SUPERIOR COURT OF JUSTICE

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Date: October 4, 2013

RE: CELIA SANKAR ET AL. v. BELL MOBILITY INC. ET AL.
DOCKET: CV-12-452867-CP

Please contact Gladys Gabbidon at (416) 327-5052 if you do not receive all pages. Thank you.

CITATION: Sankar v. Bell Mobility, 2013 ONSC 5916
COURT FILE NO.: CV-12-452867-CP
DATE: 20131004

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Celia Sankar / Moving Party / Plaintiff

AND:

Bell Mobility Inc. and Bell Canada Enterprises Inc., Responding Parties / Defendants

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward Belobaba

COUNSEL: *Louis Sokolov, Jean-Marc Leclerc* and *Nadine Blum* for the Moving Party

Steve Tenai, Jeremy Devereux and *Jennifer Teskey* for the Responding Parties

HEARD: May 21, 22 and 23, 2013

CERTIFICATION DECISION

[1] With pre-paid phone cards, cell phone users can buy a wireless plan in a denomination they can afford. The service agreement typically provides that the phone card will expire "after a specified time period." If you haven't used up or topped up the $15 or $20 value within the specified 30 days (longer with larger pre-payments) any unused balance will be forfeited to the wireless service supplier "after" the card has expired.

[2] But what happens if the wireless supplier notifies the customer that the phone card expires on a specified date (which may be a day or two longer than the time period noted, for example, on the supplier's website) and the customer relies on that date, thinking that she has that entire day to top-up her account? If the wireless supplier seizes the unused funds *on* that date, rather than *after* that date, is that a breach of the service agreement?

[3] The expiry date issue has been the subject of consumer complaints for some time. According to a recent study more than one-half of phone card consumers were concerned

about the expiry of their cell phone credits and nearly a third said they experienced a loss of their prepaid credits on a monthly basis.[1] The complaints tend to focus on two things: one, the apparent practice of some phone card suppliers to seize any unused balance one day sooner than expected and two, the need for an expiry date on a non-perishable product or service.

[4] This is a proposed class action that targets both of these complaints.

[5] The plaintiff asks that a class action be certified on behalf of all persons in Ontario who purchased Bell Mobility phone cards, paid on a pay-per-use basis, and had balances remaining in their accounts at the end of an active period which expired between May 4, 2010 (the action was commenced on May 4, 2012) and the date on which the certification of this action is finally determined.

[6] According to Bell Mobility, there are approximately 1,040,400 class members.

[7] For the reasons set out below, the action is certified as a class proceeding. However, I have revised the plaintiff's proposal as follows. I have added a sub-class of "consumers" and I have certified five of the seven proposed common issues,[2] albeit with some qualifications. The proposed common issues are set out in Appendix A. The certified common issues are in Appendix B. The parties will see that I have not certified the "unfair practices" issue or the "what remedies" question.

I. Background

The parties

[8] Ms. Sankar lives in Elliott Lake, Ontario. She is the executive director of the Diversity Canada Foundation, a non-profit organization that promotes social justice.

[9] The defendant Bell Mobility Inc. provides pre-paid phone card services under three brands, Bell Mobility, Virgin Mobile and Solo Mobile. The plaintiff has purchased and used the first two, but not the third. However, when she spoke with agents at Bell Mobility and Solo, she was advised that all three brands had the same forfeiture policy – that is, any unused balances would be forfeited *on* the expiry date that was communicated to the customer.

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[1] Consumers Council of Canada, *Changing Landscape of Wireless Plans: 2009 Review of Prepaid and Postpaid Wireless Plans and Consumer Concerns* (2009) at 9, 18 and 41 [*Changing Landscape of Wireless Plans*].

[2] On my count there are seven proposed common issues: the Gift Card Regulation; breach of contract generally; the unfair practices/*Consumer Protection Act* claim; unjust enrichment; the "what remedies" question; aggregated damages; and punitive damages. See Appendix A.

[10] The action against the defendant Bell Canada Enterprises has been discontinued.

The plaintiff's experience

[11] In April, 2011, the plaintiff purchased a Virgin Mobile prepaid cell phone for her personal use. She had a number of encounters with the defendant over the issue of the expiry date. Her most recent encounter illustrates her concern.

[12] On January 19, 2012, the plaintiff's account balance was $58.60. When she checked her account balance both via cell phone and on-line, she was advised that the expiry date was February 19, 2012. She then discovered that the defendant seized the amount just after twelve noon *on* February 19, 2012.

[13] The plaintiff created a website called "Bell, Give our Money Back" to educate and mobilize consumers. More recently, the plaintiff made submissions to the Canadian Radio Television and Communications Commission with respect to pre-paid billing practices for wireless customers.

The problem appears to be widespread

[14] According to the plaintiff, the complaints about the defendant's "expiry date" practices appear to be widespread. One particular website included the following user comments:

- My wife has a Virgin pay as you go phone; puts the new card on her phone the day it's expiring... Around 8:00 PM when she tried topping up all her carryover minutes were gone!
- Their expiry date is a day earlier than the stated expiry date.
- Virgin sends a text informing you that your account balance will expire on a staid (sic) time and date. But SURPRISE they expire/remove/take the funds earlier.
- After nearly four years of service Virgin just ripped me off nearly $30 by zeroing my balance with nearly an hour and a half left b4 expiry...
- Not happy as they stole $80 from my phone before the due date.
- The expiry on pre-paid phone card is robbery. There should be no expiry on these cards unless the minutes are used. This is stealing.

[15] The problems associated with pre-paid mobile services were the subject of a recent study by the Consumers Council of Canada.[3] Citing data from the Commissioner for Complaints for Telecommunications Service, the report noted that 29% of all complaints regarding prepaid wireless services related to the issue of expired balances.

[16] About 51% of prepaid wireless customers were concerned about the expiry of their credits and nearly 28% experienced a loss of their prepaid credits on a monthly basis.[4] The Consumers Council report also questioned the need for expiry dates in the first place:

> While expiration dates are the standard for wireless services, consumers and the researchers must question what makes this product more 'perishable' than other gift cards sold under legal control.[5]

The class

[17] As already noted, the action was commenced on May 4, 2012. Given the two-year limitation period, the start of the class period is May 4, 2010.

[18] The plaintiff seeks to be the representative plaintiff in a class action involving all three Bell brands. However, she used only the Virgin Mobile cell phone and phone cards before the action was commenced (she later purchased a Bell Mobility cell phone and phone card). She nonetheless seeks to be the class representative on two grounds: one, the terms and conditions of the service agreements were similar; and two, she was advised by Bell agents that Bell Mobility's and Solo Mobile's policies, whereby customers' balances were seized during the assigned expiry date, were identical to those of Virgin.

[19] The class is defined as:

> All persons in Ontario who contracted with the defendant for pre-paid mobile telephone subject to the defendant's Terms and Conditions, paid on a pay-per-use basis, and had balances remaining in their accounts at the end of an active period which expired between May 4, 2010 and the date on which the certification of this action is finally determined.

[20] I asked counsel for the plaintiff whether they would consider limiting their class to "consumers" rather than "persons." They were quite clear that the class descriptor had to be "persons" in order to also include people who purchased pre-paid phone cards

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[3] *Changing Landscape of Wireless Plans*, *supra* note 1.

[4] *Ibid.*, at 41.

[5] *Ibid.*, at 18.

primarily for business purposes. I will return to this distinction when I consider the class definition below and discuss whether a sub-class is needed.

The contracts

[21] The relevant language from the Virgin Mobile, Bell Mobility and Solo Mobile service agreements is similar (emphasis added):

> **Virgin Mobile:** All Top-Ups (excluding those used for prepaid mobile Internet Stick Accounts) have specified active periods and an expiry date. The active period starts on the date you placed the Top-Up on your account. *Any* Top-Up *balance left in your account after the expiry date is forfeited* and non-refundable.
>
> **Bell Mobility and Solo Mobile:** Value deposited into your prepaid account is available as prepaid credits for your Service and such *credits* are non-refundable, non-transferrable, and *will expire after a specified time period.*

[22] The gist of these provisions is that any balance left in the account after the expiry date will be forfeited. The plaintiff points to the notifications received from the defendant advising her of a specific expiry date. She says she understood that she would have until the end of the day on that expiry date to top-up her account without risk of forfeiture.

The claims

[23] There are three principal allegations: 1) the defendant seizes credit balances "on" the stated expiry date, in breach of the service agreement that provides balances will not be seized until "after" the stated expiry date; 2) the expiry dates themselves are contrary to the Gift Card Regulation[6] under the *Consumer Protection Act*,[7] with the result that the contracts are effective as though they had no expiry dates, and the defendant breached its contracts with consumers by seizing their credit balances; and 3) the defendant engages in unfair practices contrary to the *Consumer Protection Act* by misleading consumers in respect of the expiry of credit balances and by providing terms of service that are inequitable and amount to "unconscionable representations."

[24] The lawsuit is framed in breach of contract (in general, and under the Gift Card Regulation), unjust enrichment and breach of the "unfair practices" provisions of the *Consumer Protection Act.*

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[6] O. Reg. 17/05.

[7] *Consumer Protection Act, 2002*, S.O. 2002, c. 30 [*Consumer Protection Act*].

The CRTC Wireless Code

[25] On June 3, 2013, the Canadian Radio-television and Telecommunications Commission ("CRTC") released *The Wireless Code*[8] establishing a mandatory code of conduct for providers of mobile wireless voice and data services. The *Wireless Code* requires that a wireless service provider "must keep open the accounts of customers with prepaid cards for at least seven calendar days following the expiration date of an activated card, at no charge, to give the customer more time to 'top up' their account and retain their prepaid balance."[9]

[26] The Code does not come into effect until December 2, 2013. It therefore does not apply to this proposed class action. I will say more about this below.

II. **Analysis**

[27] Under s. 5(1) of the *Class Proceedings Act, 1992*[10] ("CPA") the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[28] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim. The question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be pursued as a class proceeding. Although s. 5(1) of the CPA, as just noted, requires the plaintiff to satisfy five prerequisites, the bar for certification is actually quite low. The plaintiff only has to establish a plausible cause of action under the first prerequisite and "some basis in fact" for each of the remaining four prerequisites.[11]

[29] Indeed, the Supreme Court has made it clear that the CPA should be construed generously. An overly restrictive approach must be avoided in order to realize the benefits of the legislation as foreseen by its drafters, namely serving judicial economy, enhancing access to justice and encouraging behaviour modification by those who cause

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[8] *The Wireless Code* (Telecom Regulatory Policy CRTC 2013-271).

[9] *Ibid.*, section J-1.

[10] S.O. 1992, c. 6.

[11] For a summary of the applicable principles and case citations, see *Arora v. Whirlpool Canada*, 2012 ONSC 4642, 24 C.P.C. (7th) 68, at paras. 120 to 124.

harm. The Court underlined the particular importance of keeping this principle of interpretation in mind at the certification stage.[12]

(1) Cause of action

[30] The first question is whether the plaintiffs have a cause of action. For the purposes of this part of the certification test, the allegations in the statement of claim are deemed true unless patently ridiculous or incapable of proof.[13] The test under s. 5(1)(a) of the CPA is the same as that under Rule 21 of the *Rules of Civil Procedure*, i.e. that the claim should be permitted to proceed unless it is "plain and obvious" that it cannot succeed.[14] That is, unless the claim has no chance of success.[15] This is obviously a very low hurdle.

[31] In this case, the plaintiff asserts claims for breach of contract, unjust enrichment, and breach of the unfair practices provisions of the *Consumer Protection Act*. I will consider each in turn.

Breach of contract (general)

[32] The claim makes two allegations. First, the service agreements for each of the defendant's three brands provide, as a contractual term, that the defendant can seize funds from pre-paid cell phone accounts *after* the specified expiry date. Second, the defendant has breached these terms by its systemic practice of seizing funds *on* the expiry date.

[33] This claim turns on the meaning of the contractual terms, and whether the phrase "expiry date" means either (1) the date communicated to class members after they topped-up (as argued by the plaintiff); or (2) the active period description (i.e. "expires in 30 days") found on the defendant's website and elsewhere (as argued by the defendant).

[34] The chronological structure of the breach of contract action as I understand it, and speaking very broadly, is this: the plaintiff purchases a pre-paid phone card and activates it in due course; the defendant's service agreement provides that any unused credits "will expire *after* a specified time period" and that any balance left in the account "*after* the expiry date" will be forfeited; the defendant then sends notifications to the plaintiff

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[12] *Hollick v. City of Toronto*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 14-16 [*Hollick*].

[13] *Folland v. Ontario* (2003), 64 OR (3d) 89 (C.A.), at para. 10.

[14] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at para. 36.

[15] If there is a chance that the plaintiff might succeed, then the plaintiff should not be driven from the judgment seat: *ibid.*

advising her of the expiry date; the plaintiff relies on this information and the defendant is estopped from going back on what was said in these notifications about the expiry date; the plaintiff discovers that her unused funds were withdrawn from her account *on* the notified expiry date, and not *after* as promised in the service agreement.

[35] The common issues trial judge will be obliged to undertake a fairly sophisticated contractual analysis. The claim is not straightforward. The court will have to consider not only the notifications from the defendant but also the expiry information that the defendant says can be found on the respective brand's website.

[36] However, assuming as I must that the facts as pleaded are true, the breach of contract action clears the s. 5(1)(a) hurdle. As challenging as the common issue trial judge's job may be, I am unable to say that the contractual claim is plainly and obviously doomed to fail and stands no chance of success.

Breach of contract (gift card regulation)

[37] The plaintiff claims that the pre-paid phone cards/credits are "gift cards" within the meaning of the Gift Card Regulation[16] enacted under the *Consumer Protection Act.* Specifically, say the plaintiffs, the pre-paid phone card/credits fall within the definition of "gift cards" and the agreements pursuant to which these pre-paid cards/credits are purchased are "gift card agreements." Consequently, the agreements are effective as if they had no expiry dates, and the defendant breached its contracts with its customers by seizing their funds.

[38] There is force in the plaintiff's submission because the Gift Card Regulation suffers from definitional circularity. Section 25.3(1) of the Regulation provides that "No supplier shall enter into a gift card agreement that has an expiry date on the future performance of the agreement." "Gift card agreement" is defined as "a future performance agreement under which the supplier issues a gift card to the consumer and in respect of which the consumer makes payment in full when entering into the agreement."[17] "Gift card" is defined as "a voucher in any form, including an electronic credit or written certificate, that is issued by a supplier under a gift card agreement ...".[18]

[39] The plaintiff argues, quite logically, that the Gift Card Regulation applies to more than just gift cards as commonly understood, and that "gift card" includes not only physical cards purchased in a store (like the top-up cards) but also the electronic credits

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[16] O. Reg. 17/05.

[17] *Ibid.*, s. 23.

[18] *Ibid.*

created when those cards are applied to a consumer's account. Nothing in the definition, says the plaintiff, even requires the purchase of a physical card at all.

[40] Accordingly, the definition can also encompass situations in which a consumer simply purchases electronic credits directly without also purchasing a physical card (for instance, by making a credit or debit card pre-payment). In any event, says the plaintiff, the Regulation provides that the pre-paid credits may not lawfully expire, and that a contract with an expiry date is effective as if it had no expiry date. The defendant's appropriation of the pre-paid credits is therefore in breach of its contracts with its customers.

[41] The defendant responds with several arguments impugning the plaintiff's attempt to characterize the prepaid phone card or electronic voucher a "gift card" within the meaning of the Regulation: that a pre-paid phone care is not a "gift card" as those words are commonly used and understood; that the Ontario government website clearly states that the Gift Card Regulation is not intended to apply to pre-paid phone cards; that the defendant is providing wireless services, which falls within the "one specific good or service" exemption that is set out in s. 25.1(b) of the Regulation; and, that the CRTC has exclusive jurisdiction over wireless services – witness the recent release of the *Wireless Code*.

[42] The plaintiff has responses to each of these points. The definitions in the Gift Card Regulation must be taken seriously. The fact that a government website interprets the law in a certain way is relevant but not determinative.[19] Whether wireless services fall within the "one specific good or service" exemption will require further argument and analysis – for example, the plaintiff says that the defendant was providing multiple services (voice minutes, text messages, data usage and ringtones) and thus does not fit within the "one service" exemption. As for the *Wireless Code*, until it takes effect this December, provincial laws of general application, such as the *Consumer Protection Act* and the Gift Card Regulation, will continue to apply. After the *Wireless Code* takes effect there may well be an operational conflict, and under the doctrine of federal paramountcy, the provisions of the Wireless Code will prevail over the provincial Gift Card Regulation to the extent of such conflict.[20]

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[19] See, for example, Elizabeth L. McNaughton and Parna Sahat, *A Guide to the Ontario Consumer Protection Act* (Markham: LexisNexis, 2009) at 17: "The Ontario Ministry of Small Business and Consumer Services has indicated that the Ontario gift card requirements do not apply to cards that are subject to federal jurisdiction, such as prepaid phone cards... Caution should be taken in relying on this interpretation as a court may take a different view but it indicates that Ontario is unlikely to take enforcement action against such gift cards."

[43] It is not my task at this stage to decide the merits of these submissions. It is enough to note that the "gift card" cause of action is novel. There are no cases directly on point. I am unable to say that this cause of action has absolutely no chance of success and that it is plainly and obviously bound to fail.

[44] In my view, the breach of contract (gift card regulation) cause of action clears the s. 5(1)(a) hurdle.

Unjust enrichment

[45] The cause of action for unjust enrichment has three elements: (i) enrichment of the defendant; (ii) a corresponding deprivation of the plaintiff; and (iii) an absence of juristic reason for the defendant's enrichment.[21] The plaintiff pleads that the defendant has been unjustly enriched by the amount of the balances that it has seized pursuant to the illegal expiry dates, consumers have suffered a corresponding deprivation, and that there is no juristic reason for the deprivation.

[46] In my view the unjust enrichment claim clears the s. 5(1)(a) hurdle. It is not plain and obvious that the claim has no chance of success. I note, as an aside, that courts have found unjust enrichment claims to be tenable under s. 5(1)(a) in consumer class actions.[22]

[47] I shall return to the unjust enrichment action when I consider the common issues.

Unfair practices under the Consumer Protection Act

[48] The plaintiff pleads that the defendant has engaged in unfair practices that are prohibited under ss. 14 and 15 of the *Consumer Protection Act*, by making misleading and unconscionable representations about the expiry date on its pre-paid phone cards. Section 18 of the Act provides the affected consumer with a range of remedies if "any agreement" was entered into by a consumer "after or while a person has engaged in an unfair practice."

[49] The clear intention of the Unfair Practices section of the *Consumer Protection Act* is to police against misleading or unconscionable practices that induce the consumer to enter into an agreement. The remedial provision in s. 18 is only triggered if the consumer

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[20] See the discussion of the *Wireless Code* in Lifshitz and Moses, "Mobile Contracting: Current Laws, Practical Considerations – Part 2" (2013), 14 I.E.C.L.C. 25 at 25. And see generally Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 2013) at 16-1 to 16-20.

[21] *Garland v. Consumers' Gas Co.*, [2004] 1 SCR 629 at para. 30.

[22] *Wright v. UPS*, 2011 ONSC 5044, 207 A.C.W.S. (3d) 205, leave to appeal to Div. Ct. granted, 2012 ONSC 3287, 216 A.C.W.S. (3d) 561 [*Wright*]; *Matoni v. CBS Interactive Multimedia Inc.* (2008), 168 A.C.W.S. (3d) 719 (S.C.J.).

entered into an agreement "after or while" the wrongdoer has engaged in an unfair practice.

[50] Here the plaintiff's own pleading makes it apparent that her claim is based on certain notifications from the defendant about expiry dates that were made after she made her top-up payment – not before. She did not make the top-up payment relying on these notifications. The impugned notifications did not cause or induce her to enter into any agreement. They are not unfair practices that trigger the s. 18 remedies in the *Consumer Protection Act* because no agreement was made "after or while" the defendant has engaged in an unfair practice.

[51] The plaintiff's theory is that at the time the customer accepted the terms of service which specified the expiry of credits, the defendant already had in place standard (unfair) practices for communicating expiry dates and seizing credits. Therefore, argues the plaintiff, she entered into her agreement "while" the defendant was engaging in unfair practices (with other customers) regarding the communication of expiry dates.

[52] This submission turns the rationale for the Unfair Practices section of the *Consumer Protection Act* on its head. As I have already noted, the Unfair Practices section of the *Consumer Protection Act* is concerned about representations inducing a consumer agreement. The intention is to protect consumers from entering ill-advised agreements on the basis of deceptive or unconscionable representations. The plaintiff argues that s.18 should provide a remedy even where there was no deceptive or unconscionable representation that induced her to sign the agreement as long as deceptive or unconscionable representations were being directed at other consumers while she was signing her own agreement.

[53] If the plaintiff's reasoning were accepted, it would mean a consumer could seek relief under s. 18(1) to rescind a contract or seek damages based on a representation that was never even made to her, whether directly or indirectly. I agree with the defendant that such an interpretation is completely untenable.

[54] The plaintiff's cause of action based on the unfair practice provisions of the *Consumer Protection Act* on the facts as pleaded has no chance of success because s. 18 does not apply on the facts herein. In my view, this is plain and obvious.

[55] In sum, three of the four causes of action clear the s. 5(1)(a) hurdle. The one that does not is the unfair practices claim under the *Consumer Protection Act.*

(2) Identifiable class

[56] Section 5(1)(b) of the CPA requires that there be an identifiable class of two or more persons that would be represented by the representative plaintiff. The class definition is important because it describes the persons entitled to relief, those who will

be bound by the decision and those who are entitled to notice of certification.[23] Class membership must be determinable by stated, objective criteria.[24] And, there must be a rational relationship between the class and the common issues.[25]

[57] Class members are not required to have identical claims and class membership identification is not commensurate with the elements of the causes of action advanced on behalf of the class. The plaintiffs are not required to show that everyone in the class shares the same interest in the resolution of the asserted common issue, only that each member has an interest in the resolution of the common issue.[26]

[58] I am prepared to certify the class definition that the plaintiff accepted during the course of the hearing:

> All persons in Ontario who contracted with the defendant for pre-paid mobile telephone subject to the defendant's Terms and Conditions, paid on a pay-per-use basis, and had balances remaining in their accounts at the end of an active period which expired between May 4, 2010 and the date on which the certification of this action is finally determined.

[59] I agree with the plaintiff that it is not necessary to show that all or even most of the class members will have a successful claim for damages, only that they share an interest in the resolution of the common issues.[27]

[60] The defendant challenges the inclusion of customers with contracts under the Bell Mobility and Solo Mobile brands on the ground that the plaintiff has not led direct evidence of the experiences of customers of those brands. I do not accept this submission. There is certainly some basis in the evidence before me that the class definition properly includes users of the Bell Mobility and Solo brands. See, for example, the plaintiff's evidence of her telephone conversations with representatives of Bell Mobility and Solo; copies of the Bell Mobility and Solo top-up cards; the standard Terms of Service

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[23] *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Gen. Div.), at para. 10.

[24] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 38 [*Western Canadian Shopping Centres*].

[25] *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.), at para. 57, rev'g (2004), 44 C.P.C. (5th) 276 (Div. Ct.), which had aff'd (2002), 33 C.P.C. (5th) 264 (S.C.J.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 1. at para. 57 [*Pearson*].

[26] *Gardner v. GMCL*, 2007 CanLII 58481 (S.C.J.) at paras. 23-25; see also *Patel v. Groupon*, 2012 ONSC 1799, 213 A.C.W.S. (3d) 842, at para. 7.

[27] *Fresco v. Canadian Imperial Bank of Commerce* (2009), 71 C.P.C. (6th) 97 (S.C.J.), at para. 49, rev'd on other grounds 2012 ONCA 444, 111 O.R. (3d) 501.

applicable to Bell Mobility and Solo customers; web printouts from the Bell Mobility and Solo websites describing the applicable active periods and top-up processes; and the evidence tendered by the defendant describing its practice of seizing balances from Bell Mobility and Solo customers.

[61] Furthermore, it is well-established that a representative plaintiff's claim need not be identical to, or even typical of, those of other members of the class.[28] It is enough that a representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact.[29]

[62] The defendant has also argued that certification should be denied because it fails the "two or more" requirement - that the sole plaintiff has not put forward direct evidence from any other proposed class members. However, as the Supreme Court held in *Hollick*, "...the representative of the asserted class must show some basis in fact to support the certification order... that is not to say that there must be affidavits from members of the class..."[30] The Supreme Court went on to note that pages of complaint records from governmental files could be considered in determining whether the "some basis in fact" standard had been met.[31] In this case, there is certainly evidence of widespread dissatisfaction with the defendant's "expiry date" practices: recall the Consumer Council of Canada study and the website comments.[32] In my view, the plaintiff has shown some basis in fact that a class of two or more persons exists, as required by s. 5(1)(b) of the CPA.

[63] One final comment about class definition. The consequence of using the word "persons" in the class definition is that I am obliged to establish a sub-class consisting of the consumer-users who seek to pursue the consumer-related claims, i.e. breach of contract (gift card regulation) claim and unjust enrichment. I discuss this point in more detail below.

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[28] *Western Canadian Shopping Centres*, *supra* note 24, at para. 41.

[29] *Griffin v. Dell Canada Inc.* (2009), 72 C.P.C. (6th) 158 (S.C.J.), at para. 97 [*Griffin*]; *Healey v. Lakeridge Health Corporation* (2006), 38 C.P.C. (6th) 145 (S.C.J.) at paras. 20-21; *McCracken v. Canadian National Railway Company*, 2010 ONSC 4520, 3 C.P.C. (7th) 81, at paras. 42, 305-311, rev'd on other grounds 2012 ONCA 445, 111 O.R. (3d) 745.

[30] *Hollick*, *supra* note 12, at para. 25.

[31] *Ibid.*, at para. 26

[32] Discussed above in paras. 14-16.

(3) Common issues

[64] Section 5(1)(c) of the CPA requires that the claims of class members raise common issues of fact or law that will move the litigation forward. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim. While its resolution must be necessary to the resolution of each class member's claim, it need not resolve a class member's claim.[33] Rather, the common issues need only advance the litigation by avoiding duplication of fact-finding or legal analysis.[34] A common issue may make up only a limited part of the liability question, and many individual issues may remain after its resolution.[35] Furthermore, while there must be a rational connection between the common issues and the class definition, there is no requirement that all class members have suffered harm.[36]

[65] A final introductory point. Section 6 of the CPA makes clear that the following matters are not a bar to certification: the relief claimed relates to separate contracts involving different class members; and the class includes a subclass whose members have claims that raise common issues not shared by all class members.[37]

Lack of commonality?

[66] The defendant makes a number of arguments about the common issues. The main argument is lack of commonality. Depending on which phone card was purchased (Virgin Mobile, Bell Mobility or Solo Mobile), says the defendant, there can be numerous factual permutations. There are three vendors using two slightly different contracts. There are three different expiry date practices:

(i) expiry the first day after the end of the active period at the end of the day (11:59 p.m.);

(ii) expiry the first day after the end of the active period at the same time of day as when the top up payment was made;

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[33] *Hollick, supra* note 12, at para. 18; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at paras. 53-55, leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.) [*Cloud*].

[34] *Hollick, ibid.*, *Cloud, supra* note 33, at para. 51; *Western Canadian Shopping Centres, supra* note 24, at para. 39.

[35] *Cloud, supra* note 33, at paras. 53-55.

[36] *Sauer v. Canada (Agriculture)* (2008), 169 A.C.W.S. (3d) 27 (S.C.J.), at para. 32; *Tiboni v. Merck Frosst Canada Ltd.* (2008), 60 C.P.C. (6th) 65 (S.C.J.), at para. 78;

[37] Sections 6(2) and 6(5) of the CPA.

(iii) expiry the second day after the end of the active period between midnight and 4:00 a.m.

[67] Next, there are three different expiry date communications after a customer makes a top-up payment:

(i) expiry on the last day of the active period without any specified time;

(ii) expiry on the day after the end of the active period without any specified time;

(iii) expiry on the day after the end of the active period at a specified time.

[68] Finally, depending on the brand, there are six different means of communication: i.e. web-site, mobile phone, IVR system,[38] whisper message, text notification and customer representative.

[69] In short, says the defendant, when you consider all of the permutations that would result from having three vendors, three different expiry date practices, three kinds of expiry date communications and six different methods of communication, there can be no commonality and it is "impossible to proceed on a class-wide basis."

[70] I do not accept this submission.

[71] Rather I agree with the plaintiff that even though the defendant's practices, communications, and methods of notification varied and at one point changed during the time period in question, they were not haphazard or random but systemic and uniform. The various "differences" over the time period in question have been organized and charted by the plaintiff as shown below. Using the example set out in the right hand column, and relating it to the two time periods set out in the left hand column, one can readily compartmentalize the practices, the communications and the delivery methods.

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[38] IVR is "interactive voice response" technology (i.e. talking with a computer).

BELL MOBILITY / SOLO MOBILE

	Class Period involved	*Practice of expiring credits*	*Expiration Date communicated to customer*	*Example*
1	May 4, 2010 to January 31, 2011	Forfeited at the end of the first day after the end of the active period.	Website / Phone / Whisper Message: Expiration - February 1, 2013 IVR: "Your funds will expire on January 31, 2013"	$15 added on January 1 at 10 a.m.; 30 day active period is January 31; February 1 is communicated to customer; credits forfeited 11:59 p.m. on February 1.
2	February 1, 2011 to the present	Forfeited at the end of the first day after the end of the active period at the same time of day as when the top-up payment is made.	Same as above.	$15 added on Jan. 1 at 10 a.m.; 30 day active period is January 31; credits forfeited on 10:00 a.m. on February 1.

VIRGIN MOBILE

	Class Period involved	*Practice of expiring credits*	*Expiration Date communicated to customer*	*Example*
1	May 4, 2010 to September 9, 2010	Forfeited on the second day after the end of the active period between 12:00 and 4:00 a.m.	Website / Phone / Whisper Message: Expiration - February 1, 2013	$15 added on January 1 at 10 a.m.; 30 day active period is January 31; February 1 is communicated to customer; credits forfeited sometime between 12:00 a.m. and 4:00 a.m. on February 2.
2	September 10, 2010 to end of May, 2012	Forfeited on the first day after the end of the active period at the same time of day as when the top-up was made.	Same as above.	$15 added on January 1 at 10 a.m.; 30 day active period is January 31; February 1 is communicated to customer; credits

				forfeited on February 1 at 10:00 a.m.

[72] Far from being a morass of individual complexity, the practices can be organized into compartments and the common issues can be adjudicated accordingly. The common issues trial judge will have to provide nuanced answers to the common issues based on the different systemic practices in existence during the two different time-periods. And, sub-classes may have to be established to reflect the resulting compartments.[39] However, it does not follow from this that it is "impossible to proceed on a class wide basis" as argued by the defendant.

[73] It is important to remember that the defendant does not dispute that it had a systemic and class-wide practice of assigning expiry dates one day after the end of the "active period." It is these systemic practices that will be examined at the common issues trial, not any individual representations.

[74] As noted by the Supreme Court in *Rumley*,[40] variation among defendants' practices need not defeat commonality:

> That the standard of care may have varied over the relevant time period simply means that the court may find it necessary to provide a nuanced answer to the common question ... In my view the *Class Proceedings Act* provides the court with ample flexibility to deal with limited differentiation amongst the class members as and if such differentiation becomes evident.[41]

[75] Just as the plaintiff has organized the "permutations" on the charts above, the common issues judge, with the assistance of counsel, will generate his or her own compartments showing the systemic and uniform practices within each compartment that arguably affected the members of that particular sub-class. The resulting chart or spread-sheet will show commonality within the compartments. The task will be challenging, to be sure, but not impossible.

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[39] During the course of a proceeding, subclasses can be established as the need arises: *Peppiatt v. Royal Bank of Canada* (1996), 27 O.R. (3d) 462 (Gen. Div.), at paras. 45-48; *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 (Gen. Div.), leave to appeal ref'd [1993] O.J. No 4210 (Gen. Div.).

[40] *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184.

[41] *Ibid.*, at para. 32.

The proposed common issues

[76] I will now turn to the proposed common issues. As I have already noted, the proposed common issues are attached in Appendix A. I will refer to them by their title or by using a short descriptive phrase.

[77] Proposed common issue no. 3 (the unfair practices issue) is not approved because this particular cause of action did not clear s. 5(1)(a). Proposed common issue no. 5(a) (the "what remedies" question) is not approved because in my view it is too broad, and frankly, too self-evident. This is a question that every judge must ask in almost every case that he or she adjudicates. Also, as one can see from the certified common issues in Appendix B, the plaintiff is pursuing two remedies: damages for breach of contract and restitution for unjust enrichment, plus a claim for punitive damages. No other remedies are sought, so why ask the question?

[78] There is certainly some basis in the evidence before me to support the two proposed "breach of contract" issues (common issues nos. 1 and 2). There is also some basis in the evidence for proposed common issue no. 4, unjust enrichment. I question the need for the unjust enrichment question – it may well be redundant if the plaintiff prevails on either of the breach of contract claims – but I know that unjust enrichment has been certified in other cases[42] and I am prepared to do the same.

[79] I am also prepared to certify proposed common issue no. 5(c), the punitive damages issue. I do so not because courts have frequently certified punitive damages as a common issue, holding that an award of punitive damages is to be assessed in relation to the conduct of the defendant[43] and that both the availability and quantum of punitive damages can be efficiently determined on a class-wide basis. I also note that punitive damages have been certified as a common issue in other class actions involving consumer protection matters.[44]

[80] The remaining proposed common issue no. 5(b), aggregated damages, requires a more detailed discussion.

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[42] *Supra*, note 22 and also see *Smith v. National Money Mart Co.*, [2007] O.J. No. 46 (S.C.J.), leave to appeal ref'd [2007] O.J. No. 2160 (S.C.J.).

[43] *Carom v. Bre-X Minerals Ltd.*, 44 OR (3d) 173 (S.C.J.), at para 85; *Banerjee v. Shire Biochem Inc. et al.*, 2010 ONSC 889, 88 C.P.C. (6th) 328, at para. 34; *Lavier v. Mytravel Canada Holidays Inc.*, 59 C.P.C. (6th) 57 (S.C.J.), at para. 125, rev'd on other grounds (2009), 72 C.P.C. (6th) 87 (Div. Ct.); *Pardhan v. Bank of Montreal*, 2012 ONSC 2229, 26 C.P.C. (7th) 99, at paras. 289-290.

[44] *Wright, supra* note 22, at paras. 367-375; *Griffin, supra* note 29, at para 87; *Cannon v. Funds for Canada*, 2012 ONSC 399, 13 C.P.C. (7th) 250, at paras. 370-378.

[81] Although it is by no means essential that a common issue regarding aggregate assessment be certified at this stage, it is appropriate to do so if it is reasonably likely that the preconditions of s. 24(1) of the CPA can be satisfied.[45] There is a practical utility to certifying such an issue because the certified common issues inform the disclosure obligations of the parties.[46]

[82] The circumstances in which a common issues trial judge may order an aggregate assessment of damages are set out at section 24(1) of the CPA:

> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members

[83] The plaintiff submits that this case meets each of the three criteria set out in section 24(1). Monetary relief is claimed on behalf of some or all class members. If the court decides the breach of contract claim (whether general or gift card) in the plaintiff's favour, this will establish the defendant's monetary liability to at least some members of the class. And, says the plaintiff, it is possible to reasonably assess the quantum of monetary liability without proof by individual class members. The defendant has acknowledged that it has records regarding the pre-paid credits that have expired.

[84] Specifically, the defendant has the following records for each of its pre-paid customers: the date, time, method and amount of each top-up payment; the number of days the active period was extended because of the top-up payment; the new date and time for the end of the active period; and the forfeited balance at the end of the active period (where no top-up was made prior the end of the active period). The plaintiff submits that these records could easily form the basis for an aggregate assessment of damages.

[85] The defendant does not dispute the existence of these records but says individual assessments would still be necessary. The defendant reasons as follows. If the plaintiff's

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[45] *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 44 [*Markson*].

[46] *Axiom Plastics Inc. v. E.I. DuPont Canada Co.*, 2011 ONSC 4510, 207 A.C.W.S. (3d) 47, at paras. 3 and 38; *Ramdath v. George Brown College of Applied Arts and Technology*, 2012 ONSC 2747, 216 A.C.W.S. (3d) 859, at para. 27.

breach of contract claim succeeds, the class member would still have to prove damages. She would have to show that she would have topped up her account or used up her credit balance before it expired. Thus, it would not be possible to go through the defendant's records of forfeited credit balances and determine, simply by the fact that they were forfeited, whether there is any liability with respect to a forfeited account. It is not possible to determine the amount of the defendant's liability on a global basis without proof by individual class members as to what each of them would have done, and, relying on the Court of Appeal's decision in *Fulawka*,[47] it is not possible to use statistical sampling methods to estimate the amount of that aggregate liability, without proof by individual class members.

[86] In deciding whether to certify aggregate damages as a common issue, I have to first determine whether there is a "reasonable likelihood" that the s. 24(1) criteria will be satisfied.[48] In my view, this is a predictive standard that is less than "likely" but more than "reasonably possible."

[87] I agree with the defendant that, at least with respect to the general breach of contract claim, individual assessments will be required. If the plaintiff prevails on the general breach of contract claim, she will have to show the "damage" sustained and this will require proof of what each class member "would have done" as noted above. It is therefore not reasonably likely that the s. 24(1)(c) hurdle can be cleared.[49]

[88] However, I do not agree that individual assessments will be needed to determine the losses sustained if the plaintiff prevails on the breach of contract (gift card regulation) claim. Here, if the common issues trial judge interprets the Gift Card Regulation in favour of the consumer class members, the quantum of recovery can be readily determined by the defendant by simply reviewing its corporate records, as described above. There is no concern here about what each of the class members "would have done" before the proper expiry date (because the Gift Card Regulation voids all of the expiry dates) and there is no need for "proof by individual class members." Thus the s. 24(1)(c) hurdle is easily cleared.

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[47] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, 111 O.R. (3d) 346, at paras. 137 and 139.

[48] *Markson*, *supra* note 45, at para. 44.

[49] I would make the same point about aggregate damages on the unjust enrichment claim (common issue no. 2). If successful on the general contract claim, and if restitution is nonetheless pursued, the plaintiff would still have to establish "what each class member would have done" to satisfy the "corresponding deprivation" requirement in the unjust enrichment cause of action. Here again, given the need for individual assessments, it is not reasonably likely that the s. 24(1)(c) hurdle would be cleared.

[89] In short, I am not prepared to certify aggregate damages as a common issue for the general breach of contract or unjust enrichment claims under the "persons" class, but I am prepared to do so under the "consumers" sub-class.

The need for a sub-class

[90] The plaintiff seeks to certify breach of contract as a common issue that obviously covers both business and consumer-users and thus fits under the "persons" umbrella. The plaintiff also seeks to certify the breach of contract (gift card regulation) issue which must be limited to consumer users. As a result, a problem arises.

[91] The case law is clear that there must be a rational relationship between the class and the proposed common issues;[50] that the proposed common issue must be a substantial ingredient of every class member's claim and its resolution must be necessary to the resolution of that claim;[51] and that the answer to a question raised by a common issue must be capable of extrapolation to every member of the class.[52]

[92] Put simply, not every "person" in the class is rationally connected to the "consumer" common issues; the consumer common issues are not a substantial ingredient of every "person's" claim; and the answers to the "consumer" common issues cannot be extrapolated to every member of the class. Hence, the need for a sub-class.

[93] Subclasses can be certified where there are both common issues for the class members as a whole and other issues that are common to some but not all of the class members.[53] Circumstances that necessitate defining subclasses at the certification stage include where a subclass of the generally described class raises common issues that could be determined in the class proceeding but are not shared by other members of the class.[54] That is the situation here.

[94] I am therefore certifying a sub-class of "consumers" and I am re-organizing the common issues for better alignment. As you will see in Appendix B, the general breach of contract, unjust enrichment and punitive damages issues are set out under the general

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[50] *Cloud, supra* note 33, at para. 48.

[51] *Hollick, supra* note 12, at para. 18.

[52] *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, 88 C.P.C. (6th) 27, at para. 125(g), referring to *Western Canadian Shopping Centres, supra* note 24, at para. 40.

[53] *Caputo v. Imperial Tobacco Ltd.* (2004), 44 C.P.C. (5th) 350 (S.C.J.), at para. 45.

[54] *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43, 69 C.P.C. (6th) 60 (Sask. C.A.), at paras. 121-124, rev'g 312 Sask. R. 265, leave to appeal to S.C.C. refused (2009), 401 N.R. 399 (note), 359 Sask. R. 318 (note).

"persons" class (which includes "consumers) and the breach of contract (gift card regulation), unjust enrichment, aggregate damages, and punitive damage issues are set out under the sub-class (which is limited to "consumers.")

(4) Preferable procedure

[95] Section 5(1)(d) of the CPA requires that a class proceeding be the "preferable procedure for the resolution of the common issues." The analysis must consider whether a class proceeding is a "fair, efficient and manageable method of advancing the claim" as a whole.[55] Preferability is to be broadly construed and is meant to capture two ideas: (i) whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and (ii) whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation or any other means of resolving the dispute.

[96] By any measure, the plaintiff was right to seek certification of this action as a class proceeding. According to the defendant, there are more than one million class members. Both access to justice and judicial economy would justify the aggregation of these potential claims into a class proceeding.

[97] The defendant does not dispute these assertions but argues that the CRTC, which exercise federal jurisdiction over wireless services, provides the more preferable procedure. I frankly do not understand this submission. The CRTC cannot adjudicate breach of contract claims or award damages. It cannot resolve the common issues. Put bluntly, the CRTC does not even provide a viable, let alone a preferable, procedure for the resolution of the disputes herein. The only procedure for the plaintiff is to commence an action in the Superior Court and seek certification, as she has done.

[98] I also note, in passing, that courts have frequently certified other large class actions concerning wireless communications and related issues such cell phone system access fees,[56] long-distance telephone charges,[57] and satellite-television administrative fees.[58]

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[55] *Pearson, supra* note 25, at para. 67.

[56] *Microcell Communications Inc v. Frey*, 2011 SKCA 136, 11 C.P.C. (7th) 28, leave to appeal to S.C.C. refused [2012] S.C.C.A. No. 42.

[57] *Wein v. Rogers Cable Communications Inc.*, 2011 ONSC 7290, 38 C.P.C. (7th) 304 (where certification was granted for the purpose of settlement).

[58] *De Wolf v. Bell ExpressVu Inc.* (2008), 58 C.P.C. (6th) 110, 164 A.C.W.S. (3d) 929 (S.C.J.).

(5) Representative plaintiff

[99] Finally, under s. 5(1)(e) of the CPA, the court must be satisfied that there is a representative plaintiff who (i) would fairly and adequately represent the interests of the class, (ii) has produced a workable litigation plan and (iii) does not have a conflict of interest with any of the other class members.

[100] The proposed representative need not be 'typical' of the class, but must be 'adequate' in the sense that he or she will vigorously prosecute the claim.[59] The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented.[60] If the plaintiff has her own cause of action (here as a consumer) she can also assert a cause of action on behalf of other class members (here the non-consumer or business users) provided that the causes of action all share a common issue of law or fact (here the breach of contract issue.)[61]

[101] The plaintiff is an engaged and determined plaintiff who understands her duties to the class and her role in the action. She has taken an active role in bringing this claim forward. Prior to commencing this action, she wrote letters of complaint, prepared a draft claim, and gave notice under the *Consumer Protection Act* of her intention to commence a claim. The plaintiff has also developed a website called "Bell: Give our Money Back" to educate and mobilize consumers. The plaintiff understands her role and responsibilities as the representative plaintiff. She has no conflict of interest, whether under s. 5(1)(e)(iii) or s. 5(2)(c), and can fairly and adequately prosecute the action.

[102] The plaintiff has proposed a satisfactory litigation plan for the prosecution of the action. Her litigation plan addresses the steps to be taken to identify the necessary witnesses; the collection, exchange and management of the relevant documents; whether the discovery of individual class members is likely, and if so, how the discoveries will be conducted; the need for experts and how the experts are going to be identified and retained; and the plan for resolving any individual issues, including any damages

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[59] *Campbell v. Flexwatt*, 98 B.C.A.C. 22 (C.A.), at paras. 75-76, leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 13.

[60] *Drady v. Canada (Minister of Health)* (2007) 159 A.C.W.S. (3d) 177 (S.C.J.), at paras. 36-45; *Attis v. Canada (Minister of Health)*, 29 C.P.C. (5th) 242 (S.C.J.), at para. 40, aff'd [2003] O.J. No. 4708 (C.A.).

[61] *McCracken v. Canadian National Railways Company*, 2010 ONSC 4520, 3 C.P.C. (7th) 81, rev'd on other grounds, 2012 ONCA 445, 111 O.R. (3d) 745; *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.) at para. 22, rev'd on other grounds (2003), 174 O.A.C. 44.

assessments. The litigation plan also discusses the need for ongoing reporting to the class and the mechanisms for responding to inquiries from class members.

[103] The s. 5(1)(e) criteria are satisfied herein.

III. Conclusion

[104] The action is certified as a class proceeding. Ms. Sankar is appointed representative plaintiff. A sub-class is created for the consumer-users. Five of the seven proposed common issues[62] are certified as set out in Appendix B.

IV. Disposition

[105] The motion for certification is granted as described above.

[106] Counsel shall prepare an Order in the form contemplated by s. 8 of the CPA.

[107] If the parties are unable to agree on the costs, I would be pleased to receive brief written submissions from the plaintiffs within 14 days and from the defendants within 10 days thereafter.

[108] My thanks to counsel for their assistance.

Belobaba J.

Date: October 4, 2013

[62] Recall, *supra*, note 2.

Appendix A

Proposed Common Issues

1. ***Breach of Contract - Gift Card Regulation***
   a. Are the pre-payments at issue in this action "gift cards", "gift card agreements" and "future performance agreements" within the meaning of the *Consumer Protection Act*, 2002 (the "*CPA*") and O. Reg. 17/05, (the "Gift Card Regulation") and otherwise subject to the Gift Card Regulation?
   b. If so, is the expiry and seizure of pre-payment funds contrary to law pursuant to the *CPA*, and the Gift Card Regulation?
   c. If so, is it a term of the contracts between the defendant and class members that pre-payment funds not expire?
   d. If so, has the defendant breached its contract with the class members?

2. ***Breach of Contract - Non-CPA Claim***
   a. Do the terms of the contracts between the defendant and class members require the defendant to wait until after the expiry of prepaid credits before the prepaid credits can be seized?
   b. If so, did the defendant breach the terms of the contract by seizing prepaid credits before it was entitled to?

3. ***CPA***
   a. Did the common practices of the defendant in communicating expiry dates to its customers constitute "false, misleading or deceptive representations" contrary to s. 14 of the CPA?
   b. Did the common practices of the defendant in communicating expiry dates to its customers constitute "unconscionable representations" contrary to s. 15 of the CPA?
   c. If the answer to a. and/or b. is yes, did the defendant engage in an unfair practice contrary to s. 17 of the CPA?
   d. If the answer to c. is yes, what remedy should be ordered under s. 18 of the CPA?
   e. Does the class, or any portion thereof, require, and is it entitled to, a declaration regarding the notice provisions of section 18 of the CPA?

4. ***Unjust Enrichment***
   a. Has the defendant been enriched by the expiry of the pre-payment funds?
   b. Have the class members suffered a corresponding deprivation?
   c. Is there a juristic reason for the enrichment/deprivation?

5. ***Remedies***

a. What remedies, if any, are class members entitled to?

b. Are class members entitled to an award of aggregate damages? If so

i. what is the quantum? and

ii. what is the appropriate method or procedure for distributing the aggregate damages to class members?

c. Does the defendant's conduct justify an award of aggravated, exemplary or punitive damages?

Appendix B

Certified Common Issues

A. For the general class of "persons" (including "consumers")

1. Breach of Contract (General)

a. Do the terms of the contracts between the defendant and class members require the defendant to wait until after the expiry of prepaid credits before the prepaid credits can be seized?

b. If so, did the defendant breach the terms of the contract by seizing prepaid credits before it was entitled to?

2. Unjust Enrichment

a. Has the defendant been enriched by the expiry of the pre-payment funds?

b. Have the class members suffered a corresponding deprivation?

c. Is there a juristic reason for the enrichment/deprivation?

3. Punitive Damages

Does the defendant's conduct justify an award of aggravated, exemplary or punitive damages?

B. For the sub-class of "consumers"

1. Breach of Contract (Gift Card Regulation)

d. Are the pre-payments at issue in this action "gift cards", "gift card agreements" and "future performance agreements" within the meaning of the *Consumer Protection Act*, 2002 and O. Reg. 17/05, (the "Gift Card Regulation") and otherwise subject to the Gift Card Regulation?

e. If so, is the expiry and seizure of pre-payment funds contrary to law pursuant to the *Consumer Protection Act* and the Gift Card Regulation?

f. If so, is it a term of the contracts between the defendant and class members that pre-payment funds not expire?

g. If so, has the defendant breached its contract with the class members?

2. Unjust Enrichment

a. Has the defendant been enriched by the expiry of the pre-payment funds?
b. Have the class members suffered a corresponding deprivation?
c. Is there a juristic reason for the enrichment/deprivation?

3. Aggregate Damages

Are the consumer class members entitled to an award of aggregate damages? If so

a. what is the quantum? and
b. what is the appropriate method or procedure for distributing the aggregate damages to class members?

4. Punitive Damages

Does the defendant's conduct justify an award of aggravated, exemplary or punitive damages?

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