COURT FILE NO.47068/06 CP
DATE:November 4,2008

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
GLENN WILKINS and LORETTA WILKINS	Todd J. McCarthy, Sean A. Brown, for the Plaintiffs
Plaintiffs	
- and -	
ROGERS COMMUNICATIONS INC., ROGERS CABLE, ROGERS TELECOM and ROGERS MEDIA	
Defendants	Edward J. Babin, James D. Bunting, Jordon R. Vaeth, for the Defendants
	HEARD:August 29 & September 3, 2008

REASONS FOR DECISION ON MOTION FOR CERTIFICATION
(CLASS PROCEEDINGS ACT, 2002)

Justice J. Bryan Shaughnessy

[1] Glenn Wilkins was a subscriber to digital cable services offered by Rogers Cable which is a wholly owned subsidiary of Rogers Communications Inc. (hereinafter referred to collectively as Rogers).

[2] It is pleaded in the Amended Statement of Claim that in the period between May 1, 2006 and September 30, 2006 Glenn Wilkins and similar subscribers had service interruption when attempting to view the selection of movies and shows available on two cable services provided by Rogers. Mr. Wilkins has commenced this action against Rogers by reason of the alleged service interruption of cable services and he moves to have this proceeding certified as a class proceeding pursuant to the Class Proceedings Act, 1992, S.O.1992 c.6 and to be appointed a representative plaintiff. (Loretta Wilkins is being withdrawn as a representative plaintiff).

BACKGROUND INFORMATION

[3] There are two types of services provided by Rogers on its cable network which are the subject matter of this proceeding.

[4] The first service relates to "Rogers on Demand" (ROD) which provides basic digital cable service to its customers. ROD is accessed through two main portals, located at Channels 100 and 300. When customers access ROD through one of the portals they are provided with access to a variety of On Demand content, including movies and television series. ROD consists of pay-per-view products and it also contains free content.

[5] The second service relates to the "The Movie Network On Demand" (TMNOD) which is available only to those Rogers digital cable customers who subscribe to "The Movie Network" (TMN). Customers who subscribe to TMN as part of their digital cable service receive access to TMNOD.

[6] TMN provides a customer with five standard definition channels, one high definition channel and one channel (308) that is a portal to TMNOD.

[7] The TMN content includes a number of popular television series that are not generally available to customers who do not subscribe to TMN. When a customer accesses TMNOD they are provided with access to some TMN content on demand.

[8] Once a customer selects a ROD or TMNOD show or movie, that content can be received by the customer at his /her leisure. The customer is also provided with fast forward, rewind and pause features.

[9] According to Rogers Third Quarter 2006 Financial Report (filed) there were approximately 1,064,000 digital services subscribers (calculated by subscriber household) during the period June 1 to September 30, 2006. The cost of the basic cable service is approximately $ 25.99 per month. The basic digital service package ROD is approximately $ 28.98 per month. Accordingly, the cost of subscribing to the basic digital services rather than the basic cable service is $ 2.99 per month (the difference between $ 25.99 and $ 28.98.) The additional service of TMNOD was offered to subscribers by Rogers at an additional monthly cost of $ 14.95. There were approximately 300,000 TMNOD subscribers in the period May 1 to September 30, 2006

and there were approximately 764,000 basic digital subscribers who did not subscribe to the TMNOD.

ROGERS MARKETING CAMPAIGN

[10] The ROD service was marketed to the public, which includes all class members, as a service that provided "exclusive content not available through any other provider" and which provided to subscribers "freedom" to watch "What you want" and "When you want". The ROD service was marketed to subscribers as providing ".....an incredible amount of freedom and control over how and when you watch T.V."

THE SERVICE INTERRUPTION

[11] There are two forms of service interruption in the amended claim period namely "Scheduled Outages" and the "Propagation Issue".

(a) Scheduled Outages

[12] In the amended claim period Rogers conducted what it describes as three "scheduled outages" to perform maintenance on the digital cable network as part of a service upgrade. The scheduled outages occurred as follows:

Scheduled Outage Date	Length of Outage
August 17, 2006	9 hours (2:00 am to 11:00 am)
August 24, 2006	1 hour (4:00 am to 5:00 am)
August 24, 2006	8 hours
August 24, 2006	1 hour and 15 minutes
September 6, 2006	12 minutes

(b) Propagation Issue

[13] During the Amended Claim Period Rogers acknowledges that it experienced an issue with its "Propagation Servers". These are servers that Rogers uses to distribute updated (or new) content to customers through ROD. Dermott J.A.O'Carroll in an affidavit sworn August 2, 2008(paragraph 42) and submitted on behalf of Rogers indicates that the "propagation issue" caused an interruption in service for **some part** of 64 days in the claim period. More particularly the propagation issue occurred intermittently from May 17 to June 10, 2006 and August 8 to September 17, 2006. The content affected was updated or new content that Rogers released to its customers during the propagation period. The propagation issue affected both content on ROD and TMNOD. According to Rogers there are no records (other than individual digital box transaction logs) that demonstrate what content was affected. Rogers states that even the digital box transactions do not illustrate whether content was affected. As explained by Mr. O'Carroll a code on a customer digital box referred to as NOREPLICA code indicating potentially a service

interruption may not have manifested as a customer impacting issue. (Reference the Supplementary Motion Record of the defendants dated August 26, 2008 tab B "Schedule B".)

[14] When a propagation issue occurred, the customer would see the new content as being available on the movie screen, but when the new content was selected the customer would receive a message that stated: "Error 36865". Rogers maintains that the impact varied customer by customer. It contends that a customer could have tried and failed to access a particular new release movie (that Rogers had updated during the propagation period) but tried again minutes or hours later and successfully received the same movie. Rogers also contends that other customers in the same or different locations would have been able to access the same content at the same time without difficulty.

[15] Rogers maintains that it has been able to determine which customers "might" have experienced a propagation issue. Rogers states that from the transaction logs of customer's digital boxes (each digital box having a unique identification number on Rogers' digital cable network) it can determine when a request was made to a Video server and that Video server does not have the content requested, the transaction log for a customer's digital box will record a "NOREPLICA" code. At the same time Rogers states that even if a digital box recorded a NOREPLICA code or multiple NOREPLICA codes does not mean that a customer was necessarily impacted by a propagation issue. Rogers states that the reason for this unreliability of the NOREPLICA code is that a customer request may have been served by a different Video server cluster (not the initial server) and thereby received the content when requested.

[16] Mr. O'Carroll when cross examined and in his affidavit sworn August 20, 2008 confirmed that Rogers does not have any practical way of determining the following:

(a) how many of its customers were affected by the propagation issue,
(b) for how long each customer was affected by the propagation issue,
(c) what content was affected by the propagation issue,
(d) how many customers were affected by the propagation issue by tracking the NOREPLICA code,
(e) how many customers attempted to call Rogers Customer Service Department to complain about the lack of ROD service and/or request a refund or credit
(f) how many customers did not have a problem accessing content during the claim period.

[17] Rogers has determined that 229,468 digital boxes encountered a NOREPLICA code during the claim period. However Rogers states that this does not mean that 229,468 customers were adversely affected by the propagation issue. Rogers states that it has no "practical way" of determining whether and to what extent a customer was impacted by a propagation issue.

[18] The evidence of the Plaintiff Glenn Wilkins is that during the amended claim period when he attempted to access ROD there was an indecipherable code such as 36865 or 4120 displayed on the screen. The Plaintiff also testified that at times a screen message appeared stating: "This week's ROD update has been delayed due to a technical issue. We are working

hard to bring you the rest of ROD's new titles and we apologize for any inconvenience." The Plaintiff also states that other screen messages stated: "This program is not presently available. Please check again at a later time." It is the Plaintiff's evidence that none of the screen messages instructed customers on what to do as a consequence of the service interruption. No contact telephone number was provided in the screen message. The screen message did not invite customers to call and request a refund or credit and it did not indicate that a refund or credit would be applied automatically. Those customers who did contact the Rogers Customer Service Line and indicated that they were phoning about Rogers's digital cable service received an automated message. According to Mr. O'Carroll the automated message was as follows:

> Thank you for calling Rogers Cable TV. Your call is important to us. If you are calling regarding our On Demand services, please be advised that we are experiencing (ex. reduced availability, error code 36865, 4120,32.....etc).Trying to view a video may result in the receiving of an error message. Full service will be restored as soon as possible.
> We apologize for any inconvenience and thank you for your patience.
> For all other inquiries, please remain on the line and a Technical Service Representative will be with you shortly. (emphasis added).

[19] The evidence of Glenn Wilkins is that he attempted to speak to a Technical Service Representative on one or two occasions during the claim period . After waiting on the line for 10 minutes he gave up.

[20] It is not in dispute that some subscribers contacted Rogers to complain about the lack of service and they were given an electronic credit to their account. Rogers states that it gave approximately $ 45,000 in credits in the claim period and these were for the most part given to TMNOD subscribers. Customers who did not call or wait on the line to complain did not receive a credit.

[21] In the Statement of Claim the Plaintiff alleges that Rogers did not refund their subscribers the cost of the unused digital cable services in the months it was not available or not fully available; that Rogers did not credit their subscribers accounts and they did not advise their subscribers that they could contact Rogers and obtain a credit or refund. The Plaintiff pleads that Rogers was unjustly enriched at the expense of the class.

SERVICE TERMS

[22] Rogers in its responding material states that the digital cable service is provided pursuant to its "Service Terms". The Service Terms are forwarded to each customer when they receive their digital cable box. Further an 'abbreviated version" of the service terms are printed on each invoice that the customer receives from Rogers. The Service Terms state:

> **12. Rogers Liability**
> (1) Rogers does not guarantee uninterrupted operation of the Services, or of its equipment, facilities, connections or network.....Rogers liability for negligence, breach of contract, tort or other causes of action, or ay loss, omissions, delays, errors, defects or failures in the Services, equipment or facilities, or for any other action or inaction of Rogers, is limited to a refund of charges for the affected Services proportionate to the length of time the problem existed, upon request. Under no circumstances shall Rogers be liable for any indirect, special, consequential, exemplary or punitive damages whatsoever.....

[23] The "abbreviated Service Terms" on the subscribers invoice states that "any questions or discrepancies regarding charges must be reported to Customer Care within 90 days of the billing date. Failure to contact us within the time period will constitute your acceptance of such charges."

CRITERIA FOR CERTIFICATION

[24] Pursuant to s. 5(1) of the Class Proceedings Act, the court shall certify a proceeding as a class proceeding if:

(a) the pleadings disclose a cause of action
(b) there is an identifiable class
(c) the claims of the class members raise common issues of fact or law
(d) a class proceeding would be the preferable procedure and
(e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan

[25] A summary of Rogers argument against Certification is as follows:

(a) No matter how the action is framed, liability cannot be established without conducting individual examinations of each member of the proposed class. The Propagation Issue impacted the ability of some customers to order ROD and TMNOD programs for varying amounts of time, at different times in respect of different new content.
(b) The Plaintiff bears the burden of establishing some basis in fact for each of the certification requirements and in the present case none of the criteria under s.5(1) of the CPA have been met.
(c) The requirements under s.5(1) of the CPA are cumulative and the inability to meet even one of the criteria means the proceeding cannot be certified.
(d) Before liability can be established each of the claims advanced by the Plaintiff will require the following individual examinations of the proposed class;
    (i) the breach of contract claim requires the Plaintiff to establish an implied term in the contract, which involves an examination of each member of the proposed class to determine their knowledge and understanding of the agreement. The breach of contract claim also involves a determination of

whether the service provided by Rogers fell below the standard agreed to. Since the service issue affected each customer differently, if at all, requires an examination of how each member of the proposed class was affected by the service issue;

(ii) the negligence claim advanced requires the Plaintiff to establish whether the service received by each member of the class fell below the requisite standard and whether a member of the proposed class suffered loss as a result of any breach of duty;

(iii) the Plaintiff's pleading of fraud, deceit, misrepresentation and breach of the Consumer Protection Act is at its core a point of sale misrepresentation claim. Individual issues arise in such claims including who said what to whom and how any representations made were relied on to the detriment of a particular subscriber. The claim that Rogers breached the implied warranty to provide services of a reasonable quality under s.9(1) of the Consumer Protection Act 2002 requires the Plaintiff to establish that the level of service fell below the requisite standard which in turn involves an examination of how each member of the proposed class was affected by the service issue;

(iv) The unjust enrichment claim pleaded by the Plaintiff requires proof that each member of the class was deprived (or suffered loss) which involves an individual inquiry of each member of the class to determine whether the service issue caused them loss. Further that this claim is also derivative to both the breach of contract claim and the misrepresentation claim and raises the same individual questions that arise in respect of each of these claims;

(v) the common issues are overwhelmed or subsumed by the individual issues such that the resolution of the common issues will only be the beginning of the process leading to a disposition of the claims of class members;

(vi) cases of this nature, which turn on individual inquiries, would become a "monster of complexity and cost" and thereby would undermine the goals underlying the Class Proceedings Act, 2002;

(vii) the amended statement of claim advances a number of claims that do not disclose a cause of action while other claims in the pleadings are materially deficient;

(viii) the defined class advanced by the Plaintiff as all of Rogers digital cable customers during the claim period is overly broad and includes customers who were not affected by the limited service;

(ix) the proposed common issues are not common to the class. Each of the proposed common issues will inevitably lead to individual inquiries of each member of the proposed class before the common issues can be resolved;

(x) the proposed Representative Plaintiff was not affected by the Propagation Issue, is inadequate and the proposed Litigation Plan is deficient in material respects.

ANALYSIS

[26] The goals of class proceedings legislation are judicial economy, access to justice, and behaviour modification as explained by Chief Justice McLachlin in Hollick v Toronto (City) (2001) 205 D.L.R. (4th) 19 (SCC) at para.15:

> First, by aggregating *similar individual actions*, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. (emphasis added).

[27] In the same judgment (para 16) the Chief Justice states:

> [T]he certification stage is decidedly not meant to be a test of the merits of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately presented as a class action.

[28] The CPA is remedial legislation and accordingly it should be given a liberal interpretation. In Carom v Bre-X Minerals Ltd. (2000) 196 D.L.R. (4th) 344, the Ontario Court of Appeal stated that the Ontario Legislature made a conscious attempt "to avoid setting the bar for certification too high" and the Supreme Court of Canada in Western Canadian Shopping Centres Inc. v Dutton [2001] 2 S.C.R. 534 and Hollick (supra) has directed that the Act should be construed generously and except for the cause of action requirement, the proposed representative plaintiff must establish an evidentiary basis with respect to each of the criteria under s.5(1) of the Class Proceedings Act, 2002.

[29] The CPA then is a procedural statute. While the requirements under s.5(1) of the act are commonly addressed separately by the Court nevertheless Winkler J. (as he then was) in Frohlinger v Nortel Networks Group [2007] O.J. 148 at para. 25 succinctly summarizes the essence of the first three criteria for certification:

> There must be a cause of action, shared by an identifiable class, from which common issues arise.

[30] Therefore at the core of a class action is the element of commonality and implicit in that concept is that the cause of action, the scope of the class and the common issues are inextricably

linked. In relation to the remaining two requirements under s.5(1)for certification which are linked to the first three Winkler J. states:

> There must be a cause of action, shared by an identifiable class from which common issues arise that can be resolved in a fair efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers."

DO THE PLEADINGS DISCLOSE A CAUSE OF ACTION ?

[31] The amended Statement of Claim alleges breach of contract, negligence, unjust enrichment and a breach of the Consumer protection Act, 2002, S.O. 2002 as amended.

[32] The material facts necessary to meet the requirements of s. 5(1)(a) of the CPA as pleaded by the Plaintiff principally relate to statements of fact of the Plaintiff and statements made in the two affidavits of Dermott J.A.O'Carroll sworn August 2, 2008 and August 20, 2008 as well as his cross-examination on August 20, 2008. In summary the material facts advanced by the Plaintiff are:

(a) Rogers had a "Propagation Issue" for part of 64 days within the parameters of the claim period.
(b) Content on ROD was affected including "free content" as well as content on TMNOD.
(c) In the course of the "Propagation Issue" Rogers was unable to offer "certain limited new content in particular geographic regions at certain points in time" (Affidavit of Dermot J.A. O'Carroll sworn August 2, 2008 para 42)
(d) The Propagation Issue caused the potential for customers to have delays in accessing content. Accordingly some customers were affected for some periods of time with respect to some content.(Affidavit of O'Carroll dated August 2, 2008 para 43)
(e) As a result of the Propagation Issue there was also congestion or back log between the Video Server and the Propagation Servers. As a result of this congestion Rogers delayed the release of some new content. (Affidavit O'Carroll sworn August 2, 2008 para 44)
(f) Rogers was able to solve the Propagation Issue through two configuration changes in the software. On September 17, 2006 content began to be propagated properly through all Video Servers. (Affidavit of O'Carroll sworn August 2, 2008 para 43)
(g) In the footnote to paragraph 18 of the Affidavit of Dermot J.A.O'Carroll sworn August 20, 2008 it is stated that "Rogers has no practical way of identifying whether a customer was impacted by a Propagation Issue"
(h) Rogers did not give any credits to its customers unless the customer contacted a Customer Services Representative(Affidavit of O'Carroll dated August 2, 2008 para 57)
(i) In terms of liability while Rogers did "not guarantee uninterrupted operation of the services" nevertheless Rogers "liability for negligence , breach of contract, tort or other causes of action, or any loss, omissions, delays, errors, defects, or failures in the Services, equipment or facilities, or for any other action or inaction of Rogers is limited to a refund of charges for the affected Services proportionate to the length of time the problems

existed, upon request." (Affidavit O'Carroll sworn August 2, 2008 para 14 referring to the Service Terms).

[33] The "plain and obvious" test that is used on a Rule 21 motion as stated in Hunt v Carey, [1990] 2 S.C.R. 959, is also used to determine whether the proposed class proceeding discloses a cause of action. (Anderson v Wilson (1999) 44 O.R. (3d) 673 (C.A.) at page 679).

[34] The question then at the certification proceeding is not whether the claim is likely to succeed but whether the suit is appropriately presented as a class action. The defendant Rogers in its submissions on this issue has for the most part argued the merits of the various causes of action advanced by the Plaintiff. However, as stated in Caputo v Imperial Tobacco Ltd. (1997) 34 O.R. (3d) 314 at 320 "any inquiry into the merits of the action will not be relevant on a motion for certification." Further, all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and assumed to be true for the purposes of a certification motion.(Likewise Hollick *supra* para.25 and Hunt *supra* para.33)

[35] The defendant Rogers in argument suggests that the pleading of misrepresentation lacks particularity and the Plaintiff has not pleaded how it intends to invalidate the contract to establish the claim of unjust enrichment. Further it is argued that the plaintiff has not pleaded that Rogers owed some duty of care to its digital cable subscribers outside the contract or that Rogers breached any such duty of care in relation to a claim in negligence. Further the Defendant submits that based on case law the negligence claim must also fail because there is not a specific claim for recovery of economic loss or damages. The Defendant states that there can be no recovery for pure economic loss occasioned by a non-dangerous product .Finally the Defendant submits that the pleading of a breach of the Consumer Protection Act, 2002 is not available as neither s.11 or s.12 of the Service Terms varies or negates the deemed warranty in s.9 (1) of the Consumer Protection Act and neither can it be voided under s.9 (3) of that Act.

[37] I find that that the Plaintiff's pleading in relation to a breach of contract discloses a cause of action. While amendments to the statement of claim may be necessary to provide further particulars in relation to the negligence and unjust enrichment claims, nevertheless the breach of contract claim is a plain and obvious cause of action. The failure to provide particularity in relation to other alternative causes of action is <u>not</u> a reason to refuse to certify the proceeding. The claim advanced under the Consumer Protection Act while perhaps novel does not militate against certifying the Plaintiff's proceeding. Further, matters of law which are not fully settled by the jurisprudence should be permitted to proceed at the certification stage of the proceeding.

[38] Therefore I find that the Plaintiff has met the requirement under s.5(1)(a) in that the pleadings disclose a cause of action.

<u>IS THERE AN IDENTIFIABLE CLASS ?</u>

[39] The Class Proceedings Act, 2002 requires that there be an identifiable class of two or more persons that would be represented by the representative plaintiff.

[40] The Plaintiff has defined the Proposed Class in the following manner:

> All persons(including their estates, executors or personal representatives) corporations and other entities who rented one or more digital cable terminal(s) and subscribed to Rogers digital cable services between May 1, 2006 and September 30, 2006; and
>
> All persons (including their estates, executors or personal representatives) corporations and other entities who rented one or more digital cable terminal(s) and subscribed to Rogers digital cable services, including The Movie Network on Demand (TMNOD) between May1, 2006 and September 30, 2006.

[41] There is a limit on the class definition in that the proposed class member has to be in a contract with Rogers whereby Rogers agreed to provide digital On Demand content and the proposed class member agreed to pay for the same. During the claim period Rogers had an average of 971,000 digital cable subscribers and an average of 302,000 TMNOD subscribers.(Reference the Affidavit of Dermot J.A. O'Carroll sworn August 2, 2008 para 18 and 21)

[42] In Bywater v Toronto Transit Commission, [1998] O.J. No. 4913 (Gen.Div.) at para. 10 the three purposes of the class definition are described:

(a) to identify the persons who have a potential claim for relief against the defendant;
(b) to define the parameters of the lawsuit so as to identify those persons who are bound by its result; and
(c) to describe who is entitled to notice pursuant to the Act.

[43] It is well established in the case law that a claimant's probability of success cannot be a factor in determining whether a class action has been adequately defined. This would offend the principle against merit-based criteria and would require the court to determine the outcome of the litigation on the merits prior to class membership being ascertained. The Supreme Court of Canada decision in Hollick *supra* requires only that class members have a common interest in the resolution of the common issues.

[44] In determining whether a putative action meets the statutory requirement of an identifiable class consisting of two or more persons who would be represented by the representative plaintiff Ontario decisions have been guided by two principles:

(1) the need to identify the class by objective criteria, and
(2) a rational connection between the class definition and the common issues to be decided.

[45] The Defendant submits that the proposed class is improper as the class definition includes Rogers digital cable customers regardless of whether they use ROD or TMNOD and regardless of whether they were affected by the Propagation Issue. However I find that class membership identification is not commensurate with the elements of the cause of action. What is required is a rational connection between the class members and the common issue. In the case of Tiboni v

Frosst Canada Ltd. [2008] O.J. No.2996 (S.C.J.) Cullity J. accepted a class definition of all persons in Canada (except certain provinces) who were prescribed and ingested Vioxx in the face of the defendant's evidence that of the estimated 350,000 class members, those who suffered ailments from taking the drug would be approximately 2,000 people. As Justice Cullity indicated, in any class action it is possible that the claims of some class members will be unsuccessful which he observes (para. 78) "is virtually ordained by the authorities that preclude merit- based class definitions." Further in the Hollick case the plaintiff satisfied the commonality requirement by providing evidence that complaints of harm had been received from 950 of the 30,000 putative class members.

[46] The fact that there is a sub-class of TMNOD subscribers does not in my opinion militate against certification of the action. Moreover, it follows from the prohibition of merit based class criteria that class definitions will very often be over-inclusive to the extent that they will include persons who cannot establish that they suffered damages.(Markson v MBNA Canada Bank (2007), 85 O.R. (3d) 321).

[47] I find that the plaintiff has satisfied the evidential burden to demonstrate that there is an identifiable class and a rational connection between the class definition and the common issues to be decided in the action. Although the Class is approximately one million persons nevertheless it is bound in scope and duration and they can be identified by objective means (i.e. names addresses and customer numbers etc).

DOES THE PLAINTIFF'S CLAIM RAISE COMMON ISSUES ?

[48] Pursuant to s.5(1)(c) the class members must raise "common issues" which is defined under s.1 of the CPA as:

> (a) Common, but not necessarily identical issues of fact, or
> (b) Common, but not necessarily identical issues of law that arise from common, but not necessarily identical facts.

[49] The underlying question of a common issue is whether the resolution of the common issue will avoid duplication of fact finding or legal analysis. (Western Canada Shopping Centres Inc. v Dutton [2001] 2 S.C.R.534 at para. 39). In the Bre-X case *supra* the Ontario Court of Appeal held that the statutory definition of "common issues" represents a conscious attempt by the Ontario Legislature "to avoid setting the bar of certification too high." An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. Further, an issue will be "common" in the requisite sense provided the issue is a "substantial ingredient" of each of the class members' claims. Accordingly there must be a "substantial ingredient" of each class members' claim and its resolution must be necessary to the resolution of each class members claim , although, not necessarily to the same extent.(Hollick *supra* at para. 18, Cloud v Canada(Attorney General) [2004] 73).R. (3d) 401 (C.A.) at para. 53).

[50] The Amended Statement of Claim raises the following common issues:

(a) Did the Rogers defendants breach a contract with the class by failing to provide uninterrupted on demand digital service between May 1 and September 30, 2006?
(b) Were the Rogers defendants unjustly enriched by the Class by receiving full compensation for providing digital on demand service during the claim period, and then failing to provide uninterrupted digital on demand service?
(c) Were the Rogers defendants negligent in the manner in which they attempted to upgrade, maintain and service the computer network, hardware and software that provided uninterrupted on demand digital service to the class?
(d) Does the consumer agreement or contract between the Rogers defendants and the class contravene or breach the Consumer Protection Act, 2002?
(e) With respect to the allegations of fraud, deceit, misrepresentation and breach of the Consumer Protection Act, 2002:
    (i) Did the Rogers defendants adequately disclose the interruption in On Demand services to the subscriber?
    (ii) Did the Rogers defendants make representations that the interruption in On Demand services was going to be occurring over a shorter period of time than it actually occurred?
    (iii) Did the Rogers defendants make false or misleading statements of fact to the class concerning the magnitude of the interruption in services?
    (iv) Did the Rogers defendants know or ought to have known that the On Demand services would be out of service for a period of four months?
    (v) Did the Rogers defendants engage in deceptive and unfair practices by pre-billing for a service which it knew or ought to have known would not be available for a long period of time? (Counsel for the Plaintiff acknowledged at the hearing of this motion that this statement of a common issue is incorrect as Rogers did not "pre-bill" its subscribers).
    (vi) Did the Rogers defendants engage in deceptive and unfair practices by only issuing a credit to those subscribers who complained about the lack of On Demand service?
(f) Have the members of the class sustained damages, and if so, what is the proper measure of damages?
(g) Are the Rogers defendants liable for punitive damages, and if so, in what amount?

[51 Rogers vigorously opposes certification on all the grounds of s.5(1) as summarized in paragraph 25 above. In relation to the proposed common issues Counsel for the defendants went to some great length to submit that the proposed common questions are individual questions. Further it was argued that even if the proposed common issues are common to the class, the resolution of any such issues would only be the beginning of the liability inquiry. Rogers strenuously argues that no matter how the action is framed , liability cannot be established without conducting individual examinations of each member of the proposed class to determine whether the individual was affected by the Propagation Issue or in what manner and for what period of time. Rogers argues that because it is necessary, in their opinion, to examine on a customer by customer basis how the propagation issue did or did not impact, makes it impossible

to determine on a class wide basis whether the quality of service provided by Rogers fell below the level of service contracted for.

[52] Interestingly the argument in respect of the futility of a class action because of the nature and variations among individual claimants has been advanced in a considerable number of cases and most recently in DeWolfe v Bell ExpressVu Inc [2008] O.J. No. 592. In that case Justice Perell was presented with the same argument now being advanced by Rogers namely that "all of the class members claims depend upon individually establishing an agreement or arrangement to advance credit and therefore there are no common issues for the class proceeding." (para.24) (emphasis added).Justice Perell characterized this as the so called "straw man" argument. Rogers is advancing the "straw man" argument in relation to the common issues. In essence Rogers describes the plaintiffs claim in a way that would require individual assessments and then it proceeds to challenge the claim as lacking the commonality necessary for a class proceeding.

[52] I do find that the proposed common issue in paragraph 50 (e) (v) above is not supported by the evidentiary record and should not be engaged as a common issue.

[53] There is precedent that the Court may modify the definition of the class or the common issues if the Court is of the view that such modifications is required to comply with the Class Proceedings Act (Williams v Mutual Life Assurance Co. of Canada (2000) 51 O.R. (3d) 54 (SCJ); Zicherman v Equitable Insurance Co. of Canada [2003] O.J. No.1160 and 1161(C.A.) which affirmed [2001] O.J. No.4952 (Div Ct) which in turn affirmed [2000] O.J.No.1544 (SCJ).

[54] I find that there can be a common issue concerning the interpretation of the Rogers Service Agreement and more particularly there can be a common issue relating to an alleged breach of contract in not providing service in the requisite claim period. In this regard there is commonality in the standard contract or Service Terms and in the factual nexus in which that contract is to be interpreted and performed and the damages that flow based on a finding at trial of liability. This is sufficient for the purpose of satisfying the criteria under s. 5(1)(c) of the CPA. While there is an evidentiary record to support the underpinnings of most of the remaining proposed common issues I nevertheless believe that they may have to be to some extent reformulated at a future case conference/or motion.

[55] Rogers position on the issue of damages is. that whether a subscriber suffered a loss or damage requires an assessment of the individual circumstances of each member of the proposed class and is not a common issue. However this argument is not supported as a result of the decision of the Ontario Court of Appeal in Markson v MBNA Canada Bank [2007] 85 O.R. (3d) 321. Provided that liability can be established against Rogers I find that damages can be determined by operation of s.24 of the CPA. That section inter alia provides that the court may order that all or part of an award be applied so that some or all individual class members share in the award on an average or proportional basis. Further, in deciding whether to make a proportionate or average assessment of damages under s.24(2) the court shall consider whether it would be impracticable or inefficient to identify the class members entitled to share in the award on an average or proportional basis.(s.24(3) CPA). In the Markson case Justice Rosenberg stated (para.44-45):

> .....I agree with Cullity J. in Vezina v Loblaw Companies Ltd [2005] O.J. No.1974 at para 25 (SCJ) that at the certification stage the plaintiff need only establish that "there is a reasonable likelihood that the precondition in section 24(1) of the CPA would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial of the common issues."

[56] If the Plaintiff is successful in finding liability against Rogers on the common issues I find that s. 24(1) (a) and (c) can be satisfied with no difficulty. In relation to s. 24(1) (a) monetary relief is claimed on behalf of the class. As to condition (c) statistical sampling in s. 23 of the CPA can be employed to determine the aggregate or part of the defendant's liability without proof of individual claims.

[57] In this proceeding each class member would have paid approximately the same amount for the digital subscription fee and where applicable the TMNOD subscription fee. The period or extent of the service disruption would of course have to be decided in the liability component of the common issues trial. In the result s.24 of the CPA could be employed to determine an aggregate quantum of damages for all class members without resort to proof by each individual class member. The trial judge may find it appropriate to resort to s. 24(2) and (3) of the CPA to fashion a remedial order to avoid the cost and inefficiencies that might arise from an attempt to determine the quantum of damages on an individual basis.

[58] I find that the common issue as detailed above and the other common issues as they may be reformulated (save and except as detailed in paragraph 50 (e) (v) above) are the substantial ingredients of the Plaintiff's case. The common issues meet the procedural objectives of avoiding duplication of fact finding and are rationally connected to the cause of action. Therefore I find that the Plaintiff has met the test under s.5 (1) (c) of the CPA.

IS A CLASS ACTION THE PREFERABLE PROCEDURE?

[59] In order for a class proceeding to be the preferable procedure under s. 5 (1)(d) of the CPA it must represent a fair, efficient and manageable procedure that is preferable to any alternative method of resolving the claims.(De Wolfe v Bell Expressvu Inc.*supra* para 47, Cloud v Canada (Attorney General) (2004), 73 O.R.(3d) 401 (C.A.) para 73-75 and Baxter v Canada (Attorney General) (2006), 83 O.R. (3d) 481 (SCJ) para 23.

[60] Accordingly, it is necessary to analyze whether this proposed class proceeding is preferable in that it constitutes a fair , efficient and manageable procedure for determining the common issues presented by the claims of the proposed class members. It is also necessary to consider whether such determination of the common issues advances the proceeding in accordance with the policy objectives of the CPA namely, access to justice, judicial economy and the modification of the behaviour of wrongdoers. In De Wolfe v Bell Expressvu Inc. *supra* (para 49) Perell J. states that:

> Preferability captures the ideas of whether a class proceeding would be an appropriate method of advancing the claim and whether it would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute.....

[61] In approaching the preferable procedure criterion I have considered the common issues, the individual issues which might remain after the determination of the common issues as well as the factors detailed in s.6 of the CPA. I have also considered the complexity and manageability of the proposed class action as well as alternative procedures for dealing with the claims asserted. Finally, I have assessed the extent to which certification furthers the rights of the Plaintiff and Rogers in the context of the objectives of the CPA namely, litigation efficiency, access to justice and judicial economy.

[62] In Markson *supra*, Justice Rosenberg summarized the principles enunciated by the Supreme Court of Canada in Hollick as follows (para 69):

(a) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice, and behavior modification;
(b) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be fair , efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
(c) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

[63] Therefore analyzing the "preferability" requirement in the context of the common issues I find that there is no purpose served by requiring each class member to advance a separate challenge to the Defendant Rogers conduct. The determination of the issues that that are common to all class members should be made in one action and thereby achieve judicial economy. I find individual litigation would be unreasonable and unrealistic for the parties and it would place an undue burden on the judicial system. Further, each individual claim are small amounts of money but in the aggregate constitute substantial income for Rogers. Therefore each individual claim is so small that, absent a class action, litigation would be illusory. Finally I conclude that a class action in this proceeding is a manageable way to facilitate access to justice, to efficiently and economically use judicial resources and to bring about behavioral modification in those who breach contracts to provide service to customers who have paid in full for that service.

[64] I conclude that the requirements of s.5 (1) (d) of the Class Proceedings Act, 2002 have been satisfied.

IS TH REPRESENTATIVE PLAINTIFF APPROPRIATE ?

[65] The only representative plaintiff now being advanced is Glenn Wilkins. It is not in dispute that he was a contract subscriber of Rogers On Demand during the claim period. Glenn Wilkins did not subscribe to TMNOD.

[66] In his affidavit Mr. Wilkins testifies that he experienced an interruption in his ROD service during the claim period. He states that he received various screen messages advising. that the programming was not available. When he called Rogers customer support line he received an automated message along the lines as previously described. He also testifies that he did not receive a refund or credit from Rogers.

[67] The defendant files affidavit material and states that Glenn Wilkins is not a representative plaintiff as required under s.5(1)(e) of the CPA and indeed that he is inadequate because he does not have a valid cause of action. Rogers states that the plaintiff did not experience the Propagation Issue that forms the basis of the claim in the Amended Statement of Claim. In support of its position Rogers obtained and produced the transaction logs for the Wilkins digital cable boxes which do not show a NOREPLICA code during the amended claim period. Further Rogers states that the Plaintiff does not have a cause of action with respect to TMNOD because he was never a TMN subscriber.

[68] I reject Rogers position on this issue as it is inconsistent with its own evidence as detailed in paragraphs 16 and 17 above. Rogers position is that there is no practical way to determine who was actually affected by the Propagation Issue and a NOREPLICA code is not determinative of the issue. At this stage the evidence of Mr. Wilkins is consistent with the evidence of Mr. O'Carroll concerning the on screen messages. Further at the certification stage it is not possible to explore the significance, if any, of the NOREPLICA code and how the code was activated or not activated depending on the Plaintiff's actions after receiving the on screen message relating to the unavailability of content. Further there are issues relating to findings of credibility which cannot be resolved on a motion for certification.

[69] The most important consideration in relation to Mr. Wilkins suitability as a representative plaintiff is whether there is a common interest with other class members and whether the representative would vigorously prosecute the claim. I am satisfied that Mr. Wilkins has a common interest with the majority of the proposed class members in that he was a ROD subscriber. The fact that there is a sub-class of subscribers (TMNOD) and to which he was not a subscriber is of no importance. Further I note the dispatch with which the affidavit material was delivered and the cross examinations and hearing of the certification motion were arranged that I can reasonably conclude that this representative plaintiff is vigorously prosecuting the claims of the class members. I find that Mr. Wilkins is a suitable representative plaintiff who has no conflict with other class members and who can fairly and adequately represent the class and therefore he meets the requirements of s.5(1)(e) of the Class Proceedings Act, 2002 subject to the comments relating to the Litigation Plan.

LITIGATION PLAN

[70] The Defendant has a number of criticisms of the plaintiff's litigation plan which for the most part repeats the same arguments relating to the individual nature of the claims and causation. The litigation plan at this stage while workable is nevertheless tentative and for that reason not all procedural requirements have been provided.(Anderson v St. Jude Medical Inc. 2004 CanLII Inc. 17808 para 14) Accordingly I direct that the Litigation Plan may be modified at a case conference to be heard by me at a date to be arranged with the trial coordinator at Whitby.

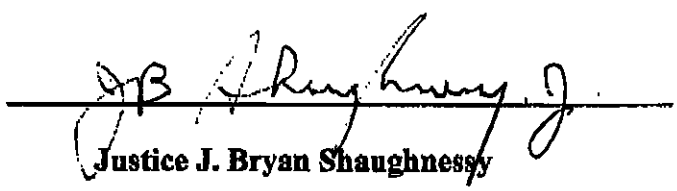
CONCLUSION

[71] In the result I find that the all the requirements under s. 5(1) of the Class Proceedings Act, 2002 have been met(subject to the modification of the Litigation Plan). I am satisfied that there is a cause of action, shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers

[72] I direct that a case conference be arranged with the Trial Coordinator to amend the Litigation Plan as required.

[73] If the parties cannot agree on the matter of costs they may arrange an appointment with the Trial Coordinator at Whitby to appear before me , file factums and make oral submissions.

Dated: November 4, 2008



Justice J. Bryan Shaughnessy

COURT FILE NO. :47068/06
DATE:November 4, 2008

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:
GLENN WILKINS and LORETTA WILKINS

Plaintiffs

- and –

ROGERS COMMUNICATIONS INC.,
ROGERS CABLE
ROGERS TELECOM and
ROGERS MEDIA

Defendants

REASONS FOR DECISION ON A MOTION
(Class Proceedings Act,2002)

JUSTICE J. BRYAN SHAUGHNESSY

Released: November 4, 2008

Superior Court of Justice
601 Rossland Road East
Whitby, Ontario
L1N 9G7
Phone: (905) 430-5820
Fax : (905) 430-5822

JUDGES CHAMBERS

Fax

To:	Todd J. McCarthy & Sean Brown	**From:**	C. Turnbull, Judicial Secretary
Fax:	(905) 686-6447	**Pages:**	20
Phone:		**Date:**	11/4/2008
Re:	*Wilkins v. Rogers Communications Inc.* – Court File No. 47068/06 CP – Reasons for Decision	**Cc:**	Edward J. Babin, James D. Bunting & Jordon R. Vaeth – (416) 863-0871

☐ **Urgent** ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

• **Comments:**

Counsel:

Attached please find the above Reasons for Decision of the Honourable Mr. Justice J.B. Shaughnessy, released on November 4, 2008.

C. Turnbull, Judicial Secretary