

**BEFORE THE CANADIAN RADIO-TELEVISION
AND TELECOMMUNICATIONS COMMISSION**

**IN THE MATTER OF AN APPLICATION BY BRAGG COMMUNICATIONS
INCORPORATED; COGECO CABLE INC.; QUEBECOR MEDIA INC., ON
BEHALF OF VIDEOTRON LTD.; ROGERS COMMUNICATIONS INC.; AND,
SHAW COMMUNICATIONS INC.**

**PURSUANT TO PART VII OF THE
CRTC TELECOMMUNICATIONS RULES OF PROCEDURE
AND SECTION 62 OF THE
*TELECOMMUNICATIONS ACT***

**TO REVIEW AND VARY TELECOM DECISION CRTC 2007-130,
*ESTABLISHMENT OF AN INDEPENDENT
TELECOMMUNICATIONS CONSUMER AGENCY***

February 4, 2008

OVERVIEW AND RELIEF SOUGHT

1. This Application is brought by Bragg Communications Incorporated (“Bragg”); Cogeco Cable Inc. (“Cogeco”); Quebecor Media Inc., on behalf of Videotron Ltd. (“Videotron”); Rogers Communications Inc. (“Rogers”); and, Shaw Communications Inc. (“Shaw”) (collectively, the “Applicants”) seeking a review and variance of Telecom Decision CRTC 2007-130, *Establishment of an independent telecommunications consumer agency* (“Decision 2007-130” or the “Decision”).
2. Specifically, the Applicants request the Commission to review and vary Decision 2007-130 by rescinding its determinations:
 - Mandating all telecommunications service providers (“TSPs”) with revenues from Canadian telecommunications services in excess of \$10 million to join the Commissioner for Complaints for Telecommunications Services Inc. (the “Agency”);
 - Mandating that the Agency is not, in the case of binding decisions, constrained by contractual limitations of liability; and
 - Holding that the Agency should accept collective complaints as well as complaints made by a consumer organization on behalf of a consumer or group of consumers.
3. Rogers, Videotron, Cogeco and Bragg are founding members of the Agency and are pleased with its operations to date. Rogers, Videotron, Cogeco and Bragg wish to stay members of the Agency. However, Rogers, Videotron, Cogeco and Bragg feel compelled to protect their legal rights and are concerned that the Commission does not have the jurisdiction to make some of the changes to the structure and mandate of the Agency that it has directed in the Decision. Shaw

may also be interested in joining the Agency, but not on the terms set out by the Commission in the Decision.

4. Of particular concern to the Applicants are the determinations in the Decision mandating TSPs to join the Agency, directing that the Agency is not bound by contractual limitations of liability, and holding that the Agency should accept collective complaints and complaints filed by a consumer organization on behalf of consumers. All of these determinations raise significant jurisdictional and policy concerns.

Mandatory Membership

5. The Commission forbore from regulating CLEC retail services, wireless services, Internet services and other telecommunications services offered by non-dominant carriers, in some cases well over 10 years ago, based on its findings of fact that competition was sufficient to protect the interests of users and forbearance was consistent with the objectives of Canadian telecommunications policy. There was no evidence before the Commission in making the Decision that these findings of fact are no longer correct. Indeed, the only evidence before the Commission was that market forces have protected the interests of consumers and promoted the achievement of the Canadian telecommunications policy objectives absent mandatory membership in an independent consumer complaints agency. In the circumstances, a mandatory membership obligation is impossible to reconcile with the Commission's forbearance decisions and the requirements imposed by *Order Issuing a Direction to the CRTC on Implementing Canadian Telecommunications Policy Objectives*, P.C. 2006-1534 (the "Policy Direction").
6. Furthermore, as a creature of statute, the Commission can only exercise the powers granted to it under the *Telecommunications Act* (the "Act"). Thus the Commission cannot delegate its powers without express or implied authority to do so. The Commission also cannot delegate authority that it does not have. Nor can

the Commission force TSPs to waive statutory restrictions on the Commission's authority and the rules of procedural fairness. This is, however, the effect of the mandatory membership obligation. By mandating membership in the Agency which has binding authority to resolve eligible consumer complaints, the Commission has delegated its authority to adjudicate these complaints. The mandatory membership obligation also requires TSPs to agree that: the Agency has authority to award monetary compensation of up to \$5,000.00; eligible consumer complaints will be adjudicated in accordance with a simplified procedural code that can be amended by a simple majority of directors; they will fund the costs of adjudicating eligible consumer complaints. As the Commission does not have authority to impose any of these obligations directly, it does not have jurisdiction to do so indirectly, by mandating membership in the Agency.

Non-Application of Contractual Limitations of Liability

7. The Commission's decision mandating that the Agency is not bound by contractual limitations of liability also raises serious jurisdictional and policy concerns. The Commission is obliged to refrain, and has refrained, unconditionally from exercising its powers under section 31 of the Act to regulate limitations of liability because it has found, as fact, that competition is sufficient to protect the interests of users. In the Applicants' submission, the Commission cannot reassert its regulatory authority over limitations of liability without finding, as fact, that competition is no longer sufficient to protect the interests of users.
8. The Applicants also believe that the Commission's decision regarding limitations of liability is inconsistent with the rules of contract interpretation and the limitations of liability that the Commission has approved for regulated services. Moreover, limitations of liability address many different kinds of liability and cannot be considered in isolation of prices or the procedural protections available

to TSPs in the adjudicative process. Each of these factors, also, raises substantial doubt as to the correctness of the Decision.

Collective Complaints

9. Finally, the Applicants have significant concerns about the Commission's decision that the Agency should address collective complaints and complaints filed by consumer agencies on behalf of consumers. The Legislatures and Courts have developed complex procedural rules for class and representative actions that must balance the objectives of efficiency and fairness. The stream-lined and expedited procedures of the Agency are not capable of addressing these kinds of issues fairly and effectively, and the Agency does not have the institutional capacity to manage the procedural complexities that necessarily arise in the context of collective and representative proceedings.

TEST FOR REVIEW AND VARIANCE

10. The Commission set out the test for exercising its power to review and vary decisions pursuant to section 62 of the Act in Telecom Public Notice CRTC 98-6. The test requires that a party seeking relief under section 62 of the Act must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to:

- (i) an error in law or in fact;
- (ii) a fundamental change in circumstances or facts since the decision;
- (iii) a failure to consider a basic principle which had been raised in the original proceeding; or,
- (iv) a new principle which has arisen as a result of the decision.

11. In this case, the Applicants submit that the Commission erred in law and in fact in mandating TSPs to become members of the Agency, directing that the Agency is

not constrained by contractual limitations of liability, and holding that the Agency should accept collective and representative complaints.

BACKGROUND

12. In Decision 2007-130, the Commission approved the structure and mandate of the Commissioner for Complaints for Telecommunications Services Inc. (the “Agency”) and directed all TSPs with annual Canadian telecommunications services revenues exceeding \$10 million to become members of the Agency.
13. As members of the Agency, TSPs must agree to the structure and mandate of the Agency including the binding authority of the Agency to adjudicate eligible consumer complaints. In adjudicating these complaints, the Commission has directed that the Agency must be authorized to ignore contractual limitations of liability and award monetary compensation to individual consumers of up to \$5,000.00.
14. Member TSPs must also agree that consumer complaints are to be adjudicated by the Agency in accordance with a stream-lined procedural code that can be modified by a simple majority of its directors, and to fund the costs of the Agency.
15. The Commission also determined that the Agency should accept collective complaints as well as complaints made by a consumer organization on behalf of a consumer or group of consumers.
16. Decision 2007-130 was precipitated by *Order requiring the CRTC to report to the Governor in Council on consumer complaints*, P.C. 2007-533 (the “Order”). The Order, which was issued pursuant to section 14 of the Act, directs the Commission to provide an annual report to the Governor in Council on

complaints received from “individual and small business retail customers” regarding services provided by TSPs. (emphasis added)

17. The Order also contains a series of recitals setting out the Governor in Council’s views on the structure and mandate of a consumer agency. These recitals refer to the Report of the Telecommunications Policy Review Panel of March 2006. In this report, the TPRP expressly concluded that “amendments to the *Telecommunications Act* will be needed to give the CRTC power to create the TCA and to give the TCA the power to make binding orders and award compensation.” (TPRP Report, p. 6-12) No such amendments to the Act have been made.

18. The Order also refers to Telecom Decision 2006-15, *Forbearance from the regulation of retail local exchange services* and Order in Council P.C. 2007-0532 varying that Decision. Telecom Decision 2006-15 established a framework for forbearance of ILEC local exchange services. CLEC retail exchange services had been forborne from regulation almost 10 years earlier in Telecom Decision 97-8. Other telecommunications services provided by non-dominant carriers had also been forborne from regulation in decisions which significantly pre-date Telecom Decision 2006-15. In all of these earlier decisions, the Commission determined that deregulation was consistent with the objectives of telecommunications policy and that competition was sufficient to protect the interests of consumers. In no case were these findings contingent on mandatory membership in an independent telecommunications complaints agency of any kind.

ARGUMENT

Mandatory Membership

- (i) **Mandatory membership cannot be reconciled with the Commission’s forbearance decisions and the Policy Direction**

19. The Policy Direction requires the Commission to rely to the greatest extent possible on market forces to achieve the objectives of Canadian telecommunications policy, as expressed in the Act.
20. In paragraph 28 of the Decision, the Commission concluded that mandatory membership in the Agency was consistent with the Policy Direction because TSPs did not establish the Agency prior to the Order and not all TSPs have voluntarily joined the Agency. However, these facts can only satisfy the Policy Direction if the evidence establishes that mandatory membership is necessary to promote the objectives of Canadian telecommunications policy.
21. There was no evidence before the Commission that mandatory membership is necessary to promote the Canadian telecommunications policy objectives. In this regard, there was no evidence before the Commission on the number of complaints from consumers of forborne services, the manner in which these complaints are currently being handled, the effect of forbearance on the number and handling of complaints, or that market forces have not ensured that non-dominant carriers have implemented effective and efficient consumer complaints handling processes. In short, there was no evidence of market failure. In the absence of such evidence, there was no evidentiary basis for concluding that mandatory membership in the Agency is necessary to promote the objectives of Canadian telecommunications policy.
22. Moreover, the Commission's conclusion that mandatory membership is necessary to achieve Canadian telecommunications policy objectives cannot be reconciled with the Commission's decisions forbearing from regulating CLEC services (Telecom Decision 97-8), wireless services (Telecom Decisions 94-15 and 96-14), services provided by non-dominant carriers (Telecom Decision 95-19) and retail Internet services (Telecom Decision 98-9). In all of these decisions, the Commission found as fact that deregulation would be consistent with the

Canadian telecommunications policy objectives and that competition would be sufficient to protect the interests of users. None of these determinations was conditioned on mandatory membership in a consumer complaints agency. Nor was there evidence before the Commission in making the Decision to suggest that the factual determinations in these forbearance decisions are no longer correct.

23. As a matter of fact, market forces have protected the interests of consumers of these services and will continue to do so in the future. The Applicants are not aware of any evidence (and certainly there was no such evidence before the Commission in making the Decision) that non-dominant carriers, including CLECs, have not been responding to and handling consumer complaints effectively and efficiently. This is because service providers that do not respond effectively to consumer complaints will not succeed in a competitive marketplace.

24. The Applicants submit therefore that there was no evidence before the Commission on which it could overturn the findings of fact in its forbearance decisions and conclude that mandatory membership is consistent with the Policy Direction.

(ii) The Order cannot and does not confer new powers on the Commission

25. The recitals to the Order cannot bind or confer new powers on the Commission. The Order was issued pursuant to section 14 of the Act which provides that the “Governor in Council may require the Commission to report on any matter within the Commission’s jurisdiction under the Act.” The Governor in Council has no authority under section 14 or any other provision of the Act to grant new powers to the Commission.

(iii) The Commission has no authority to delegate its complaint resolution powers

26. By mandating membership in the Agency, the Commission is effectively delegating its authority to adjudicate eligible consumer complaints. Member TSPs must agree that the Agency will receive and resolve eligible consumer complaints, including collective complaints and complaints referred by the Commission to the Agency. Member TSPs must also agree that the decision of the CEO is binding on the TSP member if the complainant accepts it. Thus mandatory membership forces TSPs to attorn to binding adjudication of eligible consumer complaints by the Agency.

27. There is no authority in the Act for the Commission to delegate its dispute resolution powers to a third party. Moreover, in every instance in which Parliament deemed it advisable for the Commission to delegate its powers under the Act, it has amended the Act to provide expressly for this possibility. Such is the case, for example, with respect to the Commission's powers regarding unsolicited telecommunications and the national Do Not Call list (section 41.3) and the interoperation of telecommunications networks including numbering (section 46.2).

28. In addition, in order to imply authority or jurisdiction, there must be evidence that the exercise of the authority is a practical necessity for the Commission to accomplish the objects prescribed by the legislature in the Act. (*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140) Delegation of the Commission's adjudicative powers cannot satisfy this test.

29. Indeed, the Courts have refused to imply to administrative tribunals a power to delegate purely adjudicative decision-making functions. (See: D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf ed., vol. III (Toronto: Canvasback Publishing, 2007) at 13-31) Such a delegation is particularly problematic where, as in this case, it is to a private organization operating outside the normal channels of responsibility and rules of procedural fairness. (See D.J. Mullan, *Administrative Law* (2001), p. 371 and *Niagara Wire*

Weaving Co. Ltd. (No. 2), [1972] 3 O.R. 129, striking down a decision of the Ontario Securities Commission delegating its powers to grant exemptions to a company's shareholders.)

30. Accordingly, the Applicants submit that the Commission does not have jurisdiction to delegate its adjudicative powers. Therefore, by mandating all TSPs to join the Agency and be bound by the Agency's decisions on eligible consumer complaints, the Commission erred in law and exceeded its jurisdiction.

(iv) The Commission cannot delegate powers that it does not have

31. The Commission cannot delegate powers that it does not have or mandate TSPs to attorn to a jurisdiction that the Commission itself does not possess. This is, however, the effect of the mandatory membership obligation and the Commission's direction that the Agency must have authority to award monetary compensation to consumers of up to \$5000. This monetary compensation is defined to exclude amounts refunded or credited as a result of billing errors.

32. There is no authority in the Act for the Commission to award monetary compensation to consumers and no grounds on which such a power could be necessarily implied.

33. Therefore, the Applicants submit that by mandating TSPs to join and attorn to the jurisdiction of the Agency to award monetary compensation, the Commission erred in law and exceeded its jurisdiction.

(v) The Commission cannot force TSPs to waive their procedural rights

34. In exercising its authority to resolve consumer complaints, the Commission is required to comply with the rules of procedural fairness. In addition, decisions of

- the Commission are subject to review and variance by the Commission and appeal to the Federal Court of Appeal, with leave, on issues of law and jurisdiction.
35. In contrast, the Agency is bound solely by a procedural code that can be amended by a simple majority of the directors of the Agency and decisions of the Agency that are accepted by the complainant are final and binding on a member TSP.
36. Thus the effect of mandatory membership is to force TSPs to waive their procedural rights, including their rights under section 2(e) of the *Canadian Bill of Rights* which provides that no law of Canada shall be construed or applied so as to deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice.
37. The Commission has no jurisdiction to force TSPs to waive their procedural rights. As this is the effect of the mandatory membership requirement, the Applicants submit that the Commission erred in law and exceeded its jurisdiction by mandating membership in the Agency.
- (vi) **The Commission does not have authority to order TSPs to contribute to a fund to cover the costs of complaint resolution**
38. The Agency Membership Agreement requires all member TSPs to contribute to the Agency's funding. Therefore mandatory membership in the Agency forces TSPs to fund the Agency's costs of adjudicating eligible consumer complaints.
39. There is no authority in the Act for the Commission to require TSPs to contribute to a fund to cover the costs of complaint resolution. This is in stark contrast to section 46.5 of the Act which expressly authorizes the Commission to require TSPs to contribute to a fund to support continuing access by Canadians to basic telecommunications services (i.e. Canadian Portable Contribution Fund). Also, in every case where Parliament has deemed it appropriate to permit the Commission

- to delegate its powers (and as discussed above, delegation of dispute resolution powers is not such a case), Parliament has also expressly provided that the delegate may charge rates for exercising delegated powers and conferred on the Commission authority to regulate the rates. (See sections 41.4, 41.5, 46.3 and 46.4.)
40. Also, while the Commission does have authority pursuant to sections 68 and 69 of the Act to prescribe fees by regulation with approval from Treasury Board for the purpose of recovering all or a portion of the costs attributable to its statutory responsibilities, it has no authority to delegate such legislative powers to another body or prescribe fees otherwise than by regulation. (See *Air Canada v. City of Dorval*, [1985] 1 S.C.R. 861, where the Supreme Court of Canada held that the Council of the City of Dorval had exceeded its jurisdiction by delegating to itself the power to set a tax rate by resolution, where the legislature conferred on the Council the power to tax by by-law.)
41. Therefore, on this basis also, the Applicants submit that by mandating TSPs to join the Agency and fund its operations, the Commission erred in law and exceeded its jurisdiction.

Non-Application of Limitations of Liability

42. In the Decision the Commission directed that the Agency documents be amended so as to provide that “the CEO is not, in the case of binding decisions, constrained by contractual limitations of liability”. The grounds for this conclusion are set out in section 87 of the Decision as follows:

87. The Commission notes that courts do not always apply limitation of liability clauses. The Commission considers that it would be inappropriate to allow a limitation of liability clause in a customer contract to effectively overrule a binding decision made by the CEO since doing so would effectively render illusory the Agency’s ability to award consumers meaningful financial compensation.

43. While the Courts may not always enforce limitation of liability clauses, any such non-enforcement is subject to the rules of contract interpretation and principles of duress and unconscionability applied to the specific circumstances of the case. There is no general principle of law that the Courts do not enforce limitation of liability clauses and any application of such a principle by the Commission would constitute an error of law, subject to appeal to the Federal Court of Appeal. Therefore, in adjudicating eligible consumer complaints, the Commission would be required to construe the service contract and consider whether it would be unconscionable in the specific circumstances of the case for a limitation of liability provision to be invoked. Accordingly, the Commission has no jurisdiction to direct or permit the Agency to ignore these legal principles.

44. The Commission has also previously unconditionally forborne from exercising its authority to approve limitation of liability provisions under section 31 of the Act in respect of retail services provided by CLECs, wireless services, Internet services and other services provided by non-dominant carriers based on its findings of fact that deregulation is consistent with the objectives of Canadian telecommunications policy and that competition is sufficient to protect the interests of users. For example, in its decision forbearing from regulation of CLEC retail services, the Commission stated:

263. The Commission finds as a matter of fact that retail services provided by CLECs to end-users will be subject to sufficient competition to protect the interests of users, subject to the following.

...

267. With regards to section 31 of the Act which deals with limitation of a Canadian carrier's liability, the Commission notes that several obligations that would be imposed on CLECs would in effect be similar to those imposed on ILECs, such as the provision of 9-1-1 service. However, the Commission also notes that it is forbearing from rate regulation of a very large measure of CLEC offerings in the local market, while most ILEC services will continue to be regulated. The Commission is of the view that, under these circumstances, it would not be in the public interest to provide CLECs with the regulatory protection that ILECs receive in respect of limitation of liability to end-users.

Telecom Decision CRTC 97-8 (emphasis added)

45. Most recently, in Telecom Decision CRTC 2006-15, the Commission also held that the scope of forbearance for ILEC retail local exchange services should include its powers under section 31 stating:

312. The Commission considers that, in a competitive market for local exchange services, all carriers should be able to establish through negotiations with their customers, the extent and scope of any limitations of liability, and that such limitations should not be mandated by the Commission.

313. In view of the nature and degree of competition in a relevant market in which an applicant can demonstrate that the local forbearance criteria have been met, the Commission considers that it will be appropriate to forbear with respect to section 31 of the Act in that relevant market. The Commission notes that any provision limiting liability in any existing contracts or arrangements, as of the date of the Commission decision granting forbearance in a relevant market, will remain in force until its expiry. Such existing contracts or arrangements will be deemed to terminate on the date and in the manner provided therein, notwithstanding any contractual provisions governing extensions.

Telecom Decision CRTC 2006-15 (emphasis added)

46. The effect of the Commission's direction to the Agency to ignore contractual limitations of liability is to reregulate forborne services pursuant to section 31 of the Act. This has been done absent any evidence or finding that the tests for forbearance established by section 34 of the Act are no longer satisfied.

47. Specifically, sections 34(1) and 34(2) of the Act provide that:

34(1) The Commission may make a determination to refrain, in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 in relation to a telecommunications service or class or service provided by a Canadian carrier, where the Commission finds as a question of fact that to refrain would be consistent with the Canadian telecommunications policy objectives.

34(2) Where the Commission finds as a question of fact that a telecommunications service or class of services provided by a Canadian carrier is or will be subject to competition sufficient to protect the interests of users, the Commission shall make a determination to refrain, to the extent it considers appropriate, conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 in relation to the service or class of services.

(emphasis added)

48. The Commission made no finding and had no evidence before it on which to make a finding in the Decision that deregulation of limitation of liability provisions in respect of CLEC retail services, wireless services, Internet services and other services provided by non-dominant carriers is no longer consistent with the objectives of Canadian telecommunications policy.
49. Furthermore, section 34(2) directs that the Commission shall forbear from regulation where the Commission finds, as a fact, that competition is sufficient to protect the interests of users. The Commission made no finding of fact in the Decision that competition is no longer sufficient to protect the interests of users of CLEC retail services, wireless services, Internet services and other services provided by non-dominant carriers, and had no evidence before it on which to make such a finding.
50. It follows that the Commission has re-regulated forborne services without applying the tests established by section 34 of the Act and in so doing, erred in law and exceeded its jurisdiction.
51. In the Applicants' submission, there are a number of other factors which were not considered by the Commission in the Decision that also give rise to substantial doubt as to the correctness of the Commission's direction to the Agency to waive the application of contractual limitation of liability provisions. The Applicants note, for example, that the Commission has approved terms of service for regulated services that include limitations of liability provisions that are similar, if

not identical, to the contractual limitations of liability that are used by TSPs in the contracts for forborne services. Moreover, these limitations provisions have been enforced by the Courts. These facts cannot be reconciled with the Commission's direction to the Agency in the Decision to waive the application of limitation of liability provisions.

52. In addition, the waiver of limitation of liability provisions has important ramifications for TSP costs of doing business and prices. It also has important ramifications for the requirements of procedural fairness. These factors were not considered by the Commission and raise substantial doubt as to the correctness of the Decision.

Collective Complaints

53. In paragraph 104 of the Decision, the Commission held that the Agency should accept collective complaints as well as complaints brought by consumer agencies on behalf of a consumer or group of consumers. The adjudication of collective complaints gives rise to complex procedural issues which the Agency is not equipped to handle. These kinds of complaints also go well beyond the proposal by the Governor in Council in the Order for a consumer agency "with a mandate to resolve complaints from individual and small business retail customers".
54. The Provincial and Federal Legislatures and the Courts have established detailed procedural rules for representative and collection actions which balance efficiency and fairness considerations. The Supreme Court of Canada has also held that four conditions must be satisfied in order for a class action to proceed:

- (i) The class must be capable of clear definition by reference to objective criteria. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded) and bound by the judgment;

(ii) There must be significant issues of fact or law common to all class members;

(iii) Success of one class member must mean success for all;

(iv) The class representative must adequately represent the class, having regard to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative.

(Western Canadian Shopping Centres Inc. v Dutton, [2001] 2 S.C.R. 534 at para. 34)

55. The satisfaction of these four criteria does not mean that the court must allow the action to proceed. On the contrary, other factors may weigh against allowing the action to proceed in representative form. For example, the defendant may wish to raise different defences with respect to different groups of plaintiffs, or class members may raise important issues not shared by all members of the class. In the end, the courts are required to strike a balance between fairness and efficiency (*Dutton* at para. 45).
56. Even where a class action proceeds, other procedural issues may arise. One is notice. A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. All potential class members must be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, before any decision is made that purports to prejudice or otherwise affect the interests of class members (*Dutton* at para. 49).
57. The Agency's procedural code does not address these procedural complexities which go to the very fairness of a collective or representative proceeding. The Agency – because its purpose is to create a stream-lined process for the expeditious resolution of complaints – does not have the institutional capacity to manage the procedural complexities that necessarily arise in the context of collective proceedings. How is the Agency to assure itself that all potential

claimants have been notified of a proceeding and have been given the opportunity to opt out? If proper notice has not been given, certain claimants will not be bound by the CEO's decision and will retain the right to pursue their claim in court or before the CRTC. The resulting duplicity of proceedings would undermine the very purpose of the Founding Members in setting up the Agency.

CONCLUSION AND ORDER SOUGHT

58. For all the foregoing reasons, the Applicants submit that there is substantial doubt as to the correctness of the Commission's determinations in the Decision that membership in the Agency should be mandatory, that the Agency is not bound by contractual limitations of liability and that the Agency should accept collective complaints and complaints made on behalf of consumers by a consumer agency and accordingly request the Commission to vary and rescind each of these aspects of the Decision.

59. All of which is respectfully submitted by the Applicants.

NOTICE

This Application is filed on behalf of the Applicants by Fasken Martineau DuMoulin LLP, Suite 1300, 55 Metcalfe Street, Ottawa, ON K1P 6L5, Attention: Leslie J. Milton, email: lmilton@fasken.com.

TAKE NOTICE that pursuant to section 59 of the *CRTC Telecommunications Rules of Procedure*, the Respondent is required to mail or deliver its Answer to this Application to the Secretary-General of the Canadian Radio-television and Telecommunications Commission, Central Building, 1 Promenade du Portage, Hull, Québec, K1A 0N2 and to serve a copy of the Answer on the Applicants by March 5, 2008.

Service of the Copy of the Answer on the Applicants may be effected by personal delivery or by ordinary mail. In the case of service by personal delivery, it may be effected at the address set out above.

If the Respondent does not file or serve its Answer within the time limit prescribed, the Application may be disposed of without further notice to it.

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