SUPREME COURT OF NOVA SCOTIA
Citation: Gillis v. BCE Inc., 2014 NSSC 279

Date: 2014-07-17
Docket: Hfx. No. 234376
Registry: Halifax

Between:

John Gillis, Jane Doe XVII, John Doe Ltd. XVII, Jane Doe XVIII, John Doe Ltd. XVIII, John Doe XIX, John Doe XX, John Doe XXI, John Doe XXII

Plaintiffs

v.

BCE Inc., Bell Canada, Bell Mobility Cellular Inc., Bell Mobility Inc., Aliant Telecom Inc., Bell Atlantic, Maritime Tel & Tel Ltd., NBTel Inc., Island Telecom Inc., New/Tel Communications Inc., Bell Aliant Regional Communications, Limited Partnership, Allstream Inc., Manitoba Telecom Services Inc., MTS Communications Inc., TELUS Corporation, TELUS Communications Company, TELUS Communications Inc., TELUS Mobility, B.C. TEL, TELUS Communications (B.C.) Inc., Clearnet Communications Inc., Alberta Government Telephones (AGT), Saskatchewan Telecommunication (SaskTel), Saskatchewan Telecommunications Holding Corporation, AT&T Canada Inc., Mircocell Telecommunication Inc., Rogers Communications Inc., Rogers Communications Partnership, Fido Solutions Inc., Rogers Cantel Inc., Rogers Wireless Inc. and Rogers AT&T Wireless

Defendants

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	May 14, 2014, in Halifax, Nova Scotia
Final Written Submissions:	July 17, 2014
Counsel:	Evatt Merchant and Casey Churko for the Plaintiffs
	Kathryn Podrebarac and Alan Melamud for the Bell Defendants
	Bruce Outhouse, Q.C. and James Bunting for the Rogers Defendants

By the Court:

I Introduction

[1] Anyone reading this decision, or who becomes aware of it, will not find their name specifically included as a party; however, each of them is virtually guaranteed to be a potential member of a class to this action, or one like it in another province.

[2] By letter dated October 29, 2004, Evatt Merchant, on behalf of the Merchant Law Group, headquartered in Saskatchewan, filed on November 2, 2004 an Originating Notice [Action] and Statement of Claim [Halifax No. 234376] on behalf of John Gillis of Halifax, and numerous other named [e.g. Steve Drover] and John Doe or Jane Doe Plaintiffs.

[3] The Plaintiffs were put forward as representatives of a class of persons, corporations, and entities resident or situated in Nova Scotia, and elsewhere in Canada. They were relying on *Civil Procedure Rule (1972)* 5.09 – Representative Proceeding, and guidance from the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46.

[4] The Plaintiffs sought, as against the corporate bodies that comprise the named telecommunications service providers in Canada, in relation to the payment by consumers of "system access fees", remedies that they say arise because the Defendants have by: breach of contract and duty to inform; the giving of the expressed and implied warranties and covenants regarding the cost of services provided; and deceit, misrepresentation, negligence and wrongful acts and omissions; and in breach of their statutory duty or obligation to consumers under the *Competition Act,* Revised Statutes of Canada 1985, chapter C – 34; caused the Plaintiffs to suffer economic loss and damages.

[5] Also in 2004, similar lawsuits were filed by the Merchant Law Group as follows:

British Columbia – 04 – 4697

Alberta – 0401 – 12400

Saskatchewan – QBG no. 1611 of 2004

Manitoba –CI-04 – 01 – 39951

Ontario – 04 – CV – 028452

Quebec – 550 – 06 – 000006 – 040

New Brunswick –F/C/529/04

Newfoundland and Labrador – 2004 – 01 –T – 4029 CP.

[6] On November 23, 2004 Evatt Merchant [hereinafter "Mr. Merchant"], received from Daniel M. Campbell, Q.C. of Cox Hansen O'Reilly Matheson in Halifax under the subject matter "Cellular Class Action", a fax cover sheet which enclosed a letter which read in part:

> Drover et al. v. BCE Inc. et al. [Nova Scotia]
>
> Pitre et al. v. BCE Inc. et al. [New Brunswick]
>
> Apartment Laundry Services Ltd. et al. v B.C.E. Inc. et al. [Newfoundland and Labrador]
>
> We have been retained on behalf of Aliant Telecom Inc., BCE Inc., Bell Canada and their related companies with respect to the class actions which you have filed in Nova Scotia, New Brunswick, and Newfoundland and Labrador. Your letter of November 9, 2004, to Jay Forbes of Aliant with respect to the Nova Scotia class action has been passed to us.…
>
> Your letter is addressed to six companies. As indicated, we are retained on behalf of Aliant Telecom Inc. Your letter and your pleadings refer also to Maritime Tel & Tel Ltd., NB Tel Inc., Island Telecom Inc. and Newtel Communications Inc., which are predecessors of that company and no longer exist. Neither I nor my clients are familiar with an entity named "Bell Atlantic" [other than the former regional Bell operating company in the United States]. Could you provide some particulars of the entity against which your clients assert a claim?
>
> Similarly, we have [sic] are retained on behalf of BCE Inc., Bell Canada and Bell Mobility Inc. The pleadings each name Bell Mobility Cellular Inc., which is a predecessor company and is no longer in existence.
>
> We will be taking instructions with respect to these three actions and will get back to you.

II Procedural History

[7] Until 2014, no further documents were received by the Court in relation to this action, although correspondence was occasionally received as follows:

1. In response to a Prothonotary's motion pursuant to Practice Memorandum No. 27 as set out in a Notice dated November 2, 2006, Casey Churko wrote on November 20, 2006:

> We request that the action in Nova Scotia regarding the various telephone companies be held in abeyance for a further period of one year, or until such earlier time as the court may deem appropriate, for a further status report.… An action similar to the proceedings before the Nova Scotia court was launched in a number of provinces… We elected to proceed first in Saskatchewan… If certification proceeds in Saskatchewan it is unlikely that we will ever pursue matters in the Nova Scotia court. If certification is granted in Saskatchewan, we expect that the Atlantic companies may appeal their inclusion on the basis of forum non-convenience [sic]… It is our submission that the proceedings in your court would appropriately be set over for a period of one year….

2. In a letter dated November 21, 2007 Mr. Churko wrote to the Prothonotary:

> [The action in Nova Scotia] is being prosecuted in connection with a series of parallel class proceedings which were concurrently filed in sister superior courts.
>
> In *Frey v. BCE Inc.* 2006 SKQB 328 …and *Frey v. Bell Mobility Inc.* 2007 SKQB 328… The action was certified as a class action. All six groups of defendants have since filed a notice of motion seeking leave to appeal… Following the disposition by the Saskatchewan Court of Appeal, we will be in a better indication [sic] to inform the Supreme Court of Nova Scotia as to how we intend to proceed in the within action.

> A matter of import is that Saskatchewan has recently enacted national "opt out" amendments to the *Class Actions Act* S.S. 2001, c.C- 12.01. While the legislation is not yet in force, upon proclamation, we anticipate the inclusion of the residents of Nova Scotia in the Saskatchewan proceeding on an "opt out" basis. Presently, pending a successful resolution of the appeals, they would be permitted to "opt in" to the Saskatchewan proceeding.
>
> I therefore kindly ask that you diarize [the Nova Scotia action] until mid-2008…

3. By letter dated December 2, 2009 Mr. Churko wrote to the Prothonotary:

> I received the Appearance Day Notice dated November 5, 2009 [attached]. This notice was addressed to me, but I am not a lawyer in charge on this file.
>
> If the court could accommodate me, I am willing to speak to this matter on behalf of the Merchant Law Group LLP, counsel for the plaintiffs, on December 4, 2009 by teleconference. I reside in Regina… Over the last 4 ½ years, as an associate, I have assisted Mr. Merchant QC in the prosecution of a parallel class-action in the Court of Queen's Bench for Saskatchewan. I attach a summary of those proceedings for use on December 4. [Schedule A is a chronology of proceedings of QBG number 1611 of 2004 J.C.R. (to June 2009) and consists of 16 pages typewritten]

[In response the Prothonotary placed the file in abeyance until June 7, 2010.]

4. By letter dated August 4, 2010 Mr. Churko wrote the Prothonotary:

> … [The Defendants] obtained leave to appeal on March 15, 2010. If acceptable to the court I ask that you kindly diarize your file again into 2011….

5. By emails dated September 7, 2011 and November 15, 2011 Mr. Churko wrote to the Prothonotary:

> The Defendants appeal of the cell phone class-action in the SKCA was heard in December 2010 and is still under reserve.
>
> I write to update you that the SKCA has now dismissed the Defendants appeals [2011 SKCA 136] . I will discuss with Mr. Merchant, Q.C. at an early opportunity

> to discuss how this will impact the plaintiff's plans to advance the Halifax action. [On June 11, 2012, prothonotary Caroline McInnes, advised Mr. Churko by email that: "… We have not received an update on whether the Halifax matter will be going forward. The prothonotary must now move ahead to schedule this matter for dismissal pursuant to rule 4.22…"]

6. By email dated November 20, 2012, Joshua Merchant wrote to the Prothonotary:

> The description Mr. Churko gave you a year ago on the status of the Saskatchewan litigation was lacking and easily misconstrued. The parties continue to litigate a critical issue before the Saskatchewan Court of Appeal. The central issue to be determined by that remaining appeal is whether or not the Saskatchewan litigation, which is already been granted class certification, will automatically include all Canadian residents… If the Saskatchewan plaintiffs are successful in that appeal, that would moot the need to pursue the Drover action in Nova Scotia. As a part of judicial economy, the courts recognize that while class proceedings for similar issues will often be launched across Canada, if one of those proceedings is certified as a national class action, the other similar actions may not need to be moved forward…. If Klebuc CJS permits the appeal to proceed, then respectfully the Nova Scotia matter should wait until that appeal is resolved.

[In response the Court wrote on November 21, 2012 in part: … "We will keep requesting a yearly update. Can you please keep us notified of when the appeal has been determined…."]

The Motions Herein

[8] On March 4, 2014 Bell filed a notice of motion ["the Bell motion"] requesting an order "dismissing or permanently staying this action as an abuse of process and the costs of this motion". It relied upon, the inherent jurisdiction of the

court; Civil Procedure Rule 88.02; and sections 41(e) and 41(g) of the *Judicature Act* R.S.N.S. 1989 c. 240.

[9] On April 1, 2014 Mr. Merchant faxed a letter to the prothonotary advising that he had attended at the courthouse in Halifax on March 31 and attempted to file an Amended Statement of Claim, but that this was not permitted by the administrative staff. On April 7, 2014 an Amended Notice of Action/Statement of Claim was filed, which specifically noted "proceeding under the *Class Proceedings Act*, S.N.S. 2007 c.28".

[10] Paragraphs 1 to 73 and 83 to 96 inclusive and respectively of the 2004 Statement of Claim were deleted . Those deletions removed references to all plaintiffs except those living in Nova Scotia and New Brunswick. More notable among the amendments to the 2004 Statement of Claim, were paragraphs 136 and 137 in the 2014 Statement of Claim which read as follows:

> 136 – the Defendants were unjustly enriched by charging and receiving SAFs over and above Rate Plan Receipts, without providing any additional consideration or benefit other than what they were already obliged to provide under Rate Plans. Through the Defendants receipt of the SAFs the Defendants were unjustly enriched and the plaintiffs and class members were correspondingly deprived. There is no established juristic reason for the enrichment.
>
> 137 – the Plaintiffs plead and rely upon the *Class Proceedings Act*, S.N.S. 2007 c. 28 . The Defendants unlawfully obtained the SAF from the Plaintiffs and the class, and must account for it. On behalf of class members, from 1987 to the date of judgment, the Plaintiffs' claim for recovery of the SAF , by way of an aggregate monetary award.

[11] On April 30, 2014 Rogers filed a notice of motion [”the Rogers motion”] requesting orders(a) “dismissing or permanently staying this action as an abuse of process on the grounds advanced by [the Bell motion];” and (b) in the alternative (i) dismissing the action for want of prosecution pursuant to rule 82.18;and (ii) in the further alternative, declaring that the notice of action has expired as against the Rogers defendants, pursuant to Rule 4.04 and its predecessor Rule 9.07; also requesting an abridgment of the time for filing the notice of motion and materials. Rogers relied upon, the inherent jurisdiction of the court, and Civil Procedure Rules (2009) 1, 2.03 (1)(c); 4.04; 22, 23, 77, and 82.18; and Civil Procedure Rules (1972) 9.07 and 10; and sections 41(e) and (g) of the *Judicature Act* R.S.N.S. 1989 c. 240 .

[12] On May 7, Bell filed a notice of motion requesting that portions of the Plaintiffs submitted affidavit of John Gillis be struck.

[13] In my letter of May 8, 2014 to counsel, I stated:

> 1. I will accept written submissions from the plaintiffs on their position regarding any objections that they wish to raise to the [Defendant Bell’s] rebuttal affidavit of Ms. Davis sworn May 5, 2014. These should be filed by noon May 12th 2014.

2. As to the Rogers motion, and brief of Rogers, insofar as those address the alternative bases set out in section (b) of that notice of motion, I will not consider them on May 14 2014. A separate date/time will need to be arranged. I do not consider myself seized – a proper notice of motion and supporting documents will need to be created and served on the parties.

[14] In relation to the May 7 Bell motion, I advised counsel that I would not accept the motion, because no motion was necessarily required in the circumstances of this case to make the arguments that portions of the Gillis Affidavit should be struck, and that I would hear such arguments on May 14, being the date scheduled for hearing of all motions.

III Preliminary Issue – should the Court grant leave "to present further evidence" pursuant to Rule 88.22(2)(c)?

[15] I heard arguments on the Defendant's motion to stay this proceeding as an abuse of process on May 14, 2014. I permitted the Defendants to file a written reply to the Plaintiffs' oral arguments made that day. I reserved my decision on the motion, pending receipt of the Defendants brief. As directed, those were filed by the Defendants on May 30, 2014.

[16] While the decision was still under reserve, the Defendants wrote by letter dated June 18, 2014 that pursuant to Rule 82.22(2)(c), they requested the Court to consider a motion to reopen their motion to stay this proceeding. The Defendants wished to "present further evidence". I wrote to the parties and advised them, that

in my view, I had no discretion to refuse to hear the motion, and suggested that it be done as a motion by correspondence pursuant to Rule 27.01(1)(g). I added in my letter that: "if the parties are of the view that an unfairness results by submitting the materials in this manner, please include your objection in writing with your materials". I also set filing deadlines.

[17] On July 2, I received from the Bell and Rogers Defendants collectively, a Notice of Motion, a Brief [including Book of Authorities], and the (sworn June 24, 2014) Affidavit of Kathryn Podrebarac, who is counsel for the Bell Defendants.

The Notice of Motion states in part:

> The further evidence sought to be presented is a transcript from a hearing held on November 19, 2013 before Justice E.C. Wilson in the related Alberta System Access Fee litigation in which submissions were made by Plaintiffs' counsel that contradict Plaintiffs' counsel submissions made to Justice Rosinski orally, and in the Plaintiffs' brief of law on an important matter.

[18] On July 11, I received from Plaintiffs' counsel a Brief [including Book of Authorities] in response. On July 17, I received the Defendant counsels' Reply Brief.

[19] In the Plaintiffs' Brief, they state: "alternatively, if the Court grants the motion, the plaintiffs respectfully request an opportunity to file responding

evidence and to make additional submissions on the abuse of process motions after the defendants case is re-closed."

[20] They also argue that Ms. Podrebarac is not the proper affiant because her affidavit does not deal only with matters that are purely formal or uncontroverted. They go on to state that:

> … the plaintiffs would otherwise seek to cross examine Ms. Podrebarac on issues raised in her affidavit. Moreover, the desirability of avoiding the situation of counsel acting as both deponent and advocate is an initial ground to dismiss the motion [footnote reference to paragraph 5.2 –1 Nova Scotia Barristers Society Code of Professional Conduct – advocacy and commentary].

[21] In her Affidavit, Ms. Podrebarac has sought to place evidence before the Court in relation to:

> 1) Whether the Defendants were diligent in their efforts to present this evidence to the Court earlier since it arose on November 19, 2013; and
>
> 2) That "on an important matter", what Plaintiffs' counsel stated to Justice E.C. Wilson on November 19, 2013, is inconsistent with what Plaintiffs' counsel stated to me on May 14, 2014.

[22] For good reasons, courts are generally loathe to see the affidavits of counsel placed before them in relation to any matters except those that might be considered "merely formal or uncontroverted matters"– *Veinot v. Dohaney* (2000) 189 NSR (2d) 263 per Goodfellow J.

[23] Nevertheless, since Ms. Podrebarac herself was present in court in Alberta on November 19, 2013, and on May 14, 2014 in the motion before me, and appears

to be the counsel most familiar with the conduct of the Defendants counsel relevant to this issue, she is the best source of this evidence. Furthermore, arguably at least some of the content of her affidavit could have been presented by way of representations by her to this Court.

[24] On a review of her affidavit, only paragraphs 5, 6, 8, 9, 10, 11, and 22 contain any references that might arguably go beyond "merely formal or uncontroverted matters". Of those paragraphs, only 5, 9, and 22 merit attention.

[25] In paragraph 5, Ms. Podrebarac states:

> In his oral submissions at the hearing before Justice Rosinski on May 14, 2014, Mr. Evatt Merchant submitted that the reason why multiple SAF actions were filed across the country in 2004, was out of concerns about negligence if it were determined that an action in one province did not adequately protect the interest of class members resident in another province.

[26] The best evidence of precisely what Mr. Merchant said would be contained in a certified transcript or audiotape. Moreover, one would have to examine the entirety of what he said before me to place it in context, in order to draw definitive conclusions about his position on this issue.

[27] The assertion by the Defendants is that Mr. Evatt Merchant said something on May 14, 2014 to me, "on an important matter", as the Defendants put it, that is so inconsistent with what Mr. Tony Merchant said to Justice E.C. Wilson in

Calgary on November 19, 2013, that it attains a material relevance to their motion to stay this proceeding as an abuse of process.

[28] On April 30, 2014 the Plaintiffs filed their brief of law in relation to the Defendants' abuse of process motion. Paragraphs 36 and 37 read in part:

> However, in this particular case, the suggestion that this action was filed to enhance the position of Merchant Law Group LLP in a "carriage motion" [footnote reference paragraphs 36 and 37 of the Bell brief filed April 22, 2014: "The Nova Scotia SAF class action… was commenced not to advance the legitimate interests of the plaintiffs or putative class members, but rather to advance [Merchant Law Group's] interests in maintaining carriage of the proceeding and tolling the limitation period – a patent abuse of process … commenced it solely for the illegitimate and abusive purposes of obtaining an advantage in a possible future carriage fight with a competing law firm and to toll the limitation period."] is scandalous and without factual foundation. No other firm has filed a competing proceeding in Nova Scotia, … Even if they had, "carriage" is not granted to the first to file in Canadian common law provinces that have accepted that a "carriage motion" is a legitimate practice. At the time this claim was filed, "carriage" was a relatively novel concept. Thus, the "to preserve carriage" ground is a [sic] nonexistent in this case.

[29] If I accept for the moment that Mr. Evatt Merchant did say to me that one of the reasons why multiple SAF class actions were filed in various Canadian provinces in 2004 by the Merchant Law Group, was "out of concerns about negligence if it were determined that an action in one province did not adequately protect the interest of class members resident in another province" per Ms. Podrebarac's affidavit, is that so inconsistent with what Mr. Tony Merchant said before Justice E.C. Wilson on November 19, 2013, that it attains a material relevance to the Defendants' motion to stay this proceeding as an abuse of process?

[30] What then did Tony Merchant say on November 19, 2013?

[31] A review of the transcript attached as Exhibit "E" to Ms. Podrebarac's Affidavit reveals 65 pages of transcript. Of those, at least 50 pages involve submissions by Mr. Tony Merchant. Those submissions can be fairly characterized throughout that entire portion of the transcript as a running conversation between the Court and Mr. Tony Merchant. With no disrespect whatsoever intended, in my opinion, the Plaintiffs have fairly characterized the matter as follows:

> Mr. [Tony] Merchant's statements were unclear, vague, imprecise, and incomplete for use in this Court on a different motion. The face of the Alberta transcript reveals that Mr. Merchant was often cut off during his submissions. He was not given an opportunity to fully answer questions rapidly posed, and no counsel addressed the question in writing [since the Alberta motion was about delay]. Amongst other things, he was not given the opportunity to explain how filing claims advances the interests of class members in each province.

[32] While he was not given the chance to fully answer questions, the entirety of Alberta transcript indicates that Tony Merchant's statements that Bell and Rogers extracted from pages 20 – 21, were just a few of many submissions made that day as to why similar proceedings would be filed in different jurisdictions, including:

(a) to maintain flexibility in getting to trial more quickly [transcript page 22];

(b) it is a common and accepted practice amongst the plaintiff's Bar in Canada to file multiple actions in different jurisdictions [transcript page 21, 23];

(c) the potential to bind a national class in a national opt-out class action as opposed to a provincial opt-in class-action [transcript pages 23 – 24; 26]; and

(d) the advantage to plaintiffs in determining the suitability of a class-action for certification in a no costs jurisdiction, before proceeding in a costs jurisdiction on a national opt-out basis [transcript pages 24 – 26].

[paragraphs 24 and 25 Plaintiffs' July 11, 2014 filed brief]

[33] I do not conclude that what Evatt Merchant said to me is so inconsistent with what Mr. Tony Merchant stated to Justice E.C. Wilson on November 19, 2013, that it attains a material relevance to the Defendants' motion to stay this proceeding as an abuse of process.

[34] Paragraph 9 of Ms. Podrebarac's Affidavit, references a motion heard May 26, 2014 in Manitoba, seeking to dismiss or stay the Manitoba SAF class-action. She states that:

> Mr. Churko and Evatt Merchant argued that motion on behalf of the Plaintiffs. In their written submissions, Plaintiffs' counsel similarly denied that that action was filed for carriage reasons. No reference was made to any concerns about negligence, either orally or in their written submissions. That motion was fully argued that day and is currently under reserve.

[35] In their brief for the Manitoba hearing, Plaintiffs' counsel wrote:

> Nor was this action filed to enhance the position of Merchant Law Group LLP in a "carriage motion". No other firm filed a competing proceeding in Manitoba. The

> Poyner Baxter claim [filed in British Columbia] is the key to understanding *Drover*.

[36] Without a transcript, I am unprepared to accept Ms. Podrebarac's conclusory statement, especially as vague as it is, that: "no reference was made to any concerns about negligence, either orally or in their written submissions."

[37] Moreover, that portion of paragraph 9, involves more than a "merely formal or uncontroverted matter." I will disregard it.

[38] Paragraph 21 of Ms. Podrebarac's Affidavit reads:

> Justice Wilson then asked Mr. Merchant to explain, "what in heavens' name is the point of launching multiple lawsuits in multiple jurisdictions if they are all identical?". Mr. Merchant's response was, "because sometimes you face battles with other lawyers, another group of lawyers will come along in a province and try to pursue – a different group of lawyers will – will try to pursue a similar class action". Justice Wilson then asked if he was referring to other plaintiff's counsel. Mr. Merchant confirmed that he was. At page 21 of the transcript, Mr. Merchant again confirmed the possibility of counsel, other than his firm, launching a similar action in a jurisdiction.

[39] Paragraph 22 of Ms. Podrebarac's Affidavit reads:

> The "battle" Mr. Merchant referred to between different groups of plaintiff's lawyers seeking to pursue similar actions in a province is known as a carriage battle. The issue of carriage came to the fore in Canada in 2000 – four years before the SAF class actions were filed by the Merchant Law Group – in a high profile decision *Vitapharm Canada LTD v F. Hoffman-La Roche Ltd.* [2000] O.J. No. 4594 (SC). That was the first case where a common-law court in Canada had to grapple with the principles to apply when deciding which proposed class action should be permitted to proceed and which competing action(s) should be stayed.

[40] This paragraph is disguised legal pleadings. Affidavits should be confined to facts. As the Defendants themselves stated in their May 9, 2014 filed Reply

Brief at para. 53, complaining about the inadmissibility of para. 20 in the Gillis affidavit:

> Paragraph 20 is a submission on the state of law and must be struck.

[41] Rule 82.22(2)(c) reads:

> A party may make a motion for permission to present further evidence before a final order and after one of the following events: … a judge reserves decision.

[42] In *Jeffrie v. Hendricksen* 2011 NSSC 460, at paragraph 31, I stated:

> Whether under CPR (2009) or my inherent jurisdiction to control the court's process, in my opinion, I have the jurisdiction to consider exercising my discretion to grant leave to allow the reopening of the motion for consolidation which I ruled on, in a written decision September 20, 2011.

[43] In *Jeffrie*, which involved a motion to reopen a motion for consolidation **after** I had given reasons, but before an order was taken out, I concluded regarding the appropriate test to decide the issue:

> **34** Both trial and appellate courts have adopted a flexible approach to reopening trials/proceedings and re-examining trials/proceedings during the appeal process. Ultimately the key consideration is to do justice as between the parties. "Doing justice" requires an examination and balancing assessment of "the risk of both procedural and substantial injustice to both parties" per Cromwell, JA (as he then was) in *Griffin* supra.
>
> **35** For example, in the **trial context**: see *Griffin v. Corcoran* 2001 NSCA 73 paras. 64-69 and 75 where the trial judge was held not to have erred in refusing to reopen the trial. Notably in that case, the Plaintiff did not establish, that substantial injustice would occur if the trial were not reopened to admit the proferred evidence - in fact, the Plaintiff merely contended that the proferred evidence could have tipped the balance in their favour -- see also *671122 Ontario Limited v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983 at paras. 59-61 per Major, J.; in the context of **appeals**: see in civil matters *Federal*

Business Development Bank v. Silver Spoon Desserts Enterprises Ltd., (2000), 189 N.S.R. (2d) 133 (N.S.C.A.) as cited at para. 70-71 in *Griffin* by Cromwell, JA, noting that test "is more onerous than the test applicable to a re-opening after trial but before final judgment"; and in the criminal context of a review by one justice of another's decision to not permit a motion to extend time for filing an appeal -- *R v. Mercier* 2011 NSCA 58 per Bryson, JA at paras. 21-29; leave to appeal dismissed [2011] S.C.C.A. No. 289; and in the context of **interlocutory orders**: see *Global Petroleum Corp. v. Point Tupper Terminals Co.*, (1998), 170 N.S.R. (2d) 367, [1998] N.S.J. No. 408 (C.A.) per Bateman, JA at paras. 19-21.

36 In *Globe Petroleum*, Justice Hamilton was asked to reconsider the interlocutory motion decision of Justice Nunn to not allow an amendment to Global's Defence to Counterclaim. Justice Hamilton found that she could reconsider that application on its merits as neither Justice Nunn or Justice Matthews in the earlier appeal had purported to make a final determination on that issue and there had been a "material change in circumstances". Her decision was upheld on appeal.

37 These cases reveal a consistent test is used by the courts in deciding whether to reopen a proceeding/trial, or to allow "fresh evidence" at an appeal. That test is whether it is in the interests of justice to grant the Motion. The factors considered are contextual, but in the case at Bar, I will consider whether there has been a material change in circumstances and balance "the risk of both procedural and substantial injustice to both parties". The practical reality is however, that in general, the more advanced the litigation becomes, the more significant and compelling the reasons for review will need to be before a court will reconsider an existing decision. There is, if you will, a steeper hill of finality to climb as parties get nearer to the end of litigation if they wish to successfully argue a matter should be reconsidered.

38 In the case at Bar, I am dealing with a request to review a decision refusing to consolidate two related applications in court. Hendriksen's request for reconsideration is based on evidence that has been added into the mix by way of affidavits from witnesses not identified as such in the first motion, and more particularized pleadings that Hendriksen says amount collectively to a material change in circumstances which would necessarily now lead to the conclusion that the two applications are "inextricably intertwined", and ought to be consolidated.

39 To decide whether to grant leave to reopen the Motion for Consolidation, I will consider:

> Whether granting leave is necessary to prevent an injustice as between the parties, by balancing the risk of both procedural and substantial injustice to both parties.

[44] To my mind, the correct test in making this determination about granting such permission in this case, is as I stated in *Jeffrie v Hendricksen* 2011 NSSC 260.

[45] That is, has the moving party satisfied the Court that, after balancing the risk of both procedural and substantial injustice to the each of the parties, is permission necessary to prevent an injustice as between the parties?

[46] In my opinion, Defendants' counsel was reasonably diligent, once the matter had crystallized into a potential issue regarding the motion before me. The meaningfulness of the November 19, 2013 hearing likely only became apparent to Defendants' counsel after the oral hearing on May 14, and confirmation thereof could not be effected before the filing deadline of May 30, 2014.

[47] I find however that the probative value of the proffered "evidence" is minimal at best. The Defendants have presented fulsome evidence otherwise herein, and given different contexts, and the fact that there is no transcription [i.e. reliable evidence] from the proceeding in Manitoba, and the Alberta proceeding transcript is inconclusive, the Defendants could suffer no prejudice in my opinion by the Court not considering the proffered affidavit "evidence". I note as well that the Defendants are entitled to bring another motion to stay these proceedings as an abuse of process, at some point in the future, if and when legally appropriate. I am

mindful as well, that if I permitted this "further evidence", the Plaintiffs should be entitled to respond with "further evidence" and submissions. Given that there are presently several such motions in different provinces, if I permitted the Defendants' proffered "further evidence", my inquiry would become inflated beyond what is necessary to do justice between the parties regarding the motion to stay the proceedings as an abuse of process.

[48] I therefore decline to grant leave "to present further evidence" in relation to the motion to stay the proceedings as an abuse of process.

[49] I will add for certainty, that had I granted leave, the proffered "evidence" would have had no impact on my conclusion herein.

IV The Evidence Before Me

For Bell:

[50] The Affidavits of Julie Lynn Davis filed March 4, 2014; [supplementary] filed April 30, 2014; and [rebuttal] filed May 7, 2014.

For the Plaintiff:

[51] Affidavits of John Gillis filed April 30, 2014, and Courtney Reid filed by fax May 12th [the original produced in Court May 14] with permission of the Court.

Resolution of the evidentiary issues respecting the Affidavits of John Gillis and Julie Lynn Davis

[52] In considering the Affidavits, I keep in mind the purpose for which the purported evidence is offered; that the context is an abuse of process assertion that seeks to terminate this proceeding; and that for evidence closely connected to determination of the abuse of process issue in particular, the more reliable and probative that it is, the more weight should generally be attributed to it.

The Affidavit of John Gillis sworn April 30, 2014

[53] The Defendants argue that paragraphs 4, 5, 8, 17, 18, and 19 should be struck out as they contain irrelevant assertions which are also not within the personal knowledge of John Gillis, or require expert opinion which John Gillis is not able to provide. As to paragraph 20 they object because it is a statement about the evolution of the law, and not a fact.

[54] Bearing in mind Rules 23.08, 39.02 and 39.04 [see also the instructive comments of Justice LeBlanc in *Elwin v. Nova Scotia Home for Colored Children* 2013 NSSC 196 at paras. 4 – 24], I conclude that all of the following paragraphs should be struck on the bases that:

Para. 4 - it is not a statement of fact;

Para. 5 - is irrelevant;

Para. 8 - is not a statement of fact;

Para. 17 - only everything following "but I believe it is very unlikely…" is not a statement of fact;

Para. 18 - not personal knowledge, and no specific source presented such that the hearsay evidence might exceptionally be admissible;

Para. 19 - is not a statement of fact/ is irrelevant; and

Para. 20 – is not a statement of fact.

The Affidavit of Julie Lynn Davis sworn May 5, 2014

[55] The Plaintiffs argue that paragraphs 3,4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 should be struck as being hearsay, or not proper rebuttal evidence, or irrelevant.

[56] Bearing in mind Rules 23.08, 39.02 and 39.04, I conclude that the following paragraphs should be struck as noted, on the bases that:

Para. 3 - not relevant [the Amended Statement of Claim has been filed as of right] and not proper rebuttal;

Para. 4 - not relevant and not proper rebuttal;

Para. 5 - not relevant and not proper rebuttal;

Para. 6 - hearsay and not proper rebuttal;

Para. 7 - hearsay and not proper rebuttal;

Para. 8 - not struck/chronicles the proceedings in Saskatchewan/court decision;

Para. 9 - not struck/chronicles the proceedings in Saskatchewan/court decision;

Para. 10 – not struck/chronicles the proceedings in Saskatchewan/court decision;

Para. 11 – not struck/chronicles the proceedings in Saskatchewan/court decision;

Para. 12 - hearsay, and not proper rebuttal;

Para. 13 - purportedly in response to paragraph 23 of the affidavit of John Gillis, and therefore is proper rebuttal which is also confirmed by my reference to the records in the court file – is not struck out; and

Para. 14 - purportedly in response to paragraph 15 of the affidavit of John Gillis and therefore is proper rebuttal.

V Position of the Parties on the Motion to Stay the Proceeding

[57] For convenience, I will refer to the Defendants' positions collectively under the rubric "position of Bell".

Position of Bell

[58] Bell has recently filed similar motions to dismiss for abuse of process in the provinces of Manitoba and Ontario. Those cases have not yet resulted in decisions.

[59] In summary, Bell says that this action was started without a proper purpose, and it was never intended to be actively advanced. At paragraph 38 in their Reply Brief [May 9, 2014] they state:

> It is clear that the true purpose behind the commencement of the same class action by the same plaintiffs in almost every province in Canada was to certify a single national class action in Saskatchewan, but maintain duplicative actions in the other provinces to(1) ensure carriage should a competing action by another firm be commenced;(2) toll the limitation period; and(3) provide a base from which certification and other issues could be re-litigated if necessary. This is the only interpretation consistent with the facts, and as outlined in the moving brief, a patent abuse of process.

[60] Bell notes that although the Plaintiffs' counsel now argue that a national "opt out" class action is their preferred mode of proceeding, they focused their attention on Saskatchewan in 2004 which was an "opt in" jurisdiction at the time (although in 2007 it became an "opt out" province). Moreover, they say that Nova Scotia residents will be able to opt in to Saskatchewan proceedings which have been certified since 2012, and thus their interests will be sufficiently protected, without the necessity of re-litigating the certification in Nova Scotia, which would certainly amount to an abuse of process.

[61] In the evidence, Bell also refers to:

1. The fact that the nine statements of claim issued in 2004 are in substance virtually indistinguishable; and

2. The October 29, 2004 letter from Evatt Merchant to Jay Forbes [Aliant Telecom Inc. et al.] wherein he stated:

> As you are aware, we have already served you with a copy of our Statement of Claim before the Court of Queen's Bench of Saskatchewan concerning the above referenced matter [cellular class action].… Please find enclosed our Statements of Claim concerning the same issues issued before the courts in Ontario and Alberta for service upon you. Please be aware that as we wish to avoid multiplicity of litigation concerning the same issues before various courts, it is our intention to request that the court in Saskatchewan certify one national class action to include all affected Canadian cellular customers in Canada in the class."

3. The November 20, 2006 letter from Casey Churko to Prothonotary Boucher [Nova Scotia Supreme Court] wherein he stated:

> We elected to proceed first in Saskatchewan… If certification proceeds in Saskatchewan it is unlikely that we will ever pursue matters in the Nova Scotia court.

4. The November 9, 2012 Amended Memorandum on behalf of the *Frey* Plaintiffs in Saskatchewan seeking an order extending the time for filing a Notice of Appeal in the Saskatchewan Court of Appeal, wherein Tony Merchant, Q.C. wrote:

> This action is already certified as a multi jurisdictional opt in class action. Mr. Justice Gerein refused to amend the certification order to make the action a multi jurisdictional opt out action. The practical result of his refusal to amend the order is that a multiplicity of other actions will be brought in courts across Canada and will be litigated for years to come simply to arrive at the very conclusion that has been nearly a decade in the making in Saskatchewan and has already been upheld to the highest court in Canada. Class actions are meant to increase judicial economy and access to justice, and the result described above is the antithesis of these. What purpose or benefit to anyone would there be in pursuing a multitude of parallel actions, investing what will likely be millions of dollars of lawyers' time and $100,000+ in further disbursements for each action, simply to obtain another certification in Alberta, and then another certification in Nova Scotia, and then…? [Paragraph 2].

[62] Notably he does go on to write at paragraph 6:

> Arguing purely procedural grounds, the Respondents now seek to deny the Applicant even the opportunity to have this important appeal heard. This, notwithstanding that there is no prejudice to the Respondents who will not, as a result of this appeal, avoid liability for their actions. All that the Respondents are asking, and all that they can be said to be seeking to do, is to wear out the Plaintiffs, wasting money on repeated, duplicate litigation. That – having the same issues tried over and over again – is an abuse of the court process.

[63] Bell also points to paragraph 68(i) wherein Tony Merchant wrote:

> Gerein J, with the approval of this court, certified a multijurisdictional class-action rather than a class-action restricted to the residents of Saskatchewan. Implicit in that certification is that there will have to be national advertising. The confusion that will result for Canadians of advertisements two or four years from now from Saskatchewan, advertisements five or six years from now from Québec, advertisements six or seven years from now from Nova Scotia, etc. all regarding a period which will then be 10 or 12 or 14 years in the past, will in itself bring the administration of justice into disrepute as well as confusing Canadians.
>
> [Exh. "U" February 28, 2014 Davis affidavit]

[64] Bell points to British Columbia, as an example of the Plaintiffs' persistence in "parking" the proceedings outside Saskatchewan, until the plaintiffs were forced to advance their litigation because of a competing class-action certification application brought by another law firm in the case *Ileman v. Rogers Communications Inc.* – See Exhibit "CC" to the Davis affidavit sworn February 28, 2014; and the stay of proceedings decision of Justice Weatherill in *Drover v. BCE Inc.* 2013 BCSC 1341. In his Decision at paragraphs 57 and 58 he stated:

> For the reasons set out above, I find that the *Drover* action is an abuse of process. The applications are allowed.
>
> The *Drover* action is stayed on the condition that it can be reactivated on the following conditions:

> (a) if the Defendants in the *Frey* action [the Saskatchewan class-action proceeding] withdraw their offer to consent to extension of the class period in that action; and
>
> (b) if the *Ileman* action is discontinued.

[65] Notably while my decision was on reserve, Justice Weatherill released his decision refusing certification as a class action in *Ileman v BCE Inc.* 2014 BCSC 1002.

[66] Bell similarly points to Nova Scotia as an example of the Plaintiffs counsel's persistence in "parking" the proceedings outside Saskatchewan, until the Plaintiffs were forced to advance the litigation, because of actions taken by the Defendants in 2014 to have this action dismissed as an abuse of process.

[67] Bell, in essence, says that the Plaintiffs' attempt to distinguish the Nova Scotia proceeding by amending the Statement of Claim on April 7, 2014, does no such thing, since: the amendments will not distract courts from focusing on the substance of the Plaintiffs' actions; it is unlikely that the amendments to include "unjust enrichment" could operate retrospectively to defeat the Defendants' argument that it is precluded by a limitation period.

[68] Ultimately, Bell argues that since the Saskatchewan proceeding [Q. B. G. 1611 of 2004 –*Frey v. BCE Inc.*] is so far advanced, and fairly protects the interests of the residents of Saskatchewan, and will for the other provinces in

which parallel proceedings have been commenced, the Nova Scotia action no longer serves any legitimate purpose. They suggest that the Plaintiffs are still seeking a national "opt out" class-action, and this is a significant reason why they insist on maintaining the duplicative proceedings in provinces outside Saskatchewan. Bell argues that insofar as protecting the interests of plaintiffs across Canada, there is no material difference between an "opt in" and "opt out" national class action, and therefore the Nova Scotia action should be permanently stayed.

Position of the Plaintiffs

[69] The Plaintiffs point out that only the "unjust enrichment" claim was certified in Saskatchewan. It was held that the other asserted claims had not technically been pleaded, and therefore could not be certified. All Saskatchewan residents are included, as will be any residents from other provinces who are notified, and decide to "opt in" to that class-action.

[70] Moreover, the Plaintiffs point out that if this Court concludes there is an abuse of process here, a permanent stay of proceedings is not the only possible remedy. They also suggest: a direction from the Court to "move it, or lose it"; do nothing, but allow the parties to take additional steps to advance the litigation [by a

certain date]; impose an interim/conditional stay of proceedings [see Rule 88.02]; or, which the Plaintiffs submit is most appropriate, ask the Saskatchewan Court under Section 15(1) of the *Court Jurisdiction and Proceedings Transfer Act* S.N.S. 2003 c.48, or under Rule 86.02 (1), to accept a transfer of this proceeding on condition the Nova Scotia residents benefit on the same basis as Saskatchewan class members, namely: that they will be automatically included in the class action unless they exercise their right to "opt out" after receiving due and proper notice of class action certification. [Paragraphs 46 – 50, April 29th, 2014 Brief]

[71] The Plaintiffs say that they wish either: the opportunity to advance certification in Nova Scotia on an "opt out" basis for non-residents; or have this Court request that the Saskatchewan Court "accept the transfer of this Nova Scotia proceeding, and to accept Nova Scotia residents into the Saskatchewan class action on the same favourable opt out basis as Saskatchewan class members." [Paragraph 6, April 29, 2014 Brief]

[72] They say that "Bell seeks to have only one provincial opt in class-action proceed by staying the parallel class-action in this and other provinces. If granted, the application would modestly promote judicial economy, but would have disastrous consequences for access to justice and behaviour modification. It would allow the Defendants, if found liable for wrongdoing to escape full restitution of

the false fees; and it would see that Saskatchewan residents are treated more favourably than residents of other provinces, including Nova Scotia, in that only Saskatchewan residents would fully receive the benefits of any such restitution [because they are automatically included in the class]. Residents of other provinces would have to learn of the class actions and take active steps to participate. From the perspective of Nova Scotia residents, it would effectively turn the class-action into individual actions where they would be required to file opt in requests with a foreign court rather than statements of claim in their own court." [Paragraph 4 April 29, 2014 Brief]

[73] In their oral submissions, Plaintiffs' counsel stated it thusly: "ultimate inclusion equals ultimate accountability".

[74] In response to Bell's criticism that they never intended to advance, and have not advanced, the Nova Scotia proceeding, they say:

> The plan for this proceeding when filed, and the current plan, is to advance or alternatively hold this action in abeyance, as necessary to protect the interests of Nova Scotians while seeking to achieve a national opt out class-action where possible. Since the Saskatchewan class-action will not proceed on that national opt out basis, there is now a need to look to courts in Alberta, Manitoba, Ontario, or Nova Scotia, to implement that appropriate strategy [each of these and Saskatchewan [since 2007] have national opt out legislation]" [paragraph 10 April 29, 2014 brief].

[75] They draw attention to the fact that in Alberta on November 19, 2013 the class-action was dismissed "for long delay" by Justice Wilson who had no discretion to deny the application: *Pappas v. BCE Inc.* Calgary file Q 0401- 12400 – Exhibit "GG" February 28, 2014 Davis affidavit; and that motions to dismiss for abuse of process have only been brought in Nova Scotia, Manitoba and Ontario – see Exhibit "A" April 10, 2014 Davis affidavit. They point out that each of these provinces has a national "opt out" class-action regime.

[76] They also point out that the Saskatchewan proceeding remains an "opt in" class-action, not because Gerein J determined such after an exercise of his discretion to so decide, but rather his conclusion that, as a matter of law, the 2007 amendments [effective April 1, 2008] that allowed "opt out" class actions in Saskatchewan could not be applied retroactively to the 2004 filed *Frey* action – page 10 of 10 in 2009 SKQB 165 – also at Tab G, May 5, 2014 Davis affidavit.

[77] Moreover, unless and until they are given an opportunity to opt in and actually do opt in, the manner of which has not been determined [Exhibit "O" February 28th, 2014 Davis affidavit], Nova Scotia residents have no current capacity to participate in the Saskatchewan proceeding. I will note here that the Merchant Law Group is counsel in both jurisdictions, and presumably will act in the best interests of residents of both provinces.

[78] The Plaintiffs argue that Sections 41(e) and (g) of the *Judicature Act* do not provide an independent basis to stay an action permanently because another action is advancing in another jurisdiction. Moreover, "because both the Legislature and the Rules have addressed the reality of parallel multijurisdictional class proceedings, a resort to this Honourable Court's inherent jurisdiction as Bell invites, is unnecessary and inappropriate [citing judicial precedents in the *Agent Orange, Baycol* and *Vioxx* decisions]"

[79] They note that there are legitimate uncertainties in the jurisprudence which could put at risk the interests of those Nova Scotia residents who may have the opportunity to opt into the Saskatchewan proceeding, citing: *Pardy v. Bayer Inc.* 2003 NFSCTD 109 per Mercer J [as he then was]; risk of decertification of the non-resident subclass: *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995) 25 O.R. (3d) 331 (Gen. Div.) per Zuber J [as he then was]; there is no definitive authority regarding whether class-action limitation period tolling provisions will be considered procedural or substantive such that a class action filed in one province may procedurally toll a limitation period for class members throughout *Canada-Carom v Bre-X Minerals Ltd*. (1999) 43 OR (3d) 441 (SC) per Winkler J[as he then was]; the enforceability of class-action orders in one province yet arising in another – *Meeking v. The Cash Store Inc.* 2013 MBCA 81 [2013 S.C.C.A. 443

leave granted February 27, 2014]; and *Bellefontaine v. Purdue Frederick Inc.* 2010 NSCA 58 finding there was no "real and substantial connection" between the ex-juris appellants and Nova Scotia.

[80] They argue that the technical legal arguments made by Bell are really "a smokescreen for what this motion and the identical motions in other courts, is really about from Bell's perspective: killing the national class". They note that no motions to dismiss as an abuse of process have been filed in Newfoundland and Labrador, or New Brunswick [nor in British Columbia regarding the proposed *Ileman* class-action] which can only certify national opt in class actions, in contrast to Manitoba, Ontario, and Nova Scotia, where such motions have been filed by Bell. I note here that the Defendants did successfully apply to have *Drover v. BCE Inc.* stayed in British Columbia: 2013 BCSC 1341.

[81] The Plaintiffs note that the 2004 and 2006 letters from Mr. Merchant and Mr. Churko were written very early on in this class-action scenario, and a great deal has changed, factually, legislatively and jurisprudentially since then. One cannot divorce their words used in 2004 from the context in which they were written.

[82] Ultimately, in very broad terms, the Plaintiffs say that in the Canadian Confederation, residents of a province are entitled to justice according to the law in that province. Therefore, residents of Nova Scotia are entitled to an opt out class-action regime, rather than be subjected to the opt in regime of the Saskatchewan proceeding.

[83] The Plaintiffs also caution this Court not to unduly rely upon decisions made by Courts in other jurisdictions, and the factual conclusions therein, since the entirety of the arguments made, evidence available, and legislative framework cannot completely be appreciated by this Court.

[84] I agree that this Court must be cautious in that regard. In *British Columbia [Atty. Gen.] v. Malik* 2011 SCC 18, the Court was faced with having to decide whether a judge hearing an application for an interlocutory order may admit into evidence the findings and conclusions of a prior judicial decision in a related judicial proceeding, in the **same** jurisdiction.

[85] Justice Binnie for the Court said of such matters:

> In my view, for the reasons that follow, a judgment in a prior civil or criminal case is admissible [if considered relevant by the chambers judge] as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues. It will be for that judge to assess its weight. The prejudiced party or parties will have an opportunity to lead evidence

> to contradict it or lessen its weight [unless precluded from doing so by the doctrines of *res judicata*, issue estoppel or abuse of process].

[86] Moreover, as Justice Richards stated for the Court in *England v. Pfizer Canada Inc.* 2007 SKCA 62 at para. 24:

> Foreign law, including the law of Ontario, is a question of fact, which may be proved by a properly qualified expert.

[87] I say this in response to the repeated references by counsel herein to the legislation and civil procedure rules of other provinces (eg. The effect of Notices of Discontinuance) and their submissions regarding the effect of positions and actions taken by the parties, and the significance of judicial decisions arising therefrom, in other provinces.

VI Why there is no abuse of process demonstrated in this case

(i) The Applicable Law

[88] Bell argues three bases for a permanent stay of proceedings: the common-law doctrine of "abuse of process"; Rule 88.02; and the *Judicature Act*, R.S.N.S. 1989 c. 240, particularly subsections 41(e) and (g).

[89] Rule 88.01 (3) states that Rule 88 "provides procedure for controlling abuse". Notably however, the rule itself only confirms the existence of "the inherent authority of a judge to control an abuse of the court's processes".

[90] In my opinion, the remedy sought here by Bell is best addressed through the common-law doctrine of "abuse of process". In the circumstances of this case, it is difficult to conceive any necessity to consider the provisions of the *Judicature Act*.

[91] In *Hollick v. Toronto (City)* 2001 SCC 68, the issue was whether Mr. Hollick should be permitted to pursue his action as the representative of the stated class in a class-action in relation to complaints of noise and physical pollution from a landfill owned and operated by Toronto. The Supreme Court agreed with lower courts that Mr. Hollick had not shown that a class-action was the preferable means of resolving the claims raised.

[92] Within the case Chief Justice McLachlan for the Court stated:

> 15 The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in *Western Canadian Shopping Centres* (at paras. 27-29), **class actions provide three important advantages over a multiplicity of individual suits. 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.** In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages: see Ontario Law Reform Commission, Report on Class Actions (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, Report of the Attorney General's Advisory Committee on Class Action Reform (February 1990), at pp. 16-18. In my view, it is essential therefore that courts not take an overly restrictive approach to the

> legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters. **[My emphasis]**

[93] When Canada was created as a confederation, the *Constitution Act*, 1987 [as it was then known: the *British North America Act*, 1867, 30 & 31 Vict. c.3] assigned to the Provinces the general right to enact legislation in relation to what were considered to be "local" matters – s. 92 (16).

[94] It also assigned specifically to each province powers regarding: "property and civil rights in the Province" and "the administration of justice in the Province, including the constitution, maintenance, organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts" –[subsections (13), and (14)].

[95] Thus, class-action legislation in Canada arises by virtue of provincial legislation. Each province also has its own civil procedure rules, and jurisprudence.

[96] In the context of multijurisdictional class actions in Canada, the jurisdictional differences between these aspects touching class-action litigation, can create legal issues which are not easily addressed by courts in the respective individual provincial jurisdictions.

[97] Nevertheless, the doctrine of "abuse of process" is well understood. Its application is rooted in the unique factual matrix of each case in which it is argued.

[98] A general comment on the parameters of the doctrine of "abuse of process" is appropriate. In *Toronto (City) v. Canadian Union of Public Employees, Local 79*, 2003 SCC 63, Justice Arbour for the Majority, considered whether a labour arbitrator had correctly ruled that a criminal conviction for sexual assault by a recreation instructor against a youth, was admissible evidence, but not conclusive, in a labour arbitration hearing, as to whether the instructor had sexually assaulted the youth.

[99] The Majority held that the case was appropriately decided on the basis of the doctrine of "abuse of process", rather than the narrower and more technical doctrines of either collateral attack or issue estoppel.

[100] Justice Arbour stated:

> **35** Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:
>
> > ... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.
>
> **36** The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: Conway, supra, at p. 1667. In *Blencoe v. British*

Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, 2000 SCC 44, this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the Canadian Charter of Rights and Freedoms applies, the common law doctrine of abuse of process is subsumed into the principles of the Charter such that there is often overlap between abuse of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411). The doctrine nonetheless continues to have application as a non-Charter remedy: *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21, at para. 33.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (*Watson*, supra, at pp. 624-25).

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of res judicata while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an

independent one (*Lange*, supra, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (*Lange*, supra, at pp. 347-48):

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

39 The locus classicus for the modern doctrine of abuse of process and its relationship to res judicata is *Hunter*, supra, aff'g *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (C.A.) . The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had not used violence. At the Court of Appeal, Lord Denning, M.R., endorsed non-mutual issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court", but held that the proper characterization of the matter was through non-mutual issue estoppel.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

41 It is important to note that a public inquiry after the civil action of the six accused in *Hunter*, supra, resulted in the finding that the confessions of the Birmingham six had been extracted through police brutality (see *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.), at pp. 304 et seq.). In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts (see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 1; and *R. v. Bromley* (2001), 151 C.C.C. (3d)

> 480 (Nfld. C.A.), at pp. 517-18). Although safeguards must be put in place for the protection of the innocent, and, more generally, to ensure the trustworthiness of court findings, continuous re-litigation is not a guarantee of factual accuracy.
>
> **42** The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of res judicata while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter* (H.C.), supra, at p. 264, and *Hunter*, supra, at p. 536.)
>
> …
>
> **51** Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process."

[101] Thus, keeping in mind the objectives of class-action proceedings, and the factual matrix I have been presented, I will turn to assessing Bell's motion for permanent stay of proceedings based on an "abuse of process", concentrating on the integrity of the adjudicative process.

(ii) Application of the law to the circumstances in the case at Bar

[102] In their simplest forms, Bell is arguing that especially now that the Saskatchewan "opt in" [for non-Saskatchewan residents] proceeding has been certified, any remaining proceedings in other provinces are an abuse of process; whereas the Plaintiffs argue that in spite of the Saskatchewan proceeding having been certified, they should be entitled to seek, a national "opt out" class action in whatever jurisdiction they choose, in order to achieve "ultimate accountability" by "ultimate inclusion", and generally the most advantageous outcome for the putative class.

[103] The parties also put forward more specific reasons for their positions.

[104] To my mind, there is no presumptive abuse of process merely by the filing of multiple similar class actions in different jurisdictions; whether that is done by the same law firm, or done by some agent to achieve a "carriage" advantage, and whether their reasons might be said to include "tolling the limitation period."

[105] It must be recognized that, owing to the lengthy time involved in bringing any one class-action to certification and final resolution, many changes in legislation, the civil procedure rules, and jurisprudence may take place. Many rulings will be made, the outcomes of which are not predictable with any reasonably certainty. Moreover, class-action proceedings require plaintiffs' counsel that are sufficiently resourced, capable, and financially prepared to undertake such a lengthy endeavour.

[106] Plaintiffs' counsel has an obligation to all members of the putative class wherever they reside. However some jurisdictions may provide advantages to the putative class. Those advantages may not exist, or be apparent, at the time of filing of class-action proceedings. Therefore, it is arguably prudent for Plaintiffs' counsel to commence class-action proceedings in multiple jurisdictions. As the circumstances over time change, they may determine that they have a favoured

jurisdiction. Some significant period of time may need to pass before they are in a position to make such determination. For this reason "parking" a class-action proceeding is not presumptively abusive.

[107] At some point however, the Plaintiffs may be held to task for "over parking" one or more of their class-action proceedings.

[108] Bell says that this is one of those cases. This is why they have commenced motions in Manitoba, Ontario and Nova Scotia to have the proceedings in those provinces permanently stayed as an abuse of process.

[109] In the case at Bar, I note that this litigation began under Rule 5.09 [Representative Action] of our 1972 Civil Procedure Rules, and has now been continued under the *Class Proceedings Act* of 2007 [which is an "opt out" regime]. The Saskatchewan class proceeding certification process was only concluded in 2012 [which was an "opt in" regime until 2008, but by virtue of court decisions in Saskatchewan it still remains an "opt in" class proceeding, and for which the notification process still remains to be determined].

[110] I conclude that, at this time, the continued existence of the Nova Scotia action does not constitute a misuse of this Court's procedure such that it would bring the administration of justice into disrepute.

[111] Between 2004 and 2014 Plaintiffs' counsel was in regular contact with the Prothonotary of the Nova Scotia Supreme Court. Numerous "appearance day" hearings were scheduled, and at none of them did the Court take the position that the proceeding ought to be dismissed.

[112] The issue of the proper service, or not, upon the Defendants of the 2004 Statement of Claim, and the 2014 Amended Statement of Claim, is not directly before me, and in my opinion does not need to be decided by me.

[113] Plaintiffs' counsel sent a letter in 2004 giving actual notice to Jay Forbes for some of the defendants [of the Saskatchewan, Ontario and Alberta claims], and received similar confirmation of such from Daniel Campbell, Q.C. in relation to the Nova Scotia, New Brunswick, Newfoundland and Labrador actions. I infer there is a much larger factual record, which is not before me, and that only upon consideration of it could one decide this issue. Moreover, the Defendants are not only before me, but have filed motions requesting relief from the Court. They took no objection to the Court hearing their motion.

[114] At present, of the nine original actions: Alberta has been permanently dismissed – 2014 ABQB 122; British Columbia has been conditionally stayed – 2013 BCSC 1341/and the competing class-action proceeding there [*Ileman*]has not

been certified – 2014 BCSC 1002; in the three "opt out" provinces, Manitoba, Ontario, and Nova Scotia, the actions appear to have been essentially inactive, but are each now subject to a Defendant's motion to stay for abuse of process; Québec, New Brunswick and Newfoundland and Labrador, as I understand it, are each inactive.

[115] It is important to recall that in Saskatchewan the courts have certified the class-action only on the basis that: "the claim to be advanced through this class proceeding by the Plaintiffs against the Defendants is a claim of unjust enrichment, and no other, arising from the payment by members of the Class to the Defendants of a Fee" initially for the period April 1, 1987 to the date of the order [April 24, 2008; yet most recently extended to March 31, 2014.]

[116] The amended April 7, 2014 Statement of Claim filed herein, added paragraph 136 to include a claim for "unjust enrichment", and paragraph 137, to specify the relevant claim time period as running from 1987 to the date of judgment.

[117] In *Ileman v. Rogers Communications Inc.* 2014 BCSC 1002 Justice Weatherill concluded at paragraphs 147-153:

> The plaintiff has satisfied the certification requirements set out in section 4(1)(a) of the [*Class Proceedings Act* RSBC 1996 c. 50] that the pleadings disclose a

> cause of action, but only in respect of his claim pursuant to the BPCPA [*Business Practices and Consumer Protection Act*, SBC 2004, c . 2] that the words "system access fee" have the capability, tendency or effect of deceiving or misleading those residents of British Columbia who purchased wireless cellular telephone services from one or more of the Defendants for primarily personal family, or household purposes…
>
> [However he went on to find that other requirements of the Act had not been satisfied concluding] The Plaintiff has not satisfied the certification requirement set out in section 4(1)(a) of the CPA that a remedy is available under section 172(3) of the BPCPA. The Plaintiff has not satisfied the certification requirement set out in section 4(1)(a) of the CPA in respect of his claims for unjust enrichment and money had and received. Those of the Plaintiffs' claims that do satisfy the section 4(1)(a) requirements do not satisfy the requirements set out in Section 4(1)(b) and (d) of the CPA. The application for certification is dismissed.

[118] In that case Justice Weatherill stated, in relation to the plaintiffs' claim for unjust enrichment:

> [100] The elements that must be established in a claim for unjust enrichment are well-established. They were set out in *Garland v. Consumers Gas Company* 2004 SCC 25 at paragraph 30:
>
> a) an enrichment of the defendant;
>
> b) a corresponding deprivation of the plaintiff; and
>
> c) no juristic reason for the enrichment.
>
> [101] There is no dispute that elements a) and b) are present in this claim. **The issue for determination at the certification stage is whether it is plain and obvious that the Plaintiff will be unable to prove the absence of a juristic reason for the enrichment.**
>
> . . .
>
> [102] The Plaintiff points to the *Chatfield* action [in which the Saskatchewan Court of Queen's bench certified the unjust enrichment claim as a class-action on behalf of a national class February 13th, 2008 as upheld in *Microcell Communications Inc. v. Frey* 2011 SKCA 136] in which a claim for unjust enrichment in the same factual circumstances was certified.
>
> . . .
>
> [105] In the decision on certification in *Chatfield* (then styled *Frey et al v. BCE Inc. et al*, 2006 SKQB 328), Guerin J. held, at paras. 42, 45 and 46:
>
> *Unjust Enrichment*

[42] The final cause of action to be considered is that of unjust enrichment which is set out in paragraph 155(a).

> 155a. By engaging in the acts and conduct described herein, the Defendants unjustly enriched themselves and deprived class members of a fair market place, as well as financially deprived members of the class and causing the Plaintiff class to suffer economic harm. Amongst other things, the Defendants received an unjust enrichment by reason of their additional charges of "system access fees", "system licencing charges", "system licence administration fees" or similarly described fees or charges, and the Plaintiffs have suffered a corresponding deprivation. There is no juristic reason for the benefit or enrichment of the Defendants. The Plaintiffs claim that as a result of the Defendants imposing additional charges on their customers' accounts as system access fees, the Defendants have unjustly benefited from payment of these charges by the Plaintiffs. The Plaintiffs claim for restitution of these monies unjustly charged and received by the Defendants.

...

[45] When I review the facts pleaded, if they turn out to be accurate, it may result in a finding that the defendants unlawfully obtained monies from the plaintiffs and must account for it. This being so, it cannot be said that it is plain and obvious that the claim for unjust enrichment cannot succeed.

Conclusion

[46] I have concluded that it is plain and obvious that the pleadings do not disclose a cause of action for breach of contract, misrepresentation in any form, breach of fiduciary duty, conspiracy or a cause of action based on a statutory entitlement. However, I also conclude that the pleadings do disclose a cause of action for unjust enrichment. Accordingly, the plaintiffs have demonstrated compliance with the first statutory requirement that there be a reasonable cause of action.

[106] **Notably, there was no analysis by Guerin J. of whether the service agreements constituted a juristic reason for the enrichment of the defendants.**

[107] **The decision was upheld on appeal**: *Microcell Communications Inc. v. Frey*, 2011 SKCA 136. Justice Jackson, writing for the court, stated:

> [25] In the instant case, the pleadings explicitly allege that the impugned fees were charged by the Appellants in the context of the provision of cellular telephone services to consumers. Accordingly, the allegation of enrichment of the Appellants and a corresponding deprivation to the Respondents is clear. Further, in this context there is no reasonable argument that the pleadings are inadequate to negate the existence of "disposition of law, donative intent or other valid common law, equitable or statutory obligation." The Appellants'

position, however, is that the pleadings allege that the payment of the fees was made "pursuant to" contracts between the Appellants and their subscribers, and that, accordingly, far from negating an established category of juristic reason, this allegation provides one. Thus, according to the Appellants, it was necessary for the Respondents to plead that the contracts were void or otherwise unenforceable. This they have not done.

[26] **That the existence of a contract between the parties authorizing the impugned enrichment can provide a satisfactory juristic reason justifying the enrichment, and thus negate a cause of action based on unjust enrichment, is clear.** This is inherent in the very notion of an enforceable bargain and is, in any case, confirmed in a number of cases in addition to *Garland*. See, for example, *Peter Kiewit Sons' Co. of Canada v. Eakins Construction Limited*, [1960] S.C.R. 361; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 at 455-56; *Jedfro Investments (U.S.A.) Ltd. v. Jacyk Estate*, 2007 SCC 55, [2007] 3 S.C.R. 679 at paras. 30-34; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575.

[27] **However, for the contract to provide a juristic reason for the enrichment, the clause doing so must in fact justify the defendant's enrichment at the expense of the plaintiff, and the clause must be valid and enforceable. Thus, it is open to the Respondents to argue either that the clauses authorizing the collection of the "system access fees", properly interpreted, do not justify the Appellants' retention of these sums for their own use, or enrichment, or, alternatively, if they do, that they are not valid or enforceable.**

[28] **Both positions find some support in the factual allegations in the statement of claim**. In particular, I note the following allegations contained in the pleadings:

> (1) that the "system access fees" were charged as an "add on" or "extra" fee, over and above the charges imposed for the rate plan that subscribers had agreed to (although this allegation runs throughout the pleadings, see in particular paras. 110-116, 120-123 and 126 of the Amended Statement of Claim);
>
> (2) that the contracts expressly or implicitly provided that these extra charges were collected on behalf of the government or a third party government agency as a mandatorily imposed tax, fee or charge to be paid to that third party (see, especially, paras. 111 and 116(a), but also, *inter alia*, paras. 112-113, 115, 120, 126, 128-129, 137a and 141, among others of the Amended Statement of Claim);
>
> (3) that, in fact, there was no government tax, fee or charge to be levied on cellular customers and only a small portion of the system access fee was paid to the government for the Appellants' spectrum licenses (see para. 114 of the Amended Statement of Claim);

> (4) that the sums paid to the Appellants by the cellular subscribers by way of "system access fees" were retained by the Appellants and amounted in fact to an extra charge, over and above the amount agreed to be paid for the provision of cellular services (see, *inter alia*, paras. 113, 116(d), 120-122, 127 and 141 of the Amended Statement of Claim).

[29] These allegations are clearly sufficient, if proven, to support the contention that the clauses in the cellular service contracts permitting collection of "system access fees", properly interpreted in all the circumstances surrounding their implementation, including the regulatory history, past practice, timing and mode of implementation as well as representations made by the Appellants to customers and the public, uniformly permitted collection of the "system access fees" solely for the purpose of paying those fees to a third party, and did not authorize the Appellants to retain the fees, or any portion thereof, for their own use. **This constitutes a clear pleading that the Appellants' enrichment by way of collection of these fees was not "pursuant to the contracts", and the contracts therefore do not constitute a juristic reason for that enrichment.**

...

[51] ...**Thus, the sole issue that divides these parties is whether the contracts, properly interpreted, represented these fees as government taxes or fees collected on behalf of the third-party, or whether they should be interpreted as permitting the defendants to retain the fees as part of the consideration for providing cellular telephone service to the plaintiffs. If the latter, the contracts constitute a juristic reason justifying the defendants' retention of the fees paid and would defeat unjust enrichment claim. If the former, they would not.**

[108] **With respect, I do not share the view of the Saskatchewan courts**. On my reading of the case law, a contract that expressly provides for the enrichment is a juristic reason for it: *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC 55 at paras. 30-32; *Garland* at para. 44; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2006 BCSC 1047 at paras. 74-76.

[109] In *MacLeod v. Viacom Entertainment Canada Inc.*, 2003 CanLII 47211 (Ont. S.C.J.), the court stated, at para. 25:

> [25] I reach the same conclusion with respect to the issues relating to unjust enrichment. If the fees were paid pursuant to a binding agreement between a member and the defendants, there would be a juridical reason for the payment and no issues relating to unjust enrichment would arise. Relief based on unjust enrichment must be premised on the absence of any such agreement to pay the fees...

[110] A similar statement of the law is found in *Hassum v. Contestoga College*, 2008 CanLII 12838 (Ont. S.C.J.) at para. 80:

> [80] A contract is an established category and constitutes a juristic reason for enrichment. The essence of the plaintiff's primary submission is that the policy directive makes any contracts that contravene it illegal. The plaintiff's claim in unjust enrichment therefore requires as a precondition to success that the College's contractual rights to the fees paid by the students be extinguished as these contractual rights would otherwise provide a juristic reason for the College's enrichment...

[111] In order to succeed in a claim for unjust enrichment where the impugned enrichment itself is stipulated in a contract, the Plaintiff must first invalidate the contract at least to the extent it provides for the enrichment.

[112] Indeed, in a recent decision in the *Chatfield* Action involving an application by the plaintiff to amend his pleadings to add allegations of deceit and misrepresentation, the court concluded that allegations of wrongful actions on the part of the Defendants did not advance the plaintiff's onus to negate a juristic reason. In *Chatfield v. Bell Mobility Inc.*, 2014 SKQB 82, Elson J. stated:

> [50] In my view, the plaintiffs have misconstrued the judgment in *Frey 1*, particularly in regard to the significance Jackson J.A. attached to the issue of the defendants' alleged representations. In this respect, it is noteworthy that the passages cited above were made in response to the defendants' argument, on appeal, that the amended statement of claim had failed to negate a juristic reason in contract. Jackson J.A. disagreed, holding that the plaintiffs' allegations in the claim were directed to the issue as to whether the contracts, having regard to all the relevant circumstances, could be interpreted to provide a contractual justification for the defendants to collect and retain the system access fees. While I accept that the relevant circumstances would include representations made by the defendants, I am satisfied that the role played by any such representations is limited to the assistance, if any, they provide in the interpretation of the cellular service contracts. Although I think it is beyond the scope of this application for me to discuss the specific impact of pre-contract and contractual representations on the interpretation of a contract, it is certainly conceivable that there may be some impact.
>
> [51] I am satisfied that the focus of the proposed amendments, to the extent they refer to representations made by the defendants, has little, if anything, to do with their role in the interpretation of the cellular service contracts. Rather, they are being described as the causative event for the plaintiffs' right to recover. The plaintiffs are seeking the opportunity to assert that the defendants' representations were actually "misrepresentations" which had the effect of deceiving members of the class and creating, or perpetuating, false impressions about the system access fees. These allegations are immaterial to this claim, if not outright inconsistent with it. Since the real issue in this case pertains to the meaning which is to be given to the cellular service contracts,

> as influenced by the defendants' representations, then the significance of those representations is confined to what they were, not to what they should have been, or to their tendency to deceive and mislead.

[113] **The Plaintiff has not pled that any of the service agreements are illegal or void, should be set aside or are otherwise unenforceable. Indeed, the Plaintiff pleads the ongoing existence of the service agreements.** An allegation that the Defendants' conduct constitutes a deceptive act or practice under the *BPCPA* does not amount to a plea that the service agreements pursuant to which the Defendants engaged in that conduct are themselves illegal. The *BPCPA* is a complete code. A breach of the statute cannot be used to support a common law claim for unjust enrichment or other forms of restitutionary relief: *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310 at paras. 63-65; *Wakelam* at para. 66.

[114] The system access fees were paid because there was a contractual commitment on the part of subscribers to pay them. **There is no plea that there was a failure of consideration.** The Plaintiff and the putative class received exactly what they contracted for: cellular telephone service in consideration for the payment of an agreed price.

[115] **If, as the Plaintiff alleges, there was an implied term that the fees would either be remitted to government as a tax/licence fee or used to recover monies that were being remitted to government in that regard, then his claim is for breach of contract, not unjust enrichment.**

[116] **On the basis of the pleadings as they presently stand, it is plain and obvious that the Plaintiff's claim for unjust enrichment is bound to fail.**

The Plaintiff's Claim against Bell, Rogers and Fido for Money Had and Received

[117] **While the Plaintiff alleges separate causes of action in unjust enrichment and money had and received, the latter is merely a special case of the former.** As McLachlin J. (as she then was) explained in *Peel v. Canada*, [1992] 3 S.C.R. 762, at paras. 39-41:

> The modern law of restitution finds its roots in the 16th century writ of *indebitatus assumpsit* which, as a form of trespass on the case, was returnable in the Court of King's Bench, as opposed to the Court of Common Pleas where all regular debt actions had to be instituted. Maddaugh and McCamus, *The Law of Restitution* (1990), note at p. 5 that from the Writ's birth in *Slade's Case* (1602), 4 Co. Rep. 92b, 76 E.R. 1074, a number of "standard forms of general *assumpsit* were developed depending upon the type of circumstance giving rise to the original indebtedness'"; the standard forms were called the common counts':

> Of these common counts, four have come to form the basis of the vast majority of common law actions in quasi-contract: (i) *money had and received to the plaintiff's use*, where money is paid directly to the defendant; (ii) *money paid to the defendant's use*, where money is paid, not to the defendant but to a third party for the defendant's benefit; (iii) *quantum meruit*; and (iv) *quantum valebat*, where services or goods, respectively, are bestowed by the plaintiff upon the defendant.

[Emphasis in original.]

The Court of Chancery, or Equity, also played an important role in the development of the modern law of restitution. Maddaugh and McCamus consider equity's most fundamental contribution to be the development of the remedial constructive trust as a means by which the unjust enrichment of a defendant may be avoided. Late 19th and 20th century courts faced the arduous task of making sense of the diverse branches of restitution and of creating some general principle upon which to ground restitutionary relief.

The courts found the required unifying principle in the concept of unjust enrichment. The American *Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts*, 1937, states the principle simply at p. 12: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." A leading commonwealth text offers the following elaboration:

> [Unjust enrichment] presupposes three things: first, that the defendant has been enriched by the receipt of *a benefit*; secondly, that he has been so enriched *at the plaintiff's expense*; and thirdly, that it would seem *unjust* to allow him to retain the benefit.
>
> (Goff and Jones, *The Law of Restitution* (3rd ed. 1986), at p. 16.)

These three requirements, somewhat differently articulated, have been recognized as the basis of the action for unjust enrichment by this Court: e.g., *Pettkus v. Becker*, *supra*.

At the heart of the doctrine of unjust enrichment, whether expressed in terms of the traditional categories of recovery or general principle, lies the notion of restoration of a benefit which justice does not permit one to retain. As Goff and Jones, *supra*, put it at p. 12: "Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment". Thus for recovery to lie, something must have been given, whether goods, services or money. The thing which is given must have been received and retained by the defendant. And the retention must be without juristic justification, to quote Dickson J. in *Pettkus v. Becker*.

> The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.
>
> [118] The plea regarding money had and received to the use of the Plaintiff is advanced on the basis that there has been a partial or total failure of consideration under the service contracts: Peter Maddaugh and John McCamus, *The Law of Restitution* (loose leaf) s.4:200.10. **The Plaintiff has not pleaded a failure of consideration.**
>
> [119] For that reason, as well as the reasons set out above in respect of the Plaintiff's claim for unjust enrichment, it is plain and obvious that the Plaintiff's claim for money had and received is bound to fail.
>
> [My emphasis throughout]

[119] Arguably therefore, the pleadings of the Plaintiffs in the Saskatchewan class proceeding may have a fatal flaw, in that it has been certified only in relation to a claim for "unjust enrichment."

[120] The Nova Scotia action pleads other causes of action, in addition to the recently added "unjust enrichment" aspect. Consequently, it arguably has an apparent advantage over the Saskatchewan class proceeding.

[121] The procedural components of the "opt in" aspect of the Saskatchewan class proceeding have not yet been determined by the Court. Nova Scotia residents are not part of the Saskatchewan class proceeding yet. Sasketchewan has been an "opt out" regime since 2008. The Nova Scotia legislation adopted an "opt out" regime from the start. To the extent that an "opt out" regime is more inclusive of persons

in the putative class, if the Plaintiffs are successful, the level of accountability of the Defendants will be that much greater, which will serve the goal of behaviour modification.

[122] These are but a few of the apparent advantages of maintaining the Nova Scotia class proceeding. There is no abuse of process at this point in time.

[123] I recognize that my view is at odds with the factual and legal conclusions reached by Justice Weatherill in *Drover v. BCE Inc.* 2013 BCSC 1341. As I have pointed out earlier, it is inappropriate for me to adopt factual conclusions regarding the same parties from another proceeding, in another province.

[124] I note as well that Justice Weatherill, at paragraph 26, recited with approval paragraph 77 from the Saskatchewan Court of Appeal's decision in *Bear v. Merck Frosst Canada & Company*, 2011 SKCA 152. There Justice Richards for the Court stated:

> 77 It would be naïve, in my respectful view, to think that MLG's [Merchant Law Group's] common involvement with *Wuttunee* and with the *Bear* and *Rybchinski* actions is of no import or consequence in the abuse of process analysis. Those actions must be seen as part of a common effort, effectively piloted or coordinated by MLG, to certify a *Vioxx* class action against Merck. This does not mean that these claims are MLG's claims in any legal sense of the word. It is only to say that MLG's across-the-board involvement cannot be overlooked when determining if this sort of approach undermines the integrity of the adjudicative process.

[125] Respectfully, I would observe that the involvement of one law firm as Plaintiffs' counsel in multijurisdictional class proceedings, could also serve the interests of justice . For example, as Plaintiffs' counsel here noted in oral argument; what the Defendants pejoratively referred to as "parking" an action; the Plaintiffs would refer to as "orderly traffic control." Courts must decide each case based on its own unique circumstances.

[126] In appropriate circumstances, including where inferences can be confidently drawn in support thereof, abusive conduct by plaintiff's or defendant's counsel should be addressed by courts.

[127] However, courts should be very cautious to come to such conclusions or to draw adverse inferences of such nature too readily. The complexities and uncertainties of class action proceedings in multiple jurisdictions, are such that courts should be especially reluctant to permanently stay such proceedings. Doing so would require the Court to necessarily make some assessment of what is in the best interests of the putative class in issue. Those decisions are best left with the better informed and placed capable plaintiffs' counsel.

[128] I add here that, although the Defendants are not required to prove prejudice in this "abuse of process" motion, as would be the usual case where a dismissal for

want of prosecution is alleged – *Hurley v. Cooperators Gen. Insurance Co.* (1998) 169 N.S.R. (2d)(CA), I find there is not that kind of prejudice to the Defendants here in any event.

VII Conclusion

[129] I find that an objective observer could not conclude that respect for, and confidence in, the court process itself has been so significantly undermined by the inactions and actions of the plaintiffs herein, such that the administration of justice has been brought into disrepute.

[130] The Defendants motion to permanently stay the action herein as an abuse of process is dismissed.

VIII Costs

[131] Rule 77.05 deals with the assessment of interlocutory costs. Tariff C provides the commonly referred to guidelines.

[132] In the unlikely event that the parties are not able to agree on costs, I will receive their submissions within 30 days from their receipt of this decision.

Rosinski, J.