

Federal Court



Cour fédérale

Date: 20120723

Docket: T-132-11

Citation: 2012 FC 925

Ottawa, Ontario, July 23, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

PIERRE TREMBLAY

Plaintiff

and

SHAW CABLESYSTEMS G.P.

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a joint motion presented by Plaintiff Pierre Tremblay, together with Defendant Shaw Cablesystems G.P. (Shaw), seeking this Court's certification of the action as a class proceeding and approval of a class proceeding settlement (the Settlement Agreement) dated April 5, 2012, in accordance with section 334.29(1) of the *Federal Court Rules*, SOR 98/106.

[2] The Plaintiff Pierre Tremblay brought a class proceeding on January 31, 2012. Further to discussions with the Defendant, a Settlement Agreement was reached on April 5, 2012.

[3] Preliminary Notice of the Settlement Agreement and of this hearing was given to Class Members, in the manner and form directed by this Court in its Preliminary Settlement Approval Order issued on May 10, 2012.

[4] The facts underlying this litigation occurred in December 2010. The Plaintiff, a businessman living in West Vancouver, British Columbia, subscribed to the cable services provided by the Defendant, Shaw Cablesystems GP. When Plaintiff failed to pay his monthly invoice before the due date, he was charged interest on the outstanding amount, calculated at 2% per month, compounded monthly. The Plaintiff paid the amount owed but the invoice failed to state the annualized interest rate further to the compounding of the monthly 2% interest charge. The Plaintiff claims that this practice, by Defendant, contravenes the *Interest Act*, RSC 1985, c I-15.

[5] In granting certification as a class proceeding, this Court considers the following elements in light of the tests established by the case law and the specific circumstances in this instance:

- a. the pleadings disclose a reasonable cause of action;
- b. there exists an identifiable class of two or more persons;
- c. the claims of the class members raise common questions of fact or of law;
- d. a class proceeding provides the most opportune procedure for the efficient resolution of the common questions;
- e. the Representative Plaintiff can fairly represent the interests of at least one of the classes, brings forth a plan that satisfies the Court that an acceptable method of advancing the proceeding is set out and properly notifies the Class Members of progress. The Court must also be satisfied that the Representative Plaintiff is exempt from any conflict of interest

with other class members and can provide adequate information with respect to fees and disbursements.

[6] In this instance, the Court, having heard the submissions of parties and carefully noted the affidavits of Pierre Tremblay, sworn July 2, 2012, Kenneth J. Baxter, sworn July 4, 2012, and Rhonda Bashnick, sworn June 21, 2012, is satisfied that the criteria are met for certification in that:

- a. after considering the applicable threshold, which is low, a cause of action does exist; the Plaintiff having advanced two causes of action ,one of unjust enrichment and the other alleging a breach of the Interest Act;
- b. there exists, in this instance, an identifiable class of two or more persons, namely: all individuals who, during some or all of the Class Period, were Account Holders and paid interest charges where the rate of interest was only expressed on a monthly basis on their invoices received from Shaw, and not on an annualized basis; two subclasses have also been identified that is the Analog Subclass and the Old subscriber Subclass;
- c. the following common questions of fact and law have been identified by the Plaintiff:
 1. ***Did Shaw charge interest to subscribers calculated on the basis of 2% per month compounded monthly?***
 2. ***Did Shaw charge subscribers interest on a basis contrary to the provisions of the Interest Act?***

3. *Was Shaw unjustly enriched by collecting interest from subscribers at rates that were contrary to the provisions of the Interest Act?*

- d. The class Representative, Mr Pierre Tremblay, satisfies the requirements of the *Federal Court Rules*, more precisely Rule 334.16(3). Since the members of the subclass do not have separate interests on the common questions, there are no conflicting interests present;
- e. It is clear, in the present case, that certification of the proceeding will permit an improved access to justice since the value of 90% of the claims is so small that they may not have been pursued individually, the cost involved being a significant deterrent, consequently, judicial economy warrants certification; and
- f. Finally the five criteria set out in *Federal Court Rule* 334.18, that cannot be relied upon to refuse to certify a proceeding, are non existent in the present case.

[7] In regards to the approval of the Settlement, the Court, having taken into account the parties' oral and written submissions and having questioned counsels for the Plaintiff and Defendant during the hearing held on July 18, 2012, is satisfied that the Settlement Agreement is fair and reasonable in light of the applicable jurisprudence and the overall circumstances of the matter. It is obvious that the Settlement Agreement was negotiated at arm's length.

[8] The Court considered the factors set out in *Dabbs v Sun Life Assurance Co. of Canada*, [1998] OJ No 1598, as supplemented by the two elements added by the case of *Parsons v Canadian Red Cross Society*, [1999] OJ No 3572. It is obvious that the negotiation between the parties occurred at arm's length. There were no objections to the Settlement Agreement. More than 70 potential Class members contacted counsel for the Plaintiff upon receipt of notification of this motion for class certification and approval of settlement. More importantly, the Court is satisfied that the terms of the Settlement Agreement are fair and reasonable when taking into consideration the nature of the claim, the actual interests charged by the Defendant to individual subscribers, the number of potential individual claimants, the likelihood of success and the ease of access and value of the compensation under the Settlement Agreement. Since, the Settlement Agreement also provides for far reaching notification as ordered by this Court, and in light of the absence of objections from Class Members, the Court finds no valid reason not to approve the Settlement Agreement.

[9] Finally, having reviewed the detailed account of time expended by the primary lawyers in this matter and their role in pursuing the negotiation together with the costs involved, the Court approves the payment of \$311 256.01 by Defendant Shaw to Class counsel as per the Settlement Agreement.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. Mr. Pierre Tremblay is appointed as Representative Plaintiff for the Class;
2. The action is certified as a class proceeding;
3. The Settlement Agreement is approved;
4. Fees of \$311 256.01 are approved to be paid by Defendant to Class Counsel; and
5. The appended Settlement Approval Order is an integral part of this judgment.

"André F.J. Scott"

Judge

SETTLEMENT APPROVAL ORDER

WHEREAS the Plaintiff and Defendant have reached a Settlement Agreement which is attached as Schedule A to this Order;

AND WHEREAS a certification and Settlement Approval hearing was held on July 18, 2012;

AND WHEREAS the parties to the action did consent to the certification of this action as a class proceeding under the Federal Courts Rules;

THIS COURT ORDERS THAT:

1. The Settlement Agreement is incorporated to this Order in its entirety and forms part of this order, and the definitions in the Settlement Agreement shall be applied in interpreting this Order;
2. In the event of a conflict between this Order and the Settlement Agreement, this Order shall prevail;
3. The Class is certified as:

All individuals who, during some or all of the Class Period, were Account Holders and paid interest charges where the rate of interest was only expressed on a monthly basis on their invoices from Shaw and not on an annualized basis.

4. The following subclasses are certified:
 - a. Class Members who subscribe to Shaw's Analog Cable and have not been upgraded to Digital Cable (to be referred to as the "Analog Cable Subclass"); and
 - b. Class Members who are not as of the Settlement Approval Date Shaw customers (to be referred to as the "Old Subscriber Subclass").
5. The nature of the claims asserted on behalf of the Class are:
 - a. Breach of the *Interest Act*, RSC 1985, c I-15); and
 - b. Unjust enrichment.
6. The within action is certified on the basis of the following common issues:
 - a. Did Shaw charge interest to subscribers calculated on the basis of 2% per month compounded monthly?

- b. Did Shaw charge subscribers interest on a basis contrary to the provisions of the *Interest Act*?
 - c. Was Shaw unjustly enriched by collecting interest from subscribers at rates that were contrary to the provisions of the *Interest Act*?
7. Settlement Notice shall be delivered in the manner set out in Part D, Section 8 of the Settlement Agreement, and in the form attached as Schedule “D” to the Settlement Agreement.
 8. The Defendant will bear the entire costs of the Settlement Notice.
 9. Class Members are followed to opt out of this class proceeding in the manner set out in Part F of the Settlement Agreement, using the form attached as Schedule “E” to the Settlement Agreement.
 10. The Settlement Agreement is approved as fair, reasonable, and in the best interest of the Class.
 11. Each Class Member who does not opt out shall be deemed to have released and forever discharged the Defendant.
 12. This Court retains supervisory jurisdiction to determine any disputes arising as to the interpretation or enforcement of the Settlement Agreement.

“André F.J. Scott”

Judge

SETTLEMENT AGREEMENT
Effective the _____ day of _____, 2012
(the "Effective Date")

BETWEEN:

PIERRE TREMBLAY
("Tremblay")

- and -

SHAW CABLESYSTEMS G.P.
("Shaw")

WHEREAS:

- A. Tremblay commenced Action No. T-132-11 in the Federal Court as a proposed class action, seeking certain relief against Shaw in relation to the manner in which Shaw described interest charges in its invoices.
- B. Shaw denies Tremblay's allegations and any and all liability in the action.
- C. Tremblay, on behalf of members of the class proposed in his action, and Shaw have agreed to settle this dispute on the terms contained in this agreement.

NOW THEREFORE, for good and valuable considerations, the receipt and sufficiency of which is hereby acknowledged, Tremblay and Shaw covenant and agree with each other as follows:

Part A. Definitions

- 1. Terms in this Settlement Agreement are defined as follows:
 - a) "**Account Holder**" means the individual named on an account with Shaw.
 - b) "**Action**" means Proposed Class Proceedings between Pierre Tremblay (Plaintiff and Proposed Class Representative) and Shaw Cablesystems GP (Defendant), being Federal Court File Number T-132-11.
 - c) "**Analog Cable Subclass Member**" means a Class Member who subscribes to Analog Cable and has not been upgraded to Digital Cable.
 - d) "**Analog Cable**" means Shaw's analog cable television service.
 - e) "**Claims Line**" means the telephone number Class Members can call to select and receive a Class Benefit.

- f) **"Claims Period"** means:
- i. a three month period beginning one month after the Settlement Approval Date for all Class Members other than the Old Subscriber Subclass Members and,
 - ii. a five month period beginning one month after the Settlement Approval Date for Old Subscriber Subclass Members.
- g) **"Class Benefit"** means:
- i. One Movie Credit; or
 - ii. An Internet Upgrade.
- h) **"Class Counsel"** means Poyner Baxter LLP.
- i) **"Class Member"** means each individual who, during some or all of the Class Period, was an Account Holder and paid late payment interest charges that were displayed as monthly amounts on his or her invoice(s) from Shaw.
- j) **"Class Period"** means the period running from the date listed below (for the Province in which the Class Member's billing address is located) until the Settlement Approval Date.
- i. British Columbia: January 31, 2005
 - ii. Alberta: January: 31, 2009
 - iii. Saskatchewan: January 31, 2009
 - iv. Manitoba: January 31, 2005
 - v. Ontario: January 31, 2009
- k) **"Digital Cable"** means Shaw's digital cable television service.
- l) **"Internet"** means Shaw Internet packages labeled High-Speed Lite, High-Speed, 10, and 20, and Extreme, but does not include packages labeled Unlimited or Broadband.
- m) **"Internet Upgrade"** means a free one month upgrade as follows:
- i. from High-Speed Lite to High-Speed;
 - ii. from High-Speed and High-Speed 10 to High-Speed 20; or
 - iii. from High-Speed 20 to Extreme,

provided, however, that, in the event that the above referenced Internet service packages have been rebranded within the Claims Period, the upgrade shall be from a comparable

category of Internet service (based on download speeds) to the next higher category of Internet service.

- n) **"Movie Credit"** means credit for one free Shaw Video On Demand standard definition movie rental, applied to the Class Member's account. Adult movies and programming are specifically excluded from this credit.
- o) **"Opt Out Form"** means the form attached as Schedule "E" to the Settlement Agreement.
- p) **"Opt Out Period"** means the 90 day period beginning on the Settlement Approval Date.
- q) **"Old Subscriber Subclass Member"** means a Class Member who is not as of the Settlement Approval Date a Shaw customer.
- r) **"Preliminary Notice Approval"** means an order granting approval to the Preliminary Notice, substantially in the form attached as Schedule "A".
- s) **"Preliminary Notice Approval Date"** means the date of the order granting Preliminary Notice Approval.
- t) **"Preliminary Notice"** means notice of the preliminary approval of the Settlement Agreement given to Class Members in the form attached as Schedule "B" to the Settlement Agreement and by the means detailed in Part D of the Settlement Agreement.
- u) **"Settlement Agreement"** means this agreement.
- v) **"Settlement Approval"** means an order certifying the Action as a class action and granting final approval of the Settlement Agreement substantially in the form attached as Schedule "C".
- w) **"Settlement Approval Date"** means the date that the appeal period expires from an order granting Settlement Approval.
- x) **"Settlement Notice"** means notice of certification and final approval of the Settlement Agreement given to Class Members in the form attached as Schedule "E" to the Settlement Agreement and by the means detailed in Part D of the Settlement Agreement.
- y) **"Shaw"** means Shaw Cablesystems GP.

Part B. Claims Process

2. To make a claim under the Settlement Agreement, Class Members shall call the Claims Line during the Claims Period to select and receive a Class Benefit.
3. Old Subscriber Subclass Members must have activated a new account with Shaw in order to receive a Class Benefit.

Part C. Benefit to Class Members

4. Class Members will receive their Class Benefit in the following manner:
 - a) If the Class Member selects a Movie Credit, the Movie Credit will be applied to the Class Member's account and will remain available for redemption for a period of three months from the date the credit was issued; or
 - b) If the Class Member selects an Internet Upgrade, the Class Member's Internet will be upgraded for a period of one month from the date of activation of such upgrade.
5. If an Analog Cable Subclass Member selects a Movie Credit as his or her Class Benefit, the Movie Credit will remain credited to such Class Member's account until the earlier of (a) three months after the date on which the Analog Cable Subclass Member is upgraded from Analog Cable to Digital Cable, or (b) three months after the date on which a Digital Cable upgrade is made available by Shaw to the Analog Cable Subclass Member.
6. Class Members' eligibility for Class Benefits will initially be determined by Shaw through a review of its accounts. Once every two weeks during the Claim Period, Shaw will provide Class Counsel with a report listing those applicants who have been denied eligibility, along with those individuals' contact information (as conveyed by the individual to Shaw) and Shaw's reason for the denial. If Class Counsel disagrees with Shaw's determination, it is at liberty to seek directions from the Court, on appropriate and reasonable notice to Shaw.

Part D. Notice Program

7. Preliminary Notice in the form attached as Schedule "B" to the Settlement Agreement will, within 21 days of the Preliminary Notice Approval Date, be published by Shaw once in the Globe & Mail and the National Post in a size no less than 1/8 of a page.
8. Settlement Notice in the form attached as Schedule "D" to the Settlement Agreement will, within 21 days of the Settlement Approval Date, be:
 - a) published once in the Globe & Mail and the National Post in a size no less than 1/8 of a page; and
 - b) delivered to Class Members, except to members of the Old Subscriber Subclass, as a supplement or addition to the Class Member's next invoice from Shaw.
9. Unless required by law or as otherwise contemplated in this Settlement Agreement, no statement or press release of any kind will be made to the public regarding this settlement without the prior written approval of both parties. Notwithstanding the foregoing, Class Counsel may post notice on its website of the fact that the Action has been settled. The contents of any such posting shall be in the form attached as Schedule "F".

Part E. Expenses

10. Shaw will bear the costs of the administration of the Settlement Agreement, including distribution of the Preliminary Notice and Settlement Notice.

Part F. Opt Out

11. Class Members who wish to opt out of the Settlement Agreement must complete an Opt Out Form and return that form to Class Counsel within the Opt Out Period.
12. Class Counsel will make the Opt Out Form available for download on its website and provide the Opt Out Form to all Class Members who request it.
13. Class Counsel will maintain a list of Opt Out Forms received and will provide a list of Class Members who have opted out to Shaw on the day after the Opt Out Period has expired.

Part G. Fees

14. Class Counsel will seek approval of legal fees payable by Shaw to a maximum of \$275,000.00 plus taxable disbursements and applicable taxes. These fees shall be inclusive of all steps involved in implementation of this Settlement Agreement, including, without limiting the generality of the foregoing, the steps and applications referred to in Parts F and H herein. The amount payable to Class Counsel shall be paid within 10 business days of the Settlement Approval Date.
15. Settlement Approval is not conditional upon approval of any fee request.

Part H. Settlement Approval

16. Within 21 days of the execution of this Settlement Agreement, Class Counsel will bring a motion for Preliminary Notice Approval.
17. Within 90 days of the Preliminary Notice Approval Date, Class Counsel will bring a motion for Settlement Approval.
18. If this Settlement Agreement is not approved, it will be void and the parties shall return to their original position as though this Settlement Agreement had never been negotiated or proposed to the court.

Part I. Release

19. All Class Members who have not opted out will be deemed to have provided a full release in the following form:

IN CONSIDERATION of the Defendant's agreement to the terms of the Settlement Agreement, each Class Member DOES HEREBY RELEASE and forever discharge the Defendant and its officers, directors, employees, agents, parent, subsidiaries, affiliates, predecessors, successors, and assigns, jointly and severally, from any and all losses, damages, debts, liabilities, costs, claims, suits, actions, causes of action, and demands whatsoever which the Class Member ever had, now has, or which the Class Member or his or her heirs, executors, successors or assigns may at any time in the future have against the Defendant by reason of, resulting from, or in any way arising out of, related to or connected with the subject matter of this Action.

IN WITNESS WHEREOF the parties have properly executed this Settlement Agreement with full authority to do so and further acknowledge and agree that this Settlement Agreement may be executed by the parties on separate signature pages and by facsimile or PDF, each such executed counterpart constituting an original, but altogether only one agreement.

POYNER BAXTER LLP, on behalf of and with the express authority of Pierre Tremblay (Plaintiff in the Action and proposed Representative Plaintiff)

SHAW CABLESYSTEMS G.P.

Per: *PJB*

Per: _____

c/s

Per: _____

Part I. Release

- 19. All Class Members who have not opted out will be deemed to have provided a full release in the following form:

IN CONSIDERATION of the Defendant's agreement to the terms of the Settlement Agreement, each Class Member DOES HEREBY RELEASE and forever discharge the Defendant and its officers, directors, employees, agents, parent, subsidiaries, affiliates, predecessors, successors, and assigns, jointly and severally, from any and all losses, damages, debts, liabilities, costs, claims, suits, actions, causes of action, and demands whatsoever which the Class Member ever had, now has, or which the Class Member or his or her heirs, executors, successors or assigns may at any time in the future have against the Defendant by reason of, resulting from, or in any way arising out of, related to or connected with the subject matter of this Action.

IN WITNESS WHEREOF the parties have properly executed this Settlement Agreement with full authority to do so and further acknowledge and agree that this Settlement Agreement may be executed by the parties on separate signature pages and by facsimile or PDF, each such executed counterpart constituting an original, but altogether only one agreement.

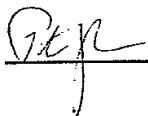
POYNER BAXTER LLP, on behalf of and with the express authority of Pierre Tremblay (Plaintiff in the Action and proposed Representative Plaintiff)


SHAW CABLESYSTEMS G.P.

Per: 

Per: _____

c/s

Per: 

SHAW
27/09/12
Approved

Legal

Schedule "D" – Settlement Notice**NOTICE OF CLASS ACTION SETTLEMENT**

If you were a customer of Shaw Cablesystems GP ("Shaw") between January 31, 2005 in British Columbia or Manitoba, or January 31, 2009 in Alberta, Ontario or Saskatchewan, up until DATE, and paid late payment interest charges on your bill during that period, your rights may be affected by a settlement of a class action lawsuit filed in the Federal Court. Read this notice carefully to find out more.

On DATE, the Federal Court approved the settlement as fair, reasonable, and in the best interest of the class, and approved this notice to inform class members of the settlement and of their legal rights.

WHAT WAS THE LAWSUIT ABOUT?

The lawsuit was brought by Pierre Tremblay and alleged that Shaw only showed late payment interest on its invoices on a monthly basis, not on an annualized basis.

WHAT WAS BEING SOUGHT IN THE LAWSUIT?

The lawsuit sought the return of late payment interest charges paid by Shaw customers during the Class Period.

WHAT CAN I GET UNDER THE SETTLEMENT?

The settlement allows Class members to select between the following benefits:

- A credit for one free Shaw Video On Demand standard definition movie rental, excluding adult movies and programming. This credit will be available for 3 months once selected; or
- A free one month Internet upgrade:
 - i) from Shaw High-Speed Lite to High-Speed;
 - ii) from High-Speed and High-Speed 10 to High-Speed 20; or
 - iii) from High-Speed 20 to Extreme,

provided that, in the event that those service packages have been rebranded within the Claims Period, the upgrade shall be from a comparable category of Internet service (based on download speeds) to the next higher category of internet service.

Class Members who do not have digital cable but choose the movie rental benefit have 3 months to use it after the earlier of their analog cable having been upgraded to digital or when digital cable was first made available by Shaw to them. Class members who are no longer Shaw customers can get the same benefits if they activate a new subscription for Shaw cable or Internet services within 5 months of DATE.

HOW CAN I TAKE PART IN THE SETTLEMENT?

If you are a Class member, you are included in the settlement automatically. Class members can call Shaw at NUMBER between DATE and DATE to select and receive their benefit. Class members who are no longer Shaw customers will have 5 months from DATE to both activate a new subscription for Shaw cable or Internet services and call Shaw to select their benefit.

OPTING OUT

If you do not want to take part in the settlement, you have to opt out by DATE. If you opt out, you will not be bound by the settlement but you will not receive any benefits.

To opt out, you must contact the lawyers for the Class and request an opt out form. You must complete the form and return it to the lawyers for the Class by DATE. If your opt out form is not received by DATE, it will not be valid and you will still be included in the settlement.

DO I NEED TO PAY ANYTHING TO TAKE PART?

No. Any fees paid to the lawyers for the class will be approved by the Court and paid by Shaw.

WHO ARE THE LAWYERS FOR THE CLASS?

The class is represented by James M. Poyner of Poyner Baxter LLP. He can be contacted at:

Poyner Baxter LLP
#408-145 Chadwick Court
North Vancouver BC V7M 3K1
604-988-6321

classaction@poynerbaxter.com

WHAT IF I WANT MORE INFORMATION?

Contact the lawyers for the class at the address above.

Schedule "E" – Opt Out Form**OPT OUT FORM**

If you **do not** want to take part in this class action against Shaw Cablesystems G.P., you must "opt out" by completing this form and returning it to the address below before **DATE**.

If you **do not** return this form before **DATE**, you will be included in the Settlement Agreement.

If you opt out:

- You will not be bound by the Settlement Agreement; but
- You will not receive any benefits under the Settlement Agreement.

FIRST NAME:

LAST NAME:

ADDRESS:

SHAW ACCOUNT NUMBER:

I confirm that I want to opt out of the Settlement Agreement.

DATE

SIGNATURE

Schedule "F" – Poyner Baxter LLP Website Content

Poyner Baxter LLP are Class Counsel in a settlement involving Shaw Cablesystems G.P. and certain of its customers who paid late payment interest charges. Particulars of the settlement have been filed with the Federal Court. Poyner Baxter LLP can be contacted at:

#408-145 Chadwick Court
North Vancouver BC V7M 3K1
604-988-6321

classaction@poynerbaxter.com

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-132-11

STYLE OF CAUSE: PIERRE TREMBLAY
v
SHAW CABLESYSTEMS G.P.

**MOTION HELD VIA VIDEOCONFERENCE ON JULY 18, 2012 FROM QUÉBEC,
PROVINCE OF QUÉBEC AND CALGARY, PROVINCE OF ALBERTA**

**REASONS FOR JUDGMENT
AND JUDGMENT:** SCOTT J.

DATED: July 23, 2012

ORAL AND WRITTEN REPRESENTATIONS BY:

James Poyner and Kenneth Baxter FOR THE PLAINTIFF

Tamela Coates and Ward Branch FOR THE DEFENDANT

SOLICITORS OF RECORD:

POYNER BAXTER LLP FOR THE PLAINTIFF
North Vancouver, British Columbia

FRASER MILNER CASGRAIN LLP FOR THE DEFENDANT
Calgary, Alberta