CITATION: Wellman v. TELUS Communications Co., 2025 ONSC 3257
COURT FILE NO.: CV-08-00360838-CP00
DATE: 20250603

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: AVRAHAM WELLMAN, Plaintiff

– and –

TELUS COMMUNICATIONS COMPANY, TELE-MOBILE COMPANY AND TELUS COMMUNICATIONS INC., Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Peter Jervis, Golnaz Nayerahmadi and Sarah Fiddes*, for the Plaintiff

Andrew Borrell and Zohaib Maladwala, for the Defendants

HEARD: May 26, 2025

MOTION TO AMEND CERTIFICATION

I. Third strike

[1] This class action, in which the Plaintiff alleges systematic overbilling of mobile phone customers, was certified on November 5, 2014. It has a long procedural history, having been to the Supreme Court of Canada and back for numerous motions and appeals. The common issues trial is set to begin in January 2026.

[2] The Defendants, the TELUS group of companies ("TELUS"), now bring this motion to amend the certification Order in several ways relating to the distinction between business subscribers to TELUS phone plans and individual, retail subscribers. Both types of TELUS customers were included in the original certified class, with causes of action in breach of contract, unjust enrichment, and anti-competitive practices, and with the individual subscribers having an additional claim pursuant to the *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sch. A ("*CPA*"): *Wellman and Corless v. TELUS and Bell*, 2014 ONSC 3318.

[3] The certification ruling was appealed on a number of grounds and in two separate procedural routes. TELUS sought to appeal certification itself to Divisional Court, but that appeal ended when leave was denied: *Corless v. Bell Mobility Inc*., 2015 ONSC 7682 (Div. Ct.). It also appealed the refusal of the certification judge, Justice Conway, to stay the proceedings in respect

of the business customers in view of an arbitration clause contained in their contracts. That appeal eventually culminated in a Supreme Court of Canada judgment that stayed the action by business subscribers: *TELUS Communications Inc. v. Wellman*, [2019] 2 SCR 144. The Supreme Court's ruling left a certified class composed only of individual/consumer subscribers. I reviewed this procedural history in somewhat greater detail in my reasons for decision in respect of the costs of the appeal process: *Wellman v. Telus Communications Co*., 2020 ONSC 5684.

[4] The basis for the current motion is TELUS' contention that the individual/consumer customers of TELUS cannot be completely distinguished from the business customers whose claims have been stayed. The Amended Amended Notice of Motion issued by TELUS seeks:

> An order to amend the certification order to provide that the question of whether a purported class member's use of their phone meets the definition of 'consumer' is an individual issue and/or to amend the certification order to decertify aggregate damages as a common issue; and
>
> An order staying the proceeding until the plaintiff has obtained an approved litigation plan as contemplated by paragraph 7 of the certification order.

[5] It is to be noted that the question of aggregate damages is currently posed as common issues question #7: "Can damages be determined on an aggregate basis in whole or in part, and if so, by which methodology should damages be determined, and in what amount?" The motion to decertify this question is, in effect, a request to answer it in the negative. The motion's premise is that not only can aggregate damages not be determined for the remaining class, but there is no longer any basis in fact for a trial judge to even turn their mind to the question. TELUS contends that the same change in landscape has necessitated a qualified class definition and a revised litigation plan, both reflecting a need for individual assessments of class membership and damages.

[6] In its factum in the original certification motion, which the Plaintiff has included in the present record, TELUS argued that establishing whether an individual is a consumer requires "an investigation … regarding whether the individual acquired the services for personal, family or household purposes", and presents "an insurmountable hurdle to certification". Given that there are an estimated 1.4 million consumer customers, it is understandable why the individual analyses could be characterized in that way.

[7] In her reasons for certification, Justice Conway rejected TELUS' view, and found that since TELUS' own records "identify whether a Plan was purchased on a business or personal account, I see no difficulty in ascertaining who will meet the definition of 'consumer'": *Wellman and Corless*, *supra*, at para. 42. Nevertheless, TELUS is at it again, seeking to re-play the business/consumer issue and, as class counsel see it, "decertify the aggregate damages common issue…and unravel the action" by requiring 1.4 million mini-trials.

[8] If it seems ironic, or at least unlikely that TELUS, having successfully convinced the Supreme Court to stay the proceedings for business customers on the basis that they have a

contractual/legal position that is distinct in a significant way from consumer customers, is now moving to amend – and, arguably, undermine – the certified action on the theory that the consumers cannot be distinguished from the business customers, it is. There is no way to season TELUS' position to make it more legally palatable. The Supreme Court stated, in no uncertain terms, that it is "clear that while the consumers remain free to pursue their claims in court, the business customers do not": *TELUS Communications*, *supra*, at para. 8. And yet TELUS is here again to assert that, on the available evidence, the distinction cannot be made out.

[9] The business vs. consumer customer issue was not only front and centre in the certification motion of 2014, but it continued to be a central feature in the ensuing motion for leave to appeal the certification ruling in 2015. There, Justice Lederer characterized TELUS' position with some disapproval, almost as that of a major leaguer taking on little league players: "a classic circumstance…[in which] a large number of small claimants (too small to proceed on their own) confront a much larger and moneyed defendant; one who is able to take them on one by one and prepared to act in a manner that requires them to do so": *Corless*, *supra*, at para. 1.

[10] The same issue was, of course, also the centrepiece of TELUS' separate appeal of Justice Conway's refusal to stay the claims of the business customers, which, as indicated, went all the way to the Supreme Court. The Court observed that, "[s]eventy percent of the class members (about 1,400,000) are consumers who purchased plans for personal use, while 30 percent (about 600,000) are non-consumers who purchased plans for business use": *TELUS Communications*, at para. 13.

[11] One of the points of disagreement between the Supreme Court's majority and dissenting judges was over this very issue – whether the challenge of identifying business and individua/consumer customers could "potentially turn the certification stage into 'a search by the defendant of the precise status of each member of the class'": *TELUS Communications*, at paras. 86, 158. The present motion is TELUS' most recent cut at the ball – its third attempt to strike the claim of the consumers based on the supposed lack of evidence on which to distinguish them from the business customers.

[12] In my view, this third try by TELUS is yet another swing and a miss. For the reasons that follow, and without meaning to overplay the metaphor – mighty TELUS has struck out.

II. The issue's long history

[13] The claim as presented to the certification judge eleven years ago claimed damages on behalf of all TELUS mobile customers who, it was alleged, were subjected to the undisclosed practice of "rounding up" the charge on calls to the next minute. The claim also sought certification of a "consumer" subclass whose members had additional claims under section 14 of the *CPA*.

[14] In its responding factum, TELUS argued against the subclass, putting forward the view that an individual customer is a consumer would require "an investigation … regarding whether

the individual acquired the services for personal, family or household purposes". Such an inquiry was said to present "an insurmountable hurdle to certification". TELUS' counsel submitted that,

> In order to establish that an individual is in the consumer class, an investigation is required regarding whether the individual acquired the services for personal, family or household purposes. The very definition of the consumer class results in the identification of its members being an inherently and inescapably individualistic exercise that cannot be resolved objectively. This is an insurmountable hurdle to certification.

[15] TELUS' position was rejected at first instance, with Justice Conway certifying all TELUS customers that claimed to have been overcharged. Since the consumer class was also certified as a subclass, the certification ruling squarely addressed the question of whether those customers could be distinguished from the business customers. Justice Conway was of the view that certification was not the stage to delve into class or subclass membership.

[16] Justice Conway therefore did not see the distinction as being problematic given the evidence in the record before her. She further opined that, "[a]s Bell's records identify whether a Plan was purchased on a business or personal account, I see no difficulty in ascertaining who will meet the definition of 'consumer'": *Wellman and Corless*, at para. 42. In a footnote, she went on to comment that "any residual difficulty in identifying who is a consumer…can be managed in the administrative phase": *Ibid*., at n.10.

[17] On its motion for leave to appeal to Divisional Court, TELUS' argument targeted the Court's analysis of preferable procedure and its identification of a "consumer subclass". Its Notice of Motion dated June 4, 2015, at paras. 17(e) and 22, set out the following ground of appeal:

> 17. The motion judge made palpable and overriding errors of fact in relation to the alleged 'standard' contract, which include erroneously:… (e) Finding that one can readily identify 'business' users and 'consumer' users of the Defendants' services in the face of uncontroverted evidence from the Defendants that this is not possible;
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> . . .
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> 22. The motion judge erred in law proposing a 'consumer' subclass on the basis of records as to who purchased services on a business or personal account. The uncontroverted evidence was that the nature of the account did not indicate whether it was used in fact for personal or business purposes. Accordingly, whether or not a particular consumer has a claim under the Consumer Protection Act is not sufficiently addressed through the creation of a subclass, but, rather, requires an individual inquiry.

[18] As class counsel point out, TELUS understood at the time of its leave application in 2015 that it could only make this argument once, and that it would be precluded from repeating the argument as it has done here, a decade later. Paragraph 41 of TELUS' Notice of Motion to

Divisional Court acknowledges the 'once and for all time' nature of this argument in unambiguous terms:

> 41. Moreover, it is essential to address the issues raised by this motion at the certification stage, and therefore on an interlocutory appeal, as the issues finally determine and circumscribe the issues for trial. TELUS will otherwise have no opportunity to raise them later. The common issues, as framed in this decision, preclude consideration of material facts relevant to the adjudication of the causes of action as the relate to individual putative class members…

[41] In the result, leave to appeal the certification ruling to Divisional Court was denied. In coming to its conclusion, the Court specifically held that, "The motion judge found that the pleadings disclosed a cause of action for breach of the *Consumer Protection Act, 2002.* There is no reason to doubt the correctness of this finding…": *Corless*, at para. 59.

[42] Class counsel submit that in so holding, the Divisional Court closed the door to re-litigation of whether there is some basis in fact that "consumers" can be identified by reference to TELUS' internal records. As noted, counsel for TELUS was also prepared at the time to concur in the finality of that holding.

[43] On a separate track, TELUS appealed Justice Conway's refusal to stay the claims of business customers to the Court of Appeal. The Court of Appeal dismissed that appeal, and then the Supreme Court granted leave and allowed it, staying the claims of business customers pursuant to s. 7(1) of the *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 7(1). In commencing its analysis, the Court noted:

> Before the motions judge, Conway J., TELUS conceded that s. 7(2) of the *Consumer Protection Act* shielded the consumers from the effect of the arbitration clause. It maintained, however, that the claims of the business customers, who enjoy no protection under the *Consumer Protection Act*, had to be stayed because they were subject to a valid and binding arbitration agreement.
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> *Telus Communications*, *supra*, at para. 17.

[44] Given this concession, the Court spent the rest of its analysis on the impact of the *Arbitration Act* and the contractual arbitration clause on the business customers, leaving the consumer class members untouched by the appeal. It took for granted that there is a distinction to be made between those two types of customers, since Justice Conway had found that there was evidence to support the distinction. Apparently, no one mentioned at the time that if the Court upheld the stay of the business claims, that ruling would itself would be taken as a kind of new evidence that the consumer claims – heretofore unchallenged – are also problematic.

[45] But that is precisely the case before me. When I asked counsel for TELUS at the hearing what's new since certification, the answer was that the Supreme Court judgment is new. As it was explained to me, now that the Supreme Court has removed the business claims and made them

subject to a separate arbitration process, the consumer claims have to be identified and there is insufficient evidence to do so.

[46] TELUS has also supported this argument with a new affidavit from its Vice-President of Communication, Dan Quick, served April 25, 2025, six years after the Supreme Court's judgment. In that affidavit, Mr. Quick reviewed records in TELUS' files that long pre-date the original certification motion. Those records were previously addressed and explained, if not set out at the same level of detail, by TELUS' Senior Business Analyst, Deborah McLean, in her affidavit and cross-examination contained in the original certification record.

[47] It was Ms. McLean's evidence that she had conducted audits of TELUS subscriber records, and that it was possible that some customers who had opened business accounts (B-BANs, in TELUS' categorization) really should have had consumer accounts (I-BANs). She deposed that she was "not able to quantify the specific number of consumer customers that may have been misclassified as business customers (or business customers who may have been misclassified as consumer customers, as that also occurred)." Although Ms. McLean was not precise in her affidavit, in cross-examination she conceded that she had a more concrete figure:

> Q [138]: So in terms of showing how many customers were misclassified, you would agree with me that on an audit, you found, three-and-a-third percent dealers that potentially misclassified?
>
> A: Yes.

[48] Ms. McLean also explained that the misclassifications she found were all in one direction – retail customers mistakenly signing up for a B-BAN. She conceded that she had no data whatsoever showing any business customer actually registered for an I-BAN, explaining that a business could not register for an I-BAN with a business name. She also made it clear that there would be no financial incentive for anyone to mischaracterize their business purchase as an individual purchase, since business accounts come with various bonuses and features that individual consumer plans lack.

[49] At certification, the motion record also contained the evidence of the Plaintiff, Avraham Wellman. He deposed that he sometimes uses his personal phone for business purposes, although he could not put a precise percentage on either of those usages. In discovery subsequent to certification, Mr. Wellman's evidence embellished on this mixed-use point, but there still is little precision in his evidence as he does not track the minutes for each use and his TELUS bills do not track that usage.

[50] Taking this evidence and this small potential margin of error into account, Justice Conway concluded: "I am satisfied that the records of business/personal accounts will be sufficient to identify who is a consumer… I do not agree…that this presents an insurmountable hurdle to certification.": *Wellman and Corless*, at n. 10.

[51] Mr. Quick's recently served affidavit does not add any new information to Ms. McLean's evidence; and it most certainly does not add any information that was not readily available to TELUS at the time of certification. In cross-examination, Mr. Quick conceded the latter point:

> Q [132]: So just to conclude and summarize, all of the exhibits appended to your affidavit and the information that's contained in them was available and known to TELUS during the class period and before the argument of the certification motion, correct?
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> A: Correct.
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> . . .
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> Q [134]: You do not claim in your affidavit that you're providing evidence about any information that was not already available to TELUS during the class period and at the time of argument of the certification motion, correct?
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> A: I believe that to be correct.

[52] In his affidavit, Mr. Quick confirmed that TELUS' policies require a customer to register their account under I-BANs for individual/personal use, B-BANs for business use, or C-BAN for corporate use in large companies of over 100 employees. He then spent some time describing TELUS's marketing strategy and the rate plans and bundles that were available to different types of customers during the class period.

[53] Mr. Quick also deposed about the ability of customers to switch back and forth between different account types and rate plans, although in cross-examination he clarified that this would be a cumbersome process in which the customer would have to cancel one plan and re-register with a new one. Mr. Quick further conceded in cross-examination that parts of his affidavit were written in a way which omitted crucial points and that made movement between a business and individual account more fluid than it really is.

> Q [80]: Okay, you say at paragraph 5 that: (as read)
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> > 'If a new business customer wanted a small business rate plan, they would be assigned a business BAN.'
>
> That is an incorrect statement, correct, because to do so they were required to provide a business name, correct?
>
> A: Correct, that would be an incomplete statement. You would need to supply a business name; correct.

[54] None of this, of course, is new information. It is a more detailed elaboration of what was already before Justice Conway in the form of the documentary record and Ms. McLean's

testimony. Class counsel's cross-examination of Mr. Quick was effective not only because it exposed some gaps in his testimony, but because it re-confirmed that Mr. Quick's evidence amounted to a new gloss on evidence that was in the court record all along.

[55] For the most part, I share class counsel's view, as expressed in their factum, that the purportedly new evidence amounts to a curious attempt by TELUS "to obfuscate and attack the reliability and utility of its own records". From my perspective, however, the obfuscation is too transparent to work. It is clear to me, as it was to Justice Conway at certification, that TELUS' documents and internal categorization of customers based on account types – I-BAN, B-BAN, or C-BAN – represent, if not perfect, suitably reliable evidence of who is a business customer and who is an individual/consumer customer.

[56] As further discussed below, the key to that distinction is the type of contract that the person signed with TELUS, not the use that the person later makes of the phone. People who subscribed for a business phone with a business name under TELUS' B-BAN plan signed a contract with an arbitration clause, and their claim is stayed regardless of whether they occasionally (or even frequently) use the phone to look up the score in an afternoon game on a business day. Likewise, people who subscribed for a personal phone under TELUS' I-BAN plan are shielded from mandatory arbitration by virtue of the *CPA*, regardless of whether they occasionally (or even frequently) use the phone to arrange business meetings or attend them on zoom.

III. Business contracts and consumer protection

[57] In their factum, counsel for TELUS submit that "the type of BAN assigned to any given account did not correlate with the actual use made by an individual of his or her phone." That may be true in some cases and untrue in others. But two things are certain about the submission: it is not new, and it is not relevant.

[58] In *Ramdath v. George Brown College* (2012), 113 OR (3d) 531 (SCJ), Justice Belobaba held that, ""[a] business purpose will generally be found when the purchaser is acting in a professional or business capacity at the time of the transaction." The Court of Appeal affirmed this holding, and opined that it accurately reflected "the [*CPA*'s] underlying principles, its statutory history, judicial interpretation of the enactment, and the legislative intent behind it": *Ramdath v. George Brown College of Applied Arts and Technology*, 2013 ONCA 468, at para. 12.

[59] In fact, Justice Belobaba specifically went on to distinguish "purchasing goods or services for an existing business" from "purchasing goods or services for future business goals or ambitions", and accordingly interpreted the phrase "acting for business purposes" under the *CPA* as if it said "acting in the course of carrying on a business": *Ramdath* (SCJ), at paras. 58-59. Again, the Court of Appeal approved of this approach, holding that on this basis "[t]he trial judge's finding that the respondents were consumers within the meaning of the *CPA* was reasonable in the circumstances": *Ramdath* (CA), at para. 12.

[60] The *Ramdath* case therefore confirms that, in Ontario, an individual purchaser or TELUS subscriber may eventually mix the personal use of a phone plan obtained under a consumer agreement with employment or business use, but that does not change the focus of the legal inquiry; that focus is on characterizing the purchase at the time of the transaction. In *Ramdath*, at para. 59, the class members were described as "typical students who obviously hoped that their education would one day lead to employment", much as Mr. Wellman described himself in the introductory paragraphs of his March 2013 affidavit in support of certification as a typical family man who signed up for a phone plan and who hoped to (and eventually did) go into a small business.

[61] The central question in both cases is whether, at the time of entering into their agreements and registering as students or activating their phone accounts, individual class members were acting in the course of business. Mr. Ramdath was not and Mr. Wellman was not; they were individual consumers at the time of their respective transactions.

[62] In Mr. Wellman's case, TELUS's internal classification system answers the question based on the type of account that he activated. If there were a need to track daily usage through the life of an appliance or other product or service, the protections of the *CPA* would be rendered ineffective, or excessively difficult to determine, in a vast number of cases. As I observed to counsel at the hearing, a toaster oven purchased for an office kitchen might be used for business lunches as well as for the occasional after-hours, gametime hotdog bun. The case law identifies the purpose at the time of purchase as the determining factor; the *CPA* does not require toaster buyers to keep play-by-play statistics on their use of the product.

[63] For Mr. Wellman and all potential class members, if their purchase was documented as an I-BAN then they are presumptively in the consumer class; if it was documented as a B-BAN then their participation in this action is presumptively stayed. As Justice Conway observed, any difficulties with individual cases will be residual in nature and can be resolved administratively: *Wellman and Corless*, at n.10. That process can take place subsequent to the resolution of the common issues at trial: *Bennett v. Lenovo (Canada) Inc*., 2017 ONSC 5853, at para. 75.

IV. Amending certification

[64] I recently stated in *David v. Loblaw*, 2024 ONSC 5818, at para. 19, and will reiterate here, that certification is not a "fluid and flexible process". It is a "complex procedure that inevitably consumes substantial resources", such that "[t]he courts expect parties to put their best foot forward": *Corless v. Bell Mobility Inc*., 2023 ONSC 6227, at para. 57. It cannot be done in piecemeal fashion, or by letting some of the evidence stay out of sight in the bull pen in case the game goes into extra innings.

[65] As a matter of course, "if a party wishes to vary the terms of a certification order he or she would have to show that new issues of fact or law had arisen since certification": *Ducharme v. Solarium de Paris Inc*., 2013 ONSC 2540, at para. 17. Moreover, the new evidence cannot just embellish existing facts or bolster arguments previously addressed, but must, as Justice Perell

noted in *Vester v. Boston Scientific Ltd*., 2020 ONSC 1308, at para. 8, support an amendment needed "to respond to a change in circumstances."

[66] I would also note that in order to eliminate a certified common issue, the moving party would have to demonstrate that the conditions for certifying that common issue no longer exist: *Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271, at para. 50. It would not be enough to show that the evidence supporting the given common issue question is weaker than previously thought, or is now a matter of some debate; there would have to no longer be any factual basis at all for asking the question at the common issues trial.

[67] Counsel for TELUS relies heavily on Justice Cullity's decision in *LeFrancois v. Guidant Corporation*, 2009 CanLII 30448 (SCJ), to the effect that new evidence introduced in a motion to amend a certification order need not be evidence that was unavailable at the time of the initial order. This view poses a certification motion as a non-onerous first step in the life of a class action, which can be reviewed again anytime as the action proceeds on its course. With the greatest of respect to my learned former colleague, this perspective on certification strikes me as somewhat dated.

[68] Indeed, the nearly two decades-old reasons for decision in *LeFrancois* indicate that "fact finding is…not intended to be a feature of certification motions and this court has deprecated the delivery of extensive motion records by the parties": *Ibid*., at para. 14. I can only say, 'would that it were still so!' Extensive, multi-volume motion records with numerous fact and expert witnesses testifying by affidavit and undergoing cross-examination, and with lengthy factums, multi-day hearings, and cost requests leaning toward 7 figures, are now the norm. In the present litigation culture, reading in *LeFrancois* that certification is a minor threshold that can be revisited with previously available evidence, recalls a different pace than today's high intensity contests.

[69] For present purposes, perhaps the even more important point is that nothing in TELUS' record before is actually new. Mr. Quick's affidavit embellishes on matters already in evidence and adds little, if anything, to the analysis engaged in by Justice Conway. And the Supreme Court judgment staying the business customers' claims is, for TELUS, at best a double-edged point.

[70] Looked at one way, it compels some mechanism for determining who is in and who is out of the class that was previously unimportant when individual plan and business plan customers were both in the class. Looked at another way, the Court's confidence that business customers can be identified so that only their action can be stayed, implies a similar confidence that consumer customers can be identified so that their action can proceed intact.

[71] TELUS' perspective could be right, or it could be way out in left field. The Supreme Court's ruling may add some new argument to the aggregate damages debate, or, alternatively, it might make the analysis more "cumbersome", as the Court put it: *TELUS Communications*, at para. 86. But it does not eliminate any and all basis in fact for posing the question and having the debate.

[72] Since there is nothing truly new, and certainly nothing transformative, there is nothing to amend: *David*, *supra*, at para. 22. There was previously some basis in fact that supported the aggregate damages common issue and the Plaintiff's litigation plan. That basis in fact has not disappeared. Likewise, there is no need to clarify or qualify the class definition in the way suggested by TELUS; any issues with class membership remain residual matters to be dealt with administratively after the common issues trial.

V. Disposition

[73] TELUS' motion to amend the certification order is dismissed.

[74] The parties may make written submissions on costs. I would ask counsel for the Plaintiff to email brief submissions to my assistant within 10 days of today, and counsel for TELUS to email brief submissions to my assistant within 10 days of receiving the Plaintiff's submissions.

Date: June 3, 2025

Morgan J.