



Province of British Columbia

**B.C. HUMAN RIGHTS TRIBUNAL**

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**DATE:** August 27, 2012

**URGENT**

**CONFIDENTIAL**

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**RE:** **Citizens for Safe Technology Society and Citizens for Safe Technology Society on behalf of Una St. Clair and others v. B.C. Hydro -and- Corix Utilities**

**(Case Number: 9854)**

**TOTAL PAGES (including cover):** 19

**COMMENTS:**

Please find enclosed a decision respecting the Representative Complaint.

Date Issued: August 28, 2012  
File: 9854

Indexed as: Citizens for Safe Technology Society obo others v. B.C. Hydro,  
2012 BCHRT 300

IN THE MATTER OF THE *HUMAN RIGHTS CODE*  
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before  
the British Columbia Human Rights Tribunal

B E T W E E N:

Citizens for Safe Technology Society obo Una St. Clair and others

**COMPLAINANTS**

A N D:

B.C. Hydro

**RESPONDENTS**

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**REASONS FOR DECISION  
REPRESENTATIVE COMPLAINT**

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Tribunal Member:

Enid Marion

Counsel for the Complainants:

David Aaron

Counsel for the Respondent:

Shelley-May Mitchell

## **Introduction**

[1] Citizens for Safe Technology Society (“Citizens”), in a representative capacity, filed a complaint on behalf of Una St. Clair and others against B.C. Hydro (“Hydro”) alleging discrimination on the basis of physical disability, contrary to s. 8 of the *Human Rights Code*. Una St. Clair is the Executive Director of Citizens, and is also a member of the proposed class of persons on behalf of whom the complaint is brought.

[2] The Tribunal requested submissions on whether or not to accept the complaint as a representative complaint. Both parties filed extensive submissions. Citizens also filed a revised Form 2 – Representative Complaint Form and referred to certain amendments to the complaint in the course of its submissions. Hydro notes that a complaint amendment form was not filed, as required by the Tribunal’s *Rules of Practice and Procedure*. Despite this, Hydro was able to substantively respond to the issue under consideration in this decision.

[3] This decision only addresses whether to accept the complaint as a representative complaint. In order to put the decision in context, I first review the background to the complaint as provided in the materials filed by the parties. In doing so, I make no findings of fact. I also note that, for the purposes of this decision, it is not necessary to identify any individual, other than Ms. St. Clair.

## **Background**

### *The Complaint*

[4] In late spring 2011, Hydro announced that premises serviced by it would receive a wireless Smart Meter. Hydro acknowledged that some persons would object to the installation of radiofrequency-based technology and indicated it would be respectful and responsive to find mutually acceptable solutions.

[5] Citizens says that it wrote to Hydro requesting wired meters for those persons with a health diagnosis that required they avoid wireless meters. It says that Hydro replied that there was not enough market demand and it was “too troublesome” to provide wired meters.

[6] Citizens further says that Hydro was contacted throughout 2011 to the date of the complaint advising that certain persons with health concerns did not consent to the installation of wireless meters and requesting wired meters. Citizens says they were refused wired meters.

[7] Citizens says that Hydro is refusing to accommodate disabilities through the provision of wired meters and the fact that there is no available opt-out choice. In particular, it says that Hydro has discriminated against:

Those with electrohypersensitivity or medical conditions who are medically advised to avoid exposure to wireless smart meters, who have requested accommodation from Hydro and who have not received an unconditional commitment from Hydro within 3 weeks of their request that wireless smart meters would not be installed in their residence or residential complex.

[8] On the other hand, Hydro says that, in 2010, the *Clean Energy Act* was introduced which included a requirement that Hydro install and operate Smart Meters and related equipment by the end of 2012. Hydro says that this was a critical infrastructure upgrade that involved the replacement of existing meters with modern, fully-integrated Smart Meters. It says that the Smart Meter Program is expected to improve public safety, provide operating efficiencies and provide Hydro customers with tools they can use to monitor and reduce their consumption of electricity.

[9] Hydro says Citizens has participated in, or filed, various complaints against the Smart Meter Program and Hydro, including with the B.C. Utilities Commission.

#### *Legal Framework*

[10] Pursuant to s. 21 of the *Code*, the Tribunal has the discretion to refuse to accept a representative complaint. In exercising that discretion, the Tribunal has noted in several decisions the importance of representative complaints to addressing issues of systemic discrimination, and the importance of not making the requirements for proceeding with such a complaint overly onerous.

[11] For example, in *C.S.W.U. Local 1611 v. SELI Canada and others (No. 3)*, 2007 BCHRT 423, the Tribunal stated:

Representative complaints filed on behalf of a group provide the Tribunal with an effective means of addressing systemic discrimination where all members of a group are alleged to have experienced discrimination. The Tribunal must exercise care when setting the requirements necessary for proceeding with a group or class complaint to ensure that it does not make the requirements so onerous that the purposes, efficiency and advantages gained from proceeding with a representative complaint are nullified. (para. 101)

[12] In *C.S.W.U. (No. 3)*, the Tribunal also set out a number of factors it considers when assessing whether or not to accept a representative complaint for filing:

For the benefit of future representative complaints, the panel provides the following guidelines regarding the filing of a representative complaint on behalf of a group or class.

Upon the filing of such a complaint, there are three matters of concern to the Tribunal. First, as is the case with respect to all complaints, the Tribunal considers whether the complaint alleges facts which, if proven, could amount to a breach of the *Code*. This assessment is important because it defines those issues over which the Tribunal has jurisdiction.

Second, the Tribunal must determine whether the complaint as framed is appropriate for a group or class complaint. Here the factors the Tribunal may consider include whether:

- i) the group or class is defined, or is capable of definition, by clear parameters or characteristics;
- ii) the alleged contravention is similar for all members of the group or class, and, in particular, there are issues in common for all of the individuals in the group or class;
- iii) proceeding with the complaint is in the interest of the group or class on behalf of which the complaint is made.

Third, the Tribunal may consider whether:

- i) the representative has notified the group or class members of the complaint, or has proposed a method for doing so;
- ii) the representative has proposed a method for keeping the members of the group or class informed of the progress of the complaint;
- iii) the representative has notified the group or class members of a right to opt out of the complaint, or has proposed a method for doing so; and
- iv) there is a potential conflict between the members of the group or class and the representative.

These are matters which the Tribunal will, to the extent possible, at such an early stage of the proceeding, consider when making the screening decision whether to accept a representative complaint for filing. Such complaints will often be suitable for the case management stream where a Tribunal member will determine what steps should be taken. (paras. 102-106)

[13] I will review each of these factors in turn.

*Does the Complaint Allege a Breach of the Code?*

[14] Citizens says that the complaint is a representative complaint, filed in accordance with s. 21 of the *Code*, that is brought on behalf of a class of individuals persons with the following characteristics:

1. The individual is a resident of British Columbia.
2. The individual resides in a residence and/or a residential complex that gets its electricity from Hydro.
3. The individual has been advised, in writing, by a physician licensed to practice medicine in all or part of Canada, to avoid, for reasons of illness and/or disability, residing in a residence and/or residential complex at which a wireless smart meter device is operating.
4. The individual, on his/her own behalf or by way of a representative, has requested, as an accommodation, that Hydro refrain from installing and/or operating a wireless smart meter at the individual's place of residence and/or residential complex
5. Within three weeks of making the request for accommodation, the individual has not received an unconditional written commitment from Hydro that it will refrain from installing and/or operating a wireless smart meter at the individual's place of residence and/or residential complex. ("Defining Characteristics")

[15] Citizens notes that in *National Automobile, Aerospace, Transportation and General Workers of Canada (CAW – Canada) Local 111 v. Coast Mountain Bus Company (No. 7)*, 2005 BCHRT 478 ("*Coast*"), the Tribunal described the distinction between a class and group as follows:

A group of persons is a number of individuals who are identifiable, or who, with relative ease, could be identified by name for the dates relevant to the complaint. On the other hand, a "class" of persons is a number of individuals who can be described by characteristics for the dates relevant to the complaint but cannot necessarily be individually named.

[16] Citizens says that it intends to adduce evidence to identify dozens of individuals who can be described by reference to the Defining Characteristics, but that it is not necessary that every member of the class be named or known. It says that any person may claim membership in the class and entitlement to any remedy awarded by the Tribunal as long as the person can be described by reference to the Defining Characteristics.

[17] In support of what it describes as an open class membership, it relies on *Western Canadian Shopping Centres Inc., v. Dutton*, [2001] 2 S.C.R. 534 (“*Western*”):

While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person’s claim to membership in the class be determinable by stated, objective criteria....(para. 38)

[18] Citizens did identify some persons who it says meet the Defining Characteristics. The identified “illness and/or disability” was not necessarily the same in each case, and included the following:

- i) Highly electro-hypersensitive (“EHS”)
- ii) Occupational exposure induced EHS
- iii) Angioedema
- iv) MCS and EHS
- v) Genetic cardiomyopathy/defibrillator
- vi) Unspecified medical conditions
- vii) EMF hypersensitivity

[19] Citizens also identified numerous individuals who it says are interested in joining the class and who it anticipates will be advised by their physician to avoid residing in a residence or residential complex at which a wireless Smart Meter device is operating. The identified illness/disabilities for these individuals were varied, and in some cases unspecified.

[20] Despite the identification of various illnesses/disabilities, Citizens describes the disability it relies on in this case as:

An environmental sensitivity resulting in an inability to be well while residing in a residence and/or residential complex in which a wireless smart meter has been installed and/or is operating. (the "Disability")

[21] Citizens says that while the specific medical circumstances of each class member may vary, the medical circumstances give rise to the common Disability. In this regard, it says that a disability must be analyzed in terms of an individual's accommodation needs rather than their specific medical circumstances. As an example, it says that persons in a wheelchair may have different medical circumstances which cause them to be in a wheelchair, but they all have a common disability in relation to the inability to access raised curb sides.

[22] Citizens says that in all cases, the disability must be characterized in terms of the impediment that it raises to accessing the public service and the resulting need for accommodation.

[23] Citizens also says that one of the medical conditions giving rise to the Disability is EHS, and relies on reports about EHS posted on the Canadian Human Rights Commission website.

[24] On the other hand, Hydro says that the complaint does not allege a breach of the *Code*. In this regard, it relies on what it says was Citizens' failure to provide certain information requested by the Tribunal. I note, however, that Citizens did provide certain of the requested information, though it may not have been in the form, or as extensive, as anticipated by Hydro. In any event, my assessment of whether the complaint alleges a breach of the *Code* will be based on the information set out in the complaint itself. In making the assessment, the Tribunal does not consider additional information or alternative explanations asserted by a respondent: *Bailey v. B.C. (Min. of Attorney General) (No. 2)*, 2006 BCHRT 168, para. 12.

[25] Hydro says that the complaint does not allege adverse treatment of a specific set of individuals, but about the health of the province's general population. It further says that there is no specified adverse treatment, and the matter does not come within the



jurisdiction of the *Code*. In particular, it characterizes the complaint as reflective of a health preference and a disagreement with mandatory steps imposed on Hydro under provincial legislation. It says the *Code* was not intended to facilitate political lobbying with respect to actions mandated by provincial legislation. As such, it says that the complaint should be not accepted for filing.

[26] As well, Hydro says that EHS has not been established as a disability in British Columbia or elsewhere. It also says that there is nothing to establish that those persons with “medical conditions” are suffering from anything that would constitute a disability under the *Code*.

[27] Hydro further asserts that Citizens’ description of the Disability does not constitute a disability under the *Code* since it is contingent and based on the assumption that a wireless Smart Meter has been installed. In this regard, it is dependent on a future event which may not occur. As well, Hydro says that it assumes the Disability is caused by or based on the installation and operation of the Smart Meter, which it says is not the case since the alleged, unspecified medical conditions or EHS allegedly already exists.

[28] Hydro notes that the Tribunal has held that a disability involves a state that is involuntary, has some degree of permanence, and impairs a person’s ability to carry out the normal functions of life: *Schodra v. Vancouver Axle and Frame*, 2009 BCHRT 173, para. 37. It says the complaint states that members of the class choose to avoid exposure to wireless telecommunications devices, and that an individual’s personal preference is voluntary and impermanent. As such, it says that the alleged Disability is not captured by the *Code*.

[29] In reply, Citizens says the *Act* does not require Hydro to install wireless Smart Meters; and that the class is restricted to persons who have received written advice from their physicians that, due to medical conditions, they must avoid residing in a residence at which a wireless Smart Meter device is operating. As well, it says that, at this stage of the proceeding, it is not necessary for it to tender medical evidence in support of each individual within the class, as the issue before the Tribunal is whether the complaint is appropriately brought as a representative proceeding.

[30] Citizens also says that it is not necessary that Smart Meters actually be installed in an individual's residence in order to be a member of the class. Rather, it is the written advice of the physician to avoid exposure that is relevant. As well, Citizens says that it is not necessary that a class member actually be a Hydro customer. It says that the complaint is brought so as to represent affected persons who ordinarily receive the service benefits of the utility, such as co-residents, spouses and children of Hydro clients.

[31] In this case, in order to allege a breach of the *Code*, the complaint must allege a disability, adverse treatment in respect of a service customarily available to the public, and a nexus or connection between the disability and the adverse treatment. For the following reasons, I find that the complaint has made such an allegation.

[32] First, I accept that not every person in the class must be a Hydro customer, and do not consider this to be a barrier to the representative nature of the complaint. For example, if a child who allegedly has EHS was living in a home and was allegedly adversely affected by the operation of a wireless Smart Meter, that child could properly be a member of the class despite not being the Hydro customer.

[33] Second, while Citizens may have political motivations, this does not preclude it from filing a human rights complaint. Nor does the fact that an individual may have asserted both a discrimination and privacy claim as reasons for opposing the installation of a Smart Meter. What must be determined is whether the complaint, as framed, actually alleges a breach of the *Code*.

[34] Third, I accept that the complaint, with one exception, alleges various disabilities, including EHS. The exception is the reference to "unspecified medical conditions". In my view, such an assertion is too vague to form the basis of a complaint.

[35] I also agree with Citizens that it is not necessary, at this point in the proceeding, to provide medical proof of an alleged disability. Such evidence would be required in the context of an application to dismiss the complaint, a hearing on the merits of the complaint, or at the request of the Tribunal as a preliminary matter.

[36] Fourth, I accept that the complaint has also identified adverse treatment and a connection between it and the alleged disability in the form of an inability to be well, or

becoming symptomatic, in the presence of wireless technology. One might analogize this to a person with asthma who becomes ill in a home with cats and therefore must avoid such spaces.

[37] As a result, except for the “unspecified medical conditions”, the complaint alleges a breach of the *Code*.

*Is the Complaint Appropriate as a Representative Complaint*

[38] In respect of the considerations set out in the second step of the *SELI* analysis, Citizens says that the class is capable of clear definition through the application of the Defining Characteristics; the group members have issues in common in that each of the members has medical circumstances giving rise to the need to be free from wireless Smart Meters in their domestic environments, and each has been effectively denied accommodation by Hydro.

[39] On the other hand, Hydro says that the complaint amounts to a list of 45 individuals who object to the installation of wireless Smart Meters in British Columbia and who take the position that they have medical conditions that could or may be impacted by the wireless Smart Meter technology. It says that no medical evidence is referenced or provided and many characteristics include unspecified medical conditions.

[40] Hydro says the Defining Characteristics cast a wider net than Citizens' membership, and that the class is defined so broadly as to capture anyone in the Province who may allegedly suffer from any medical ailment and who may allege they have been discriminated against by the installation of Smart Meters. It also says that many of the identified individuals are not Hydro customers and many have not had a Smart Meter installed in their residence.

[41] Hydro also says that the complaint is really about an attempt to stop the installation of Smart Meters and not the need to accommodate individual medical circumstances. In this regard, it relies on various communications it has received from members of the proposed class in which, in addition to medical circumstances, other reasons are expressed for opposing the installation of the meters.

[42] In addition, Hydro says the class is not capable of clear definition: *Vorley v. British Columbia (Ministry of Solicitor General)*, 2005 BCHRT 50, para. 29. In particular, it says that the definition of the class does not bear a rational relationship to the subject matter of the complaint, and that membership is speculative and ambiguous: *Corren v. Abbotsford School Board District No. 34*, 2010 BCHRT 32, at para. 61-62. It further says that at least two members of the proposed class have written to it opposing installation of Smart Meters due to privacy issues, and not requesting accommodation or identifying any medical reason for opposing installation.

[43] As well, Hydro says that the Defining Characteristics are overly broad, and do not even apply to many of the proposed individuals in the class. It says it would require a detailed analysis by the Tribunal and Hydro to determine who, in fact, would form part of the proposed class. It says that those with undefined “medical conditions” and also those “who expect to receive medical evidence in the future” should not be allowed to form a part of the proposed class. It says that, at this point, it is impossible to accurately determine the size or scope of the proposed class, as well as Citizens’ ability to manage or represent the class.

[44] Further, Hydro says that the criteria by which individuals are included in a class should not depend on the outcome of the litigation. In this respect, it says that EHS has not been accepted as a disability by any Canadian Tribunal.

[45] Hydro also says that common issues of fact and law are not present amongst members of the proposed class, given that there are an assortment of alleged conditions and disabilities cited in the proposed class. From this, it says that it can be inferred that Hydro’s installation of Smart Meters will be alleged to impact the proposed members in a variety of ways, and that a plethora of accommodative measures may be requested.

[46] Hydro also says that even if the class was limited to those claiming to be afflicted with EHS, the complaint would still fail to contain sufficiently common issues of fact or law such that it could be appropriately pursued as a representative complaint. It says that even these proposed class members will have differing degrees of disability and their need for accommodation will differ. Each member would need to be individually assessed. It says that if the complaint were to succeed, the complaint of each member of

the class would need to be determined in the context of its individual factual matrix, defeating the purpose of proceeding with a representative complaint in the first place: *Stephen v. British Columbia (Ministry of Children and Family Development)*, 2006 BCHRT 123 at para. 27.

[47] In reply, Citizens says that it is permissible for membership of the proposed class to remain open at this stage of the proceeding. It says that once the common issues under the representative proceeding are determined, it will remain open for Hydro to challenge whether any given individual is a member of the class and entitled to relief. It also says that the need for a determination of individual issues does not undermine the propriety of a representative claim: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 (“Waldman”).

[48] Citizens further says that the Defining Characteristics are objective so as to allow for easy and objective determination of any given individual’s qualifications for class membership, and that membership is not speculative and ambiguous, but delineated by reference to the Defining Characteristics.

[49] In respect of an undefined medical condition, Citizens says that what brings an individual into the proposed class is the advice of a physician, not the particulars of the individual’s medical condition. As well, Citizens says that the class is not as broad as Hydro characterizes it to be, since it is limited by the criterion requiring written avoidance advice from a physician.

[50] In respect of conflicting positions regarding accommodation, Citizens says that this may constitute an argument of undue hardship to be advanced on an individual basis, but that it is not a relevant consideration in assessing whether to proceed with a representative complaint. Further, it says that the fact that there may need to be individual assessments of accommodation does not render a class unmanageable or lacking in commonality.

[51] Citizens also says that the appropriateness of the representative proceeding does not depend on the outcome of the litigation, but rather the class is defined on the basis of receipt of advice from a licensed physician, and not on the basis of EHS or any other specific illness.

[52] In regard to whether the class is consistent with the form of the complaint, Citizens says that neither the choice to avoid wireless telecommunication devices or affliction with “other medical conditions” are necessary or defining criteria of the proposed class.

[53] In regard to common issues of fact and law, Citizens says that each class member has in common the fact that he or she has received avoidance advice from a physician. Only one single accommodation request is contemplated by the complaint and that is that Hydro refrain from the installation of the wireless device at the residence of the afflicted Hydro customer.

[54] Finally, Citizens says that Hydro’s allegations of potential conflicts of interest is pure conjecture and speculation.

[55] For the following reasons, I find that the defined class is not capable of clear definition and is overbroad. I also find that a class restricted to those persons who have been diagnosed with EHS would be appropriate for a representative complaint.

[56] First, I agree with Hydro that the complaint casts too broad a net. It is simply unmanageable to have a plethora of various medical conditions that must be proven and linked to the adverse treatment. The issues and evidence respecting whether the various conditions constitute a disability, whether there is a nexus between the disability and the adverse treatment, and if so whether Hydro either has proven a *bona fide* reasonable justification for the installation of wireless Smart Meters or reasonably accommodated the disability will be of differing complexity and focus, dependent on the nature of the alleged disability.

[57] Second, while I accept that membership in a class may be open-ended, the defining characteristics must be specific enough to clearly delineate membership. I agree with Hydro that, as currently framed, any person with a medical condition, diagnosed or undiagnosed, could conceivably fall within the class. Such broad membership means that that there will be divergent issues of fact and law among the members of the class, given the types of evidence and legal arguments to be made in respect of each alleged disability, the impact (if any) of wireless Smart Meter technology on the disability and the form of resultant accommodation required, if any.

[58] I also note in this regard that the disability, or particulars of the medical condition, must be specified. A vague and medically-unsubstantiated reference by a physician to avoid wireless technology is insufficient to constitute a disability. There must be a medical diagnosis, as well as a contraindication for exposure to such technology because of its effect on the medical condition.

[59] Third, I disagree with Hydro that a class limited to those claiming to be afflicted with EHS would fail to contain common issues of fact and law. For example, the issues of whether or not EHS is a disability, and whether exposure to wireless Smart Meters adversely affects persons with EHS to a degree requiring accommodation are common issues. In any representative complaint, individual circumstances may ultimately need to be explored if a systemic breach of the *Code* is found: *Coast*, paras. 52-56.

[60] In summary, the class, as defined, is overbroad. However, a class restricted to those persons allegedly diagnosed with EHS and who have been advised to avoid exposure to wireless technology would be appropriate as a representative complaint.

#### *Notification, Opt Out and Conflict Issues*

[61] Citizens says that it is ideal, as a representative, to facilitate:

- i) Pooling individual resources;
- ii) Effective participatory governance with respect to representational matters;
- iii) Effecting communication with respect to representational matters; and
- iv) Administering the prosecution of the complaint.

[62] Citizens says that it is vastly networked amongst a community of British Columbians opposed to Hydro's installation and operation of wireless Smart Meters. It says that it can be anticipated that it will take sufficient steps to keep the class members advised about the complaint and its status.

[63] Citizens also says there is no potential for a conflict between the members of the class and the Society, and that the complaint is in the interests of the class. The Society also notes that while it has obtained written authorization from each known member of the class, it is not a requirement that such authorization be obtained for the Tribunal to accept a representative complaint for filing.

[64] Citizens also says that, in the event the Tribunal finds there to be deficiencies in the manner in which the representative complaint is brought, then those deficiencies should be addressed by way of amendment to the complaint rather than dismissal: *Corren v. Abbotsford School Board District No. 34*, 2010 BCHRT 32.

[65] In regard to authority, Citizens says that the executed versions of the individual representative complaint forms previously filed with the Tribunal constitute a sufficient basis for determining the issue of authority.

[66] By way of the remedy, Citizens seeks the following:

1. A declaration that Hydro has discriminated against each person in the class by failing to provide each person in the class with an unconditional written commitment that it will refrain from installing and/or operating a wireless smart meter at the individual's place of residence and/or residential complex.
2. An order that Hydro cease and desist the discriminatory conduct forthwith.

[67] Citizens says that the remedy, if granted, would not result in an outcome binding on any person in the class, but would be available to any person in the class. An individual could, however, choose to opt out of the complainant or reject the remedy.

[68] Citizens says that the representative manner of proceeding provides the Tribunal with an effective means of addressing the discrimination that the members of the class have experienced when accessing Hydro's service.

[69] On the other hand, Hydro says that Citizens is neither an adequate nor appropriate representative of the class because:

- i) It has failed to communicate adequately with the Tribunal, and in doing so, has demonstrated a lack of diligence and commitment;
- ii) It has failed to notify the proposed class members of the existence of the complaint and has failed to detail or propose a method for keeping members of the proposed class informed of the progress of the complaint. In this respect, it notes that the class is not restricted to Citizens' members, and that no plans were put forward for communicating with persons who were not members of Citizens. Hydro says that where a complainant has been found to have limited its communication efforts to a small subset of the proposed group or class, the Tribunal has accordingly limited the size of the group or



class before accepting the complaint for filing: *SELI*, para. 80. 86 and *Corren*, para. 68.

- iii) Citizens has failed to notify proposed members of the class of the right to opt-out of the complaint;
- iv) There is a potential conflict between members of the class and Citizens. In this respect, it says that, given how broadly defined the class is, and the differing levels of accommodation to be considered, there will likely be conflicts amongst members in terms of strategy, goals and possible settlement. It says that Citizens' political interest in ceasing wireless Smart Meter installation everywhere is in conflict with the best interests of the individuals it purports to represent; and
- v) Citizens has failed to provide particulars of authority or establish that it has authority.

[70] In respect of the adequacy of the representative complaint, Citizens says that, at this stage of the proceeding, the "litigation plan" need only provide a reasonable framework for the issues reasonably expected to arise as the case proceeds: *Waldman*. It says that the need for a communication plan should not be strictly construed and the development and execution of such a plan should be an ongoing work in progress, analogous to the "litigation plan" referred to in *Waldman*.

[71] After considering the parties' submissions, and for the following reasons, I am persuaded that Citizens is an appropriate representative.

[72] First, in *CSWU No. 3*, the Tribunal held that the *Code* does not require that the members of a group or class authorize the filing of a representative complaint on their behalf, nor does it require the representative to canvas all members of the group or class with respect to their interest in proceeding. The Tribunal noted that:

... human rights legislation creates fundamental public policy. Discrimination is not only an offence *vis-à-vis* the individual affected, but is also an offence to society at large. Requiring every member of a group or class to authorize the filing of a representative complaint on their behalf would weaken the public policy aspect of human rights legislation by treating a representative complaint as nothing more than a consolidation of several individual complaints which the Tribunal has decided to deal with together under s. 21(6).

Requiring a representative to obtain an authorization from, or canvas, members of a vulnerable group would likely act as a deterrent to their participation in a representative complaint. Further, it would clearly not be an efficient, or in some cases even a viable, way of proceeding, for

example, where the group is large or the complaint is filed on behalf of a class. (paras. 73-74)

[73] In this case, the Society has filed written authorizations from numerous individuals. I find it has the requisite authority.

[74] As well, the Tribunal held that the nature and scope of notice and communication obligations with the group or class would depend on the individual circumstances in any complaint. The Tribunal has stated that it will not hold representatives to a standard of perfection, as to do so would undermine the ability of representative complaints to proceed, which would be contrary to the purposes of the *Code: CSWU*, para. 86. I am satisfied that Citizens has proposed a means of communication which is sufficient at this stage of the proceeding.

[75] Having said this, I accept Hydro's position that when communication efforts have been limited to a small subset of a proposed class, the Tribunal has limited the size of the class before accepting the complaint for filing. Since I have already concluded that the class is overbroad, the narrowing of the class should address this issue.

[76] I also note that in *Corren* (para. 53), the Tribunal stated that there is no obligation under the *Code* that a member of a complainant group or class be advised about the right to opt out, though the Tribunal may find it appropriate, in any given circumstance, to direct that a representative provide notice to members of the right to do so. At this stage of the proceeding, I am not persuaded that it is necessary to make such an order.

### **Summary**

[77] In summary, I have concluded that the complaint alleges a potential breach of the *Code*, Citizens is an appropriate representative, but that the class, as currently defined, is overly broad.

[78] If Citizens wishes to amend its complaint to restrict the class to those persons allegedly diagnosed with EHS who have been advised to avoid wireless technology, then it must file such an amendment within 30 days of the date of this decision.

[79] If it does so, then the Tribunal will schedule a pre-hearing conference call to discuss any issues arising out of the amendment, including whether to invite written submissions or, alternatively, hold a hearing on the discrete issue of whether or not EHS is a disability for the purposes of the *Code*.

  
Enid Marion, Tribunal Member