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*

REPLY

1. The Plaintiff admits the allegations contained in the first sentence of paragraph 11 of the Statement of Defence. With regard to the second sentence of paragraph 11, the Plaintiff subscribed to Rogers cable television and home internet services between May 2, 2011, and December 7, 2021. He subscribed to home telephone services for only a brief period of time near the beginning of his tenure as a Rogers customer.

2. The Plaintiff has no knowledge of the allegations contained in paragraph 14 of the Statement of Defence.

3. The Plaintiff denies all other allegations in the Statement of Defence unless otherwise specifically admitted herein.

SOFT CREDIT CHECKS ARE BREACHES OF PRIVACY

4. The Defendant ("Rogers") alleges that it conducted only soft credit inquiries of the Plaintiff's credit information. The Plaintiff denies that only soft credit inquiries were completed of his credit information.

5. Even if only soft credit inquiries were completed, which is denied, such inquiries nevertheless resulted in the repeated disclosure of the Plaintiff's entire credit file and breached his privacy interest in his personal credit information.

6. The privacy intrusion associated with a soft credit inquiry is no less than that associated with any other forms of credit inquiry which impact an individual's credit score.

LACK OF CONSENT FOR ROGERS BANK OBTAINING CREDIT SCORE INFORMATION TO ASSESS ELIBILIGY FOR CREDIT CARDS

7. At no time whatsoever was the Plaintiff informed that Rogers would be accessing his personal information, including his credit information, for the purpose of assessing his eligibility for a Rogers-branded credit card. The Plaintiff never applied for a Rogers-branded credit card, and he never consented to such a use of his personal information.

8. Nothing in the Rogers Residential Services Agreement (the "Agreement") explicitly authorizes Rogers Bank to access, store, or use Rogers communications customers' credit information in order to assess their eligibility for a Rogers-branded credit card, regardless of whether they applied to receive the credit card or not.

9. Assessing eligibility for a credit card bears no relationship to any of the services for which Rogers communications customers contracted. The business of providing credit card services is wholly unrelated to the business of providing communications services. The use of Rogers communications customer personal information in support of a functionally separate Rogers credit card business is a purpose that falls well outside of an ordinary use for personal information that was within the Plaintiff's contemplation or that would have been within the contemplation of any reasonable customer. Accordingly, it was incumbent upon Rogers to obtain its customers' explicit, informed consent for their personal information, including their credit information, to be used for this purpose, which it failed to do.

10. When the Plaintiff first applied to become a Rogers customer, he understood that Rogers might review his credit score on a single, initial occasion in order to assess his creditworthiness for Rogers communications services. He consented to this one-time use of his personal information. The Plaintiff was not informed that he would be subjected to repeated credit checks, multiple times per year, for purposes entirely unrelated to the Rogers communications services for which he was contracting. He would not have consented, and did not consent, to this use of his personal information.

THE LIMITATION OF LIABILITY CLAUSE DOES NOT APPLY OR IS UNENFORCEABLE

11. The Plaintiff specifically denies that the limitation of liability clause referred to at paragraphs 20-22 of the Statement of Defence applies to his claims or the claims of the Class Members. The terms of the limitation of liability clause on which Rogers seeks to rely are not applicable to an intentional invasion of privacy such as is alleged here, rather than an inadvertent or negligent breach of privacy.

12. Further, or in the alternative, the limitation of liability clause is unenforceable because it is unconscionable. In particular:

a. the limitation of liability clause is not included or referenced in the main Agreement document and can only be found in the incorporated Terms of Service document;

b. a limitation of liability clause in a consumer contract significantly compromises the consumer's rights and, consequently, must be brought to the consumer's attention in the main Agreement (whether directly or through a warning that the Terms of Service contain such a clause);

c. no Rogers employee brought the limitation of liability clause to the Plaintiff's attention, either orally or in writing, when he initially applied to become a Rogers customer or at any time thereafter while he was a Rogers customer;

d. as a result, the Plaintiff had no knowledge when he entered into the Agreement Residential Services Agreement that there was a limitation of liability clause buried within the Terms of Service, nor did he ever become aware of the limitation of liability clause while he was a Rogers customer;

e. Rogers is a multi-billion dollar corporation, which is one of the few major players in Canada's concentrated telecommunications market. The Plaintiff and Class Members are unsophisticated consumers, who are presented with the Agreement, a contract of adhesion, on a "take it or leave it" basis. Neither the Plaintiff nor any of the Class Members are able to negotiate any of the terms of the Agreement, and they are subjected to a massive disparity in bargaining power with Rogers.

13. Further, or in the alternative, the limitation of liability clause is contrary to public policy and ought not to be enforceable. If read as Rogers proposes, the limitation of liability clause would have the effect of allowing Rogers to pry into the private affairs of its customers with complete impunity. If this reading is the true construction of the contract, which is denied, Rogers can effectively access any private information of any of its customers, for any purpose and without customers' knowledge or consent, and avoid all legal liability for doing so.

14. Rogers' proposed reading of the limitation of liability clause fundamentally undermines the statutory protections afforded by the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (and similar provincial legislation), various provincial consumer protection instruments, and the evolving common law recognition of Canadians' privacy interests

in a digital world. A clause that allows a company to contract out of these protections unilaterally is contrary to public policy and cannot be enforced.

15. The unconscionability is highlighted by the fact that the Plaintiff and proposed Class Members do not have a meaningful choice as to whether or not to contract for the services provided under the Agreement. Internet access is effectively necessary to participate in modern society, and Rogers enjoys a dominant position in the provision of internet services in Canada.

THE ARBITRATION CLAUSE IS UNENFORCEABLE

16. The Plaintiff specifically denies that the arbitration clause referred to at paragraphs 23-25 of the Statement of Defence is enforceable as against the Class Members who live outside of Alberta, Ontario and Québec, because it is unconscionable. In particular:

a. the arbitration clause is not included or referenced in the main Agreement. It is only referenced in the Terms of Service, and the actual terms of the purported mandatory arbitration are contained in a separate Arbitration Protocol document;

b. the Arbitration Protocol is not provided to customers when they enter into the Agreement, or when they make adjustments to their services, and is only available in an obscure location on the Rogers website;

c. a mandatory arbitration clause in a consumer contract significantly compromises the consumer's rights and, consequently, must be brought to the consumer's attention in the main Agreement (whether directly or through a warning that the Terms of Service contain a clause stipulating arbitration under the terms of the Arbitration Protocol);

d. the Agreement is a contract of adhesion presented to consumer customers such as the Plaintiff in a "take it or leave it" fashion. None of the Class Members were able

to negotiate any of the terms of the Agreement, and they were subjected to a massive disparity in bargaining power with Rogers, which is Canada's second-largest telecommunications company.

e. the Terms of Service are misleading as to the rules governing the arbitration. While they state that Rogers will "pay all reasonable costs associated with the arbitration", the Arbitration Protocol stipulates that claimants are responsible for the "costs, fees and expenses" necessary to prosecute their claims;

f. the terms of the Arbitration Protocol are unilateral and asymmetric, since the Arbitration Protocol states that it applies only to arbitrations initiated by a "Rogers customer". There is no framework specified for arbitrations initiated by Rogers;

g. Rogers is a multi-billion dollar corporation, which is one of the few major players in Canada's concentrated telecommunications market. The Plaintiff and Class Members are unsophisticated consumers, who are presented with the Agreement, a contract of adhesion, on a "take it or leave it" basis. Neither the Plaintiff nor any of the Class Members are able to negotiate any of the terms of the Agreement, and they are subjected to a massive disparity in bargaining power with Rogers;

h. the arbitration agreement exists solely for the benefit of Rogers, by depriving the subject Class Members of the possibility of litigating their claims on a class basis and obtaining restitutionary or declaratory relief for their claims;

i. the arbitration agreement does not confer jurisdiction on the arbitrator to provide restitutionary or declaratory relief, and arbitrations under the Arbitration Protocol would be private and confidential;

j. the Arbitration Protocol does not permit or contemplate group or mass arbitration; and

k. the arbitration agreement is improvident. The Arbitration Protocol would impose all "costs, fees and expenses" necessary to prosecute a claim on the subject Class Member. Given the complexity of legal issues necessary to resolve a Class Member's claim, the need to prosecute each such claim on a one-off, individualized basis through the arbitration process, the arbitration agreement's provision that costs be borne by the claimant, and the relatively low quantum of award that a Class Member could expect to recover from their claim, the arbitration agreement renders the subject Class Members' claims impossibly uneconomical to pursue through arbitration.

17. Even if Class Members reviewed or were aware of the arbitration clause, which is denied, they could not reasonably have expected it to apply to conduct by Rogers that was unrelated to the communications services for which they contracted.

18. Further, or in the alternative, the arbitration agreement is contrary to public policy and ought not to be enforceable, on the same bases that the limitation of liability clause is contrary to public policy and consequently unenforceable.

THE PLAINTIFF'S CLAIM IS NOT OUT OF TIME

19. The Plaintiff denies that his claim is barred by the *Limitation Act, 2002*, S.O. 2002, c. 24, Schedule B, as alleged by the Defendant. No limitation period began to run until after the Plaintiff first discovered, in the summer of 2019, that Rogers had initiated credit checks/account review inquiries with TransUnion, and therefore that his privacy had been unlawfully breached and that a proceeding against the Defendant would be an appropriate means to seek a remedy for the injury, loss or damage that he suffered.

April 25, 2022

WADDELL PHILLIPS
PROFESSIONAL CORPORATION
36 Toronto Street, Suite 1120
Toronto, ON M5C 2C5

Margaret L. Waddell (LSO No.: 29860U)
marg@waddellphillips.ca
John-Otto Phillips (LSO No.: 70097N)
otto@waddellphillips.ca
Adam Babiak (LSO No.: 77899C)
adam@waddellphillips.ca

Tel: 647.261.4486

Lawyers for the Plaintiff

TO: **TORYS LLP**
79 Wellington Street West, Suite 3000
Box 270, TD South Tower
Toronto, ON M5K 1N2

Sylvie Rodrigue (LSO No.: 54834L)
srodrigue@torys.com
Shalom Cumbo-Steinmetz (LSO No.: 72181J)
scumbo-steinmetz@torys.com
Norman Chung (LSO No.: 81638D)
nchung@torys.com
Tel: 416.865.0040

Lawyers for the Defendant

DAVID TRUEMAN Plaintiff	-and-	ROGERS COMMUNICATIONS CANADA INC. Defendant	Court File No.: CV-21-00670953-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

REPLY

WADDELL PHILLIPS PROFESSIONAL CORPORATION
36 Toronto Street, Suite 1120
Toronto, ON M5C 2C5

Margaret L. Waddell (LSO No.: 29860U)
marg@waddellphillips.ca
John-Otto Phillips (LSO No.: 70097N)
otto@waddellphillips.ca
Adam Babiak (LSO No.: 77899C)
adam@waddellphillips.ca

Tel: 647.261.4486

Lawyers for the Plaintiff