Court File No. CV-21-00670953-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

DAVID TRUEMAN

Plaintiff

- and -

ROGERS COMMUNICATIONS CANADA INC.

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

STATEMENT OF DEFENCE

1. Rogers Communications Canada Inc. (**Rogers**), admits the allegations contained in the first sentence of paragraph 13 and the first sentence of paragraph 15 of the Second Amended Statement of Claim dated April 8, 2022 (the **Statement of Claim**).

2. Rogers denies the balance of the allegations in the Statement of Claim and specifically denies that the plaintiff and the proposed class are entitled to any of the relief claimed.

Overview

3. This is an action about the collection and use of credit information, using non-intrusive privacy protective means, to pre-approve existing customers for Rogers branded credit cards. The plaintiff has suffered no loss and he alleges none. Nevertheless, he seeks to certify a $22 million global class action against Rogers on the basis that Rogers did not give its consumer

customers sufficient notice that it would collect and use their credit information for marketing purposes.

4. The action is doomed to fail. The credit information that is collected and used to preapprove customers for Rogers branded credit cards is known as a "soft credit inquiry." Soft credit inquiry information is only collected and used to assess customers' eligibility for Rogers branded credit cards. It is not collected or used for any other purpose.

5. Soft credit inquiries are inherently privacy protective. They have no impact on customers' credit scores and are only visible to the individual customer. They are not visible to any third party, and they are not disclosed to any third party. No soft credit inquiry information is shared outside the Rogers group of companies. It is not even shared widely within the Rogers group of companies. Only Rogers and Rogers Bank handle this information. The collection and use of this information had no impact on the plaintiff's credit file nor on any other customer's credit file. Neither the plaintiff nor anyone in the proposed class has suffered any harm. None of the causes of action pleaded provide compensation in these circumstances.

6. In fact, Rogers customers, including the plaintiff, provided express consent for the collection and use of soft credit inquiry information to assess their eligibility for Rogers branded credit cards. This consent is contained in Rogers' standard contractual documents.

7. By agreeing to Rogers' standard terms of service, the plaintiff also agreed that he would not sue Rogers for "breach of privacy" claims, including claims related to marketing initiatives or communications. This is a complete bar to this proceeding. In addition, Rogers' contracts with customers living outside of Québec, Ontario, and Alberta require any claims to be resolved through arbitration. The plaintiff cannot advance a class action on behalf of these people.

8. The plaintiff's own claim is also out of time.

9. This proposed class action has no merit and would be an enormous waste of judicial resources. It should be dismissed with costs.

The Parties

10. Rogers is a telecommunications company incorporated under the laws of Canada, with registered offices in Toronto, Ontario. Rogers provides cellular voice and data communication services, cable television, high-speed Internet, telephone services, and home security products to businesses and individuals in Canada. Rogers branded credit cards are provided by Rogers Bank, a member of the Rogers group of companies.

11. The plaintiff was a Rogers consumer customer between May 2, 2011 and December 7, 2021. During this period, the plaintiff subscribed to several Rogers services, including cable television, home Internet, and home phone services.

Soft Credit Inquiries

12. Soft credit inquiries are a non-intrusive method for reviewing an individual's credit file without affecting their credit score. Unlike a regular or "hard" credit inquiry, soft credit inquiries have no impact on an individual's ability to obtain credit. Soft credit inquiries are inherently privacy protective. They do not show up on an individual's credit report and are only visible to the individual themself. No third party can see a soft credit inquiry in the credit file.

13. Soft credit inquiries are used to assess customers' eligibility for Rogers branded credit cards issued by Rogers Bank. Soft credit inquiries are not used for any other purpose and,

contrary to the allegation in paragraphs 33, 40, and 48(d) of the Statement of Claim, soft credit information is not shared with third parties. This information is only used by Rogers Bank.

14. The practice of conducting and using soft credit inquiry information to assess consumer customers' eligibility for Rogers branded credit cards began in 2015.

Service Agreement

15. When an individual signs up for a Rogers product or service, they agree to a service agreement. These agreements lay out important terms of the relationship, including the most up-to-date versions of Rogers' terms of service, acceptable use policy, and privacy policy.

16. If a customer requests changes to their current services, they are provided with an updated service agreement. While his Rogers account remained active, the plaintiff made no fewer than 10 changes to his subscribed services. On each occasion, he verbally consented to the change of service and subsequently received an updated copy of his service agreement, including the terms of service and privacy policy.

17. At no time did the plaintiff dispute the terms contained in his service agreement. Instead, by continuing to use his Rogers services, the plaintiff agreed to its terms.

Terms of Service

18. The terms of service set out several important contractual terms, including limits on Rogers' liability, terms for dispute resolution, and Rogers' privacy policy.

19. ***Limitation of Liability*****.** At all material times, the Rogers terms of service have expressly limited Rogers' liability for damages in breach of privacy claims, including those relating to Rogers' marketing practices.

20. For example, the plaintiff's terms of service provided:

> **9c. How does Rogers limit its liability?**
>
> Unless otherwise specifically set out in an Agreement, to the maximum extent permitted by applicable law, and except towards Residents of Québec** for damages resulting from a Rogers Party's own act, the Rogers Parties will not be liable to you or to any third party for:
>
> i. Not applicable to Residents of Québec**: any direct, indirect, special, consequential, incidental, economic or punitive damages (including loss of profit or revenue; financial loss; loss of business opportunities; loss, destruction or alteration of data, files or software; breach of privacy or security; property damage; personal injury; death; or any other foreseeable or unforeseeable loss, however caused) resulting or relating directly or indirectly from or relating to the Offering or any advertisements, promotions or statements relating to any of the foregoing, even if we were negligent or were advised of the possibility of such damages. [Underlining added]

21. Rogers' terms of service change from time to time. At all material times, the terms of service have contained either the same or a substantively similar limitation of liability clause.

22. The limitation of liability clause is a complete bar to the plaintiff's claim.

23. ***Mandatory Arbitration*.** At all material times, Rogers' terms of service have included a mandatory arbitration clause, requiring disputes to be determined by final and binding arbitration, to the exclusion of the courts (the **Arbitration Clause**).

24. The current terms of service, for example, state:

> […] To the extent permitted by applicable law, unless we agree otherwise, any claim or dispute, whether in contract or tort, under statute or regulation, or otherwise, and whether pre-existing, present or future, arising out of or relating to the following items will be determined by final and binding arbitration to the exclusion of the courts: [Underlining added]
>
> i. an Agreement;

ii. the Services or Equipment;

iii. oral or written statements, advertisements or promotions relating to an Agreement, the Services or Equipment; or

iv. the relationships that result from an Agreement.

25. Customers who live outside of Québec, Ontario, and Alberta are required, by virtue of the Arbitration Clause, to have their disputes with Rogers resolved through arbitration.

26. ***Privacy policy***. At all material times, Rogers' privacy policy has notified customers that their personal information would be used to assess their eligibility for, and to market to them, Rogers' products and services, including those offered by Rogers Bank. Customers who did not wish to receive marketing could opt out.

27. Contrary to the allegations at paragraphs 9 and 29 of the Statement of Claim, at all material times, customers were given the appropriate notice that Rogers would use their soft credit inquiry information to assess eligibility for Rogers branded credit cards.

28. For example, in 2015, when soft credit inquiries began to be used to assess customers' eligibility for Rogers branded credit cards, the Rogers privacy policy Q&A, publicly available on Rogers' website, stated:

> Your personal and account information may also be shared with other Rogers' companies or affiliates, such as Rogers Bank, in order for them to assess your eligibility for their products or services; to directly provide you offers about their products or services; to confirm or authenticate your identity and ensure they have your correct and up-to-date information; to manage credit risk or other business risk; to better understand your needs and to serve you better; to process any offers or loyalty credits; or to detect, prevent, manage, and investigate fraud or other unauthorized or illegal activity.

29. Rogers Bank only offers credit cards. It does not offer chequing accounts, savings accounts, or other deposit taking services. When customers were told their information would be used to assess their eligibility for, among other things Rogers Bank services, that consent necessarily included Rogers branded credit cards issued by Rogers Bank.

30. The privacy policy Q&A was incorporated by reference into Rogers' terms of service. It formed part of the plaintiff's contract with Rogers as well as the contracts of the other proposed class members.

31. The Rogers privacy policy has been updated from time to time. The version of the privacy policy that governs the plaintiff's contract states, among other things, that customers' information may be collected "from credit agencies or members or affiliates of the Rogers Communications Inc. organization, such as Rogers Bank" and that customer information may be used "to evaluate eligibility for other Rogers' products and services."

32. Contrary to the allegations at paragraphs 10, 11, and 30 of the Statement of Claim, by agreeing to the privacy policy, the plaintiff and every other Rogers customer provided their express consent to the collection and use of soft credit information to assess their eligibility for Rogers branded credit cards.

No Intrusion on Seclusion

33. The plaintiff cannot meet the high bar required to establish the serious claim that there was an intrusion on seclusion. The authorized collection of soft credit inquiry information, which has no impact on a customer's credit score, for the limited purpose of assessing eligibility for a Rogers branded credit card, is clearly not an intentional intrusion on one's privacy in a manner that would be highly offensive to a reasonable person.

34. As set out above, the plaintiff knew or should have known that soft credit inquiry information would be collected and used this way. This was clearly set out in his terms of service. By continuing to use his Rogers products and services, the plaintiff authorized soft credit inquiries for the purposes of assessing his eligibility for a Rogers branded credit card.

35. A reasonable person would not regard the collection and use of soft credit inquiry information in these circumstances as being highly offensive, causing distress, humiliation, or anguish. The soft credit inquiries had no impact on the plaintiff's credit score, were not visible on his credit report, they were conducted for a legitimate business purpose, and the information was not disclosed to anyone other than Rogers Bank.

36. Instead, the plaintiff and others in the proposed class benefitted. They were given preferential and expedited access to Rogers branded credit cards, and any special offers, or other rewards that may come with a Rogers branded credit card.

37. Moreover, the common law tort of intrusion on seclusion is not recognized in every Canadian common law jurisdiction. Proposed class members in jurisdictions that have not recognized the tort do not have a claim under this cause of action.

No Breach of Confidence

38. To make out a breach of confidence claim, the plaintiff must establish that Rogers misused or misappropriated his information. Rogers did neither.

39. The plaintiff's claim for breach of confidence is entirely dependent on his claim for breach of contract. Any obligation of confidence, and what that obligation entailed, is based on Rogers' contractual obligations.

40. The plaintiff's soft credit information was not collected or used for a non-permitted purpose. The plaintiff received no fewer than 10 copies of Rogers' terms of service and privacy policy since 2015, each notifying him that his soft credit information might be used for marketing purposes. The plaintiff knew or should have known of these soft credit inquiries. By continuing to use his Rogers products and services, the plaintiff consented to them as a term of his service agreement with Rogers.

41. More fundamentally, the plaintiff has suffered no detriment, which is a necessary element of a breach of confidence claim. The plaintiff and the class he proposes to represent have suffered no harm as a result of the fact that their soft credit inquiry information was collected and used to preapprove them for Rogers branded credit cards.

No Breach of Contract

42. Rogers denies the allegations at paragraphs 41-48 of the Statement of Claim that it breached any contract with the plaintiff.

43. The plaintiff's allegations are based entirely on his assertion that Rogers conducted soft credit inquiries for marketing purposes without his consent. As set out above, at all material times, Rogers' service agreement has authorized the collection and use of personal information for marketing purposes.

44. The plaintiff received notice of and consented to Rogers' practice through the continued use of his Rogers products and services.

45. Even if there were a breach of contract (and there was none), the plaintiff has suffered no damages that are recoverable under any principle of contract law.

No Breach of the *Civil Code of Québec*

46. Rogers denies the allegations at paragraphs 49-51 of the Statement of Claim that it breached articles 35, 36, and 37 of the *Civil Code of Québec* (***CCQ***). The fact that the plaintiff agreed to Rogers conducting soft credit inquiries for marketing and promotional purposes under the terms of service is a complete answer to this claim.

47. Rogers denies that the plaintiff has suffered any damages. The plaintiff is not entitled to moral and material damages, as alleged at paragraph 50 of the Statement of Claim.

48. Rogers denies any liability under article 1457 of the *CCQ*. Because the plaintiff and every member of the class he proposes to represent had a contract with Rogers, there is no cause of action under this article.

49. Paragraph 50 of the Statement of Claim pleads articles 1463 and 1464 of the *CCQ* without any particulars. Rogers denies that it has any liability or that there is any tenable cause of action under these articles.

Withdrawal of Consent to Marketing

50. Contrary to the allegations in paragraphs 27, 28, and 33, Rogers properly complied with the plaintiff's request that he no longer receive marketing communications for Rogers products. The plaintiff's requests were always expressed in general terms related to receiving promotional offers from Rogers. Rogers ceased marketing outreach when it received this request (*i.e.*, Rogers stopped sending the plaintiff promotional material by email and stopped making telephone marketing calls to the plaintiff).

51. The plaintiff did not initially advise Rogers that, in addition to his wish not to receive general marketing, he also did not want Rogers to proceed with soft credit inquiries for the purpose of verifying his eligibility for a Rogers branded credit card. As soon as Rogers received this specific request, it stopped collecting and using the plaintiff's soft credit information.

Compliance with Statutes

52. At all times, Rogers fulfilled its obligations under the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c 5 (***PIPEDA***) and the *Consumer Reporting Act*, RSO 1990, c C.33.

53. Contrary to the suggestion at paragraph 46 and 47 of the Statement of Claim, Rogers did not breach *PIPEDA* or the *Consumer Reporting Act*. Breach of statute (and there was none here) is also not a cause of action.

Plaintiff's Claim is Out of Time

54. The plaintiff's claim was commenced after the expiry of the basic limitation period in the *Limitations Act, 2002*, SO 2002, c 24, Sched B.

55. The collection and use of soft credit information began more than half a decade ago, in 2015. The plaintiff knew or ought reasonably to have known of the material facts on which he now relies more than two years before this claim was commenced.

No Damage

56. Even if the plaintiff could establish liability (and he cannot), neither he nor anyone else in the class he proposes to represent has suffered a loss or damage that is recognized in law.

57. The plaintiff and the proposed class members are not entitled to any of the damages claimed at paragraphs 52-54 of the Statement of Claim. In particular:

(a) The plaintiff and proposed class members have suffered no financial harm and are not entitled to damages for "injury to dignity," anxiety, or frustration.

(b) Contrary to paragraph 52(f), there is no basis for "wasted time" damages. This is not a recognized head of damages. There is also no objective basis for "wasted" time. Soft credit inquiries are inherently privacy protective. They have no impact on an individual's credit score and they do not form part of the individual's credit report. There was nothing the plaintiff or proposed class members needed to do to maintain their privacy. It was always protected.

(c) Contrary to paragraph 53, the emotional reaction of the plaintiff or any other proposed class member would be highly individualized, based on each person's individual experience. A global uniform assessment of either the objective reasonableness of these reactions or any entitlement to damages (which is denied) would be impossible in the aggregate.

(d) Contrary to paragraph 54, the plaintiff and proposed class members are not entitled to punitive damages. Rogers did not engage in any conduct that warrants this extreme remedy. The soft credit inquiries were conducted for a legitimate business purpose and Rogers was not (contrary to the allegation at paragraphs 30 and 48 of the Statement of Claim) "enriched" by this practice—credit cards are ultimately only issued to customers who apply for them and are approved.

No Jurisdiction to Apply Extra-provincial Statutory Torts

58. The Statement of Claim proposes to advance claims based on statutory torts contained in extra-provincial legislation. These statues grant exclusive jurisdiction to the superior courts of the enacting province. The Ontario courts do not have jurisdiction to apply these torts.

No Jurisdiction over Class Members Outside of Québec, Ontario, and Alberta

59. Class members residing outside of Québec, Ontario, and Alberta are subject to the Arbitration Clause. As described above, the clause requires these customers to submit all disputes to binding arbitration.

60. The court has no jurisdiction over claims by these members of the proposed class.

61. Rogers pleads and relies on the *Arbitration Act, 1991,* SO 1991, c 17.

Class Proceeding

62. Rogers denies that a class proceeding would be the preferable procedure for the resolution of the claims in this proposed class action.

63. There are numerous versions of the Rogers service agreement in force across the proposed class. While all versions provided the appropriate level of notice and consent, a common assessment of proposed class members' contractual rights would be unmanageable and inevitably devolve into individual issues, including the contents of customers' individual telephone conversations when they requested changes to their accounts. The plaintiff, for example, contracted 10 different changes to his account, all over the telephone.

64. Rogers denies that the proposed class definition is reasonable or appropriate. Among other things, it covers a time period when soft credit information was not collected and includes individuals over whom the court does not have jurisdiction.

65. Rogers reserves the right to further defend the claims of the proposed class and to amend this statement of defence if the action is certified as a class proceeding.

Legislation

66. Rogers is a federally regulated entity subject to the exclusive constitutional jurisdiction of Parliament. Rogers does not accept that it is subject to regulation through provincial legislation and reserves its right to challenge the application of such legislation on constitutional grounds.

67. Rogers relies on the following legislation, as amended, and all regulations thereunder, subject to paragraph 66 above:

(a) *The Constitution Act*, 1867, 30 & 31 Vict, c 3;

(b) *Arbitration Act, 1991*, SO 1991, c 17;

(c) *Civil Code of Québec, LRQ, c C-1991* and *Act Respecting the Protection of Personal Information in the Private Sector*, RSQ, c P-39.1;

(d) *Consumer Reporting Act*, RSO 1990, c C.33;

(e) *Courts of Justice Act*, RSO 1980, c 43;

(f) *Limitations Act, 2002*, SO 2002, c 24, Sched B;

(g) *Personal Information Protection Act*, SA 2003, c P-6.5;

(h) *Personal Information Protection Act*, SBC 2003, c 63;

(i) *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5;

(j) *Privacy Act*, CCSM, c P125;

(k) *Privacy Act*, RSBC 1996, c 373;

(l) *Privacy Act*, RSNL 1990, c P-22; and

(m) *Privacy Act*, RSS 1978, c P-24.

68. The action should be dismissed with costs.

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Proceeding commenced at TORONTO

STATEMENT OF DEFENCE

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