

> action, after conducting a comprehensive review of the authorities. Cullity J. observed that Ontario courts (in contrast to the courts of Saskatchewan and Québec) have taken an expansive approach to jurisdiction, even in cases where non-resident class members had no connection to the jurisdiction except their sharing of common issues with resident class members. His decision was consistent with a number of Ontario authorities, including *Baxter v. Canada (Attorney General)*, where Winkler J. observed that where a class action involving intra-provincial plaintiffs could be certified, and the common issues forming the basis for the certification are shared by both the resident class and extra-provincial non-residents against the defendant, the existence of such common issues provides a "real and substantial connection" of the non-residents to the forum in relation to the action [citations omitted].

[34] A similar decision was reached in *Thorpe v. Honda Canada Inc.,* 2011 SKQB 72, in the Saskatchewan Court of Queen's Bench.

[35] There are other authorities on the issue of what constitute a real and substantial connection. In *Bellefontaine v. Purdue Frederick Inc.*, 2010 NSCA 58, six named plaintiffs, who were suing a number of defendants in Nova Scotia, proposed a class action. Only two of the plaintiffs were residents of Nova Scotia. The allegation was with respect to misrepresentation about the properties of OxyContin7 Tablets. Prior to the certification application, the defendants applied to dismiss the claims of the non-residents for lack of jurisdiction. In an apparently unreported decision, the trial judge granted the application on the basis that the non-resident plaintiffs had no real and substantial connection to Nova Scotia. This decision was upheld on appeal. However, Hamilton J.A. stated at para. 2:

> The appeal does not deal with whether so-called "national" class actions are available in Nova Scotia or with whether the *ex juris* appellants can be members of a national class as certified in Nova Scotia as opposed to named plaintiffs in the action.

[36] In my view, the *Bellefontaine* decision is a confirmation of the law of jurisdiction *simpliciter,* and simply does not address the issue of whether non-residents must have a real and substantial connection to Nova Scotia when they are members of a national class with issues similar to the common certified issues.

[37] The jurisdiction issue is the focus of Courts of Appeal judgments in other contexts. In *Fewer v. Sayisi Dene Education Authority*, 2011 NLCA 17, the Newfoundland and Labrador Court of Appeal confirmed that there was no jurisdiction for a Newfoundland court to hear a case where the alleged assault and injuries originated in Manitoba with only one medical visit in Newfoundland. The Court also held that a reasonable and substantial connection must be established independent of any consideration of fairness.

[38] The Court in *Fewer* considered the Ontario Court of Appeal decision in *Muscutt v. Courcelles*, (2002), 60 O.R. (3d) 20 (C.A.), as modified in *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84. In *Van Breda*, the Ontario Court of Appeal assumed jurisdiction where Van Breda was injured at a resort in Cuba but had entered into the contract to visit the resort in Ontario (para. 137). The Court emphasized the integral importance of the principles of 'order and fairness' in assessing the real and substantial connection (paras. 93 – 99).

[39] In *Van Breda*, the Court stated the following at paras. 43 and 44:

> [43] As we noted in *Muscutt*, at paras. 36-37, in these cases, the Supreme Court of Canada described the real and substantial connection test in deliberately general language to allow for flexibility in its application. In *Tolofson*, at p. 1049, the Court described a real and substantial connection as "a term not yet fully defined". In *Hunt*, at p. 325, the Court observed that *Morguard* had not defined "[t]he exact limits of what constitutes a reasonable assumption of jurisdiction" and added that "no test can perhaps ever be rigidly applied" as "no court has ever been able to anticipate" all the possible circumstances. The Court added that the real and substantial connection test "was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction" and that "the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections". To the same effect is the more recent decision in *Pro-Swing v. Elta Golf Inc.* [2006] 2 S.C.R. 612, at para. 21, stating that the real and substantial connection test "is flexible and its formulation

> has allowed it to be applied to various evolving circumstances." ...

[40] *Van Breda* is presently under reserve at the Supreme Court of Canada. However, in my view, *Van Breda, Fewer* and *Bellefontaine* do not directly address the real and substantial connection test in the context of a national class action.

[41] I return now to the *Dutton* case, which provides the basis for this court's certification of a class action in the absence of class proceeding legislation. McLachlin C.J. stated at the outset:

> [2] The claimants wanted to immigrate to Canada. To qualify, they invested money in Western Canadian Shopping Centres Inc. ("WCSC"), under the Canadian government's Business Immigration Program. They lost money and brought a class action. The defendants (appellants) claim the class action is inappropriate and ask the Court to strike it out. For the following reasons, I conclude that the claimants may proceed as a class.

[42] With respect to the issue of proceeding where no legislation exists, McLachlin C.J. stated in para. 34:

> [34] ...However desirable comprehensive legislation on class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action and the mechanics of class action practice.

[43] The Chief Justice explained the importance of class actions as follows:

> [26] The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the megacorporation, and the recognition of environmental wrongs have all contributed to its growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the

> alleged wrongdoer. Sometimes, the complainants are identically situated *vis-à-vis* the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.

[44] After considering these authorities, I do not agree that the jurisdiction assumed by the British Columbia, Ontario and Saskatchewan courts in national class actions is solely as a result of the provisions in their respective *Class Proceedings Acts*. I find that this Court's jurisdiction over extra-territorial defendants is inherent and dependent upon a finding that the claimants who reside outside the jurisdiction have a real and substantial connection to this forum based upon the common issues certified.

[45] There is no doubt that Bell Mobility carries on business in the Northwest Territories and that this court has jurisdiction to hear a local class action. I am satisfied that the Ontario decisions and *Harrington v Dow Corning* provide strong precedents for finding that the common issues in this case provide putative plaintiffs in Yukon and Nunavut a real and substantial connection to this jurisdiction.

[46] I conclude that the class shall be defined as follows:

> All persons who before April 13, 2010 were:
>
> a) resident in the Northwest Territories, Yukon (excluding Whitehorse), or Nunavut;
>
> b) entered into an agreement with Bell Mobility Inc. to receive cellular phone services;
>
> c) were charged 911 emergency access fees; and
>
> d) have no 911 live operator where they reside.

[47] The principles of order and fairness support this finding. In my view, it would not be fair to the claimants or Bell Mobility to have three separate court actions in Northwest Territories, Yukon and Nunavut, each of which will involve considerable cost for all parties. This decision is also supported by the policies of access to justice and judicial economy.

[48] I have also concluded that requiring the extra-territorial plaintiffs to opt out is preferable to having them opt in. The financial rewards on an individual basis are in the order of $9.00 per year, so it would not be economic or efficient for a class member to have to spend time and effort to join in the proceeding. In addition, there are strong policy considerations that favour the opt-out mechanism, and it has been recommended by the Uniform Law Conference of Canada's *Class Proceeding Act* (Consolidated 2006) as well as adopted in a number of provincial *Class Proceeding Acts*. The opt-out procedure is the same for residents and non-residents, and it enhances access to justice for all people who may not take advantage of the proceeding for a variety of reasons. Opting out also better ensures, in the event liability is found, that the full measure of damage is assessed.

THE NOTICE PLAN

[49] At the certification hearing, the issue of notice to the class was adjourned for further submission. The main issue in contention is not the content of the notice, but the question of who pays the costs of the proposed notice.

[50] As stated in *Dutton* at para. 49:

> 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.

[51] The Notice Plan proposed by counsel for the Andersons is the following:

(a) Bell Mobility encloses the Notice in the monthly cellular telephone bills that it delivers to class members who are currently Bell Mobility customers;

(b) Bell Mobility sends the Notice to the last known mailing address and e-mail address of class members who are no longer Bell Mobility customers;

(c) Publication on two occasions of a ¼ page notice in the following newspapers:

i) *News/North* (a publication for communities in the Northwest Territories and Nunavut);

ii) *The Yellowknifer* (a newspaper that serves NWT's capital City of Yellowknife and is distributed throughout the NWT);

iii) *The Nunatsiaq News* (a primary newspaper for Nunavut); and

iv) *The Yukon News* (a newspaper distributed throughout Yukon);

(d) Publication of the Notice on the Website of Landy Marr Kats LLP.

[52] I am in agreement that it is most cost effective and efficient to have Bell Mobility distribute the notices. Bell Mobility estimates that cost to be $19,600 to insert a Notice in the monthly billing to current customers; $7,000 to retrieve the contact information of former customers; and $.86 to mail the Notice to each former customer.

[53] The newspaper Notice is to ensure that even class members who don't receive the Notice in the mail or by e-mail may receive notice via the newspapers. The proposed newspaper Notice has a cost of $7,353 plus GST.

[54] The Notice of Class Proceeding is attached as Schedule A to this judgment. It is in plain language, and it lays out the nature of the lawsuit or class proceeding, the common issues, the class counsel's fee arrangement and contact information, the financial consequences for class members and the manner of opting out.

[55] I have varied the Notice in recognition of Bell Mobility's point that the Notice should indicate that the class proceeding is defended. I have also included the common issues as suggested in para. 49 of *Dutton.*

[56] I have also concluded that the alternative proposal of Bell Mobility to add a 300-character Notice on each customer invoice, while being more economical, would not meet the notice requirement in *Dutton.* In my view, a 300-character message would not contain sufficient information to inform potential class members properly about the suit. It would also have the weakness of not necessarily catching the attention of the potential class members. There was no prototype presented to assess the merits of a 300-character notice, but I nonetheless conclude that a billing insert containing the Notice of Class Proceeding in

Schedule A is the most effective method of notification of the potential class members.

[57] I am satisfied that direct mail to known potential class members in combination with publication in northern newspapers is the most efficient and fair way to accomplish notification.

[58] The issue of who must bear the costs of notice is contested by Bell Mobility who submits that they should not be required to pay anything for notification of a lawsuit that it is vigorously contesting. As indicated in *Dutton*, at para. 51, procedural complexities must be addressed on a case-by-case basis in a "flexible and liberal manner, seeking a balance between efficiency and fairness."

[59] The case law has examples of both plaintiffs and defendants being ordered to pay the costs of notice, depending on whether the issue is access to justice, the strength of the plaintiff's case, or whether the burden should be fairly placed upon the plaintiff or defendant. For example, in *Farkas v. Sunnybrook and Women's College Health Sciences Centre*, [2004] O.J. No. 5134 (S.C.), costs of notice have also been ordered to be paid by the defendant hospital as it was more efficient and less expensive than being done by class counsel.

[60] I do not agree with Bell Mobility's submission that an order that Bell Mobility pay the costs of notice is tantamount to an order for advance costs as permitted in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71. In *Okanagan*, the real issue was whether the Band's impecuniosity and inability to pay legal fees would result in an injustice leaving constitutional rights unenforceable and public interest issues unresolved. In such cases it is understood that costs would be paid in advance and never recovered regardless of the outcome of the action. That is not the case here, where the payment of notice expenses is recoverable in an award of costs.

[61] In the case at bar, both parties will benefit from adequate notice to the potential class members. Bell Mobility has the information that is required for mail or e-mail notification and a system in place. It would be inefficient to require the plaintiff to mail the notice. In these circumstances, it is appropriate for Bell Mobility to bear the costs of preparing and mailing the inserts and for the plaintiffs bear the cost of the newspaper publications. As noted, both costs are recoverable in an award of costs.

LIABILITY AND DAMAGE

[62] In the certification decision, I decided that the determination of damages would be heard after the common issues trial on liability (paras. 70 and 77). I made that ruling on the basis that the calculation of damages could vary depending upon the finding of liability, if any, arising out of the common issues. However, I did not intend this to be interpreted as suggesting that document discovery and examination for discovery on damage issues must await the liability hearing. In my view, these matters are inextricably entwined and should be discovered at the same time to avoid duplication and delay. Counsel may address this issue further in case management should any difficulties arise.

TRIAL BY JURY

[63] The Andersons seek to have the class action tried by jury, pursuant to s. 2(1)(b) of the *Jury Act*, R.S.N.W.T. 1988, c. J-2. Their counsel submit that the facts and law are not particularly complex.

[64] Section 2(1)(b) and 2(2) are as follows:

> 2. (1) Where, in any action
>
> ...
>
> (b) founded on a tort or contract in which the amount claimed exceeds $1,000, ...
>
> either party to the action applies to the Court, not less than two weeks before the time fixed for the trial of the action before a jury, the action shall, subject to subsection (2) and section 3, be tried before a jury, but in no other case shall an action be tried before a jury.
>
> (2) Where, in any action of a class specified in subsection (1), application is made for the trial of that action before a jury and it appears to a judge, either before or after the commencement of the trial, that the trial will involve any prolonged examination of documents or accounts or any scientific investigation that, in the opinion of the judge, cannot conveniently be made by a jury, the judge may direct that the action be tried without a jury or that the

> jury be dismissed, in which case the action shall be tried or the trial continued, as the case may be, without a jury.

[65] While I am satisfied that this will not be a long trial by today's standards, it will be a factually and legally complex case involving different contracts, express or implied terms, and claims of unjust enrichment, waiver of tort, and punitive and exemplary damages.

[66] These matters taken together are sufficient for me to exercise my discretion to order that the class action shall be tried without a jury.

[67] I am also mindful of the fact that the population of Yellowknife, where the jury will be selected, is approximately 21,000 out of a total territorial population of approximately 43,000. The number of cell phone users in the Northwest Territories is approximately 24,000 and while it may be that some of that 24,000 reside outside of Yellowknife, it is likely that it will be difficult to empanel a jury that does not have an interest or a relationship with someone interested in the proceeding.

[68] I am aware that jurors could be questioned on that issue to determine their impartiality, but it nevertheless remains a possibility that it will be difficult to empanel an impartial jury.

[69] For all of the reasons set out above, I order that the class action proceed without a jury.

THE LITIGATION PLAN

[70] The Statement of Claim in this class action was filed in November 2007. Bell Mobility filed an application to strike which was dismissed in this Court on October 30, 2008, and in the Court of Appeal in April 27, 2009. The certification of the class action was ordered on July 30, 2010, followed by the further applications decided in this judgment. The trial is set for May 7 – 18, 2012, in Yellowknife. I recite these matters to indicate that the matter has been extant for approximately 3 ½ years.

[71] Counsel are in agreement, with one qualification, that the following is a reasonable litigation plan and I so order:

(a) the Plaintiff deliver any Reply by June 7, 2011;

(b) the parties exchange Statements as to Documents and copies of the documents by July 5, 2011;

(c) examinations for Discovery be completed by October 31, 2011;

(d) answers to any Undertakings be provided by December 15, 2011; and

(e) any pre-trial motions or motions arising out of Examinations for Discovery be brought and heard by February 13, 2012.

[72] The only qualification was expressed by counsel for Bell Mobility, as I recall, relating to the documents that may be required on the damages issue as they could be in the many thousands based upon the expansion of the class and the nature of the damage issue. That said I trust that counsel will bring concerns on the production and delivery of documents relating to damages to case management.

SUMMARY

[73] To summarize, I order the following:

(a) that the definition of the Class be expanded to include persons resident in Nunavut and Yukon (excluding Whitehorse) as set out in para. 46;

(b) that all persons who meet the Class definition shall be included in the Class unless they specifically opt out of the Class following receipt of the Notice of Class Proceeding attached as Schedule A;

(c) that Notice of Class Proceeding attached in Schedule A shall be given to Class Members by

i) Bell Mobility, at its own expense, by enclosing the Notice in monthly cellular telephone bills that it delivers to Class Members who are currently Bell Mobility customers;

ii) Bell Mobility, at its own expense, by sending the Notice to the last known mailing and email addresses of Class Members who are no longer Bell Mobility customers;

iii) Publication, paid by the plaintiffs, on two occasions of a ¼ page advertisement in the following newspapers:

a) *News/North* (a publication for communities in the Northwest Territories and Nunavut);

b) *The Yellowknifer* (a newspaper for Yellowknife and distributed throughout the NWT);

c) *The Nunatsiaq News* (a primary newspaper for Nunavut); and

d) *The Yukon News* (a newspaper distributed throughout Yukon);

iv) Publication of the Notice on the Website of Landy Marr Kats LLP.

(d) the Defendant is to provide the Plaintiffs' counsel within 30 days the last known mailing address, email address (if available), cellular and other phone numbers for each Class Member;

(e) that the Litigation Plan be as set out in para. 71 of this judgment;

(f) that the action be tried without a jury on May 7 – 18, 2012; and

(g) the costs of this Application may be spoken to, if necessary, at case management.

VEALE J.

SCHEDULE A

NOTICE OF CLASS PROCEEDING

TO: Bell Mobility Inc. Customers

If you are a person who before April 13, 2010 was:

a) a resident in the Northwest Territories, Yukon (excluding Whitehorse), or Nunavut;
b) entered into an agreement with Bell Mobility Inc. to receive cellular phone services;
c) was charged 911 emergency access fees; and
d) has no 911 live operator where you reside.

Please read this notice carefully.

The Lawsuit: *Anderson v. Bell Mobility Inc.*

By Order dated July 30, 2010, of the Supreme Court of the Northwest Territories, a civil action was certified as a class action.

The action is against Bell Mobility Inc. ("Bell Mobility").

The representative Plaintiffs in the Class Action are James Douglas Anderson and Samuel Anderson.

In the Class action it is alleged that Bell Mobility is charging the Plaintiffs and the Class Members a fee for 911 Emergency access. It is further alleged that the Class members, who reside in the Northwest Territories, Yukon (excluding Whitehorse) or Nunavut, receive no 911 Emergency Access services. The Plaintiffs seek repayment to class members of the monthly charges paid for the 911 Emergency Access service which they never received, plus interest and legal costs. Additionally the Plaintiffs seek an award for punitive and exemplary damages of $1,000,000.00.

Bell Mobility denies the plaintiffs' allegations and will defend the lawsuit on the basis, among others, that it provides call-routing services and local governments are responsible for emergency dispatch. Bell Mobility customers have access to 911 emergency calling whenever made available by local governments.

Certification is a preliminary procedural order that merely allows the lawsuit to proceed to trial as a claim on behalf of a class. The Supreme Court of the Northwest Territories has not made any determination as to merits or validity of any claims or defences asserted.

The common issues for trial without a jury in Yellowknife on May 7 – 18, 2012, are:

(a) Do the service agreements between the class members and Bell Mobility expressly require Bell Mobility to provide 911 live operator service to class members?
(b) 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?
(c) Did Bell Mobility provide 911 live operator service to class members?
(d) Did Bell Mobility breach the contracts with the class members?
(e) Has Bell Mobility been unjustly enriched for no juristic reason, or has there been a failure of consideration?

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

Financial Consequences of the Lawsuit

As a member of the Class, you may be entitled to compensation if the action is successful. If the action is not successful, as a member of the Class, you will not be responsible for any of the costs of the trial of the common issues.

Your right to Opt Out of the Lawsuit

Any judgment in the lawsuit, whether favourable or not, will bind all the members of the Class who have not opted out.

If you wish to opt out of the Class, **you must advise Landy Marr Kats LLP, Barrister & Solicitors in writing, by mail or fax to the address listed below, so that the Opt Out notification is received by no later than October 31, 2011.**

If you opt out of the Class action, you will not be entitled to share in any settlement which may be reached in this lawsuit or any compensation which may be recovered from the Defendant, and you will not be bound by any decision in the class proceedings. If your written request to opt out is not received by the above date, you will remain a member of the Class. YOU WILL AUTOMATICALLY BE INCLUDED IN THE CLASS UNLESS YOU OPT OUT.

Agreement with Solicitors

Landy Marr Kats LLP has agreed to act as counsel in this legal proceeding under a contingency Agreement. The Class does not have to pay any fees to the lawyers unless the action is successful. If the lawsuit is successful or a satisfactory settlement is negotiated and approved by the Court, then the law firm of Landy Marr Kats LLP will request fees based upon a percentage of the amount actually recovered. Such fees must be approved by the Court.

Further information

If you have any questions about this notice or about the class action, you may contact Landy Marr Kats at the address below.

This notice is dated this _____ day of _____ 2011.

Please contact:

LANDY MARR KATS LLP
Barristers & Solicitors
900-2 Sheppard Avenue East
Toronto, Ontario
M2N 5Y7

Keith M. Landy
kmlandy@lmklawyers.com

Samuel S. Marr
smarr@lmklawyers.com
Tel: (416) 221-9343
Fax: (416) 221-8928

S-1-CV2007-000247

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

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