

CITATION: Trueman v. Rogers Communications Canada Inc., 2023 ONSC 2222
COURT FILE NO.: CV-21-670953-00CP
DATE: 20230412

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: David Trueman

AND:

Rogers Communications Canada Inc. and Rogers Bank

BEFORE: J.T. Akbarali J.

COUNSEL: *Margaret L. Waddell, John-Otto Phillips and Adam Babiak*, for the plaintiff

Sylvie Rodrigue, Shalom Cumbo-Steinmetz and Norman Chung, for the defendants

HEARD: In writing

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

Overview

[1] In this proposed class action, the plaintiff seeks leave to amend the Fourth Amended Statement of Claim. The defendants resist most of the proposed amendments. The parties disagree as to whether the proposed amendments add a new claim which is out of time.

Brief Background

[2] The plaintiff claims that the defendants engaged in a practice of obtaining private and confidential credit information of Rogers Communications' customers from credit reporting agencies in order to pre-approve, and then promote, Rogers Bank-issued credit cards to these customers. The plaintiff alleges that the customers' private credit information is obtained through soft credit checks, involving disclosure of details such as the customer's name, age, occupation, place of residence, marital status, educational or professional qualifications, estimated income, place of employment, and paying habits, among other things.

[3] The plaintiff alleges that the soft credit checks are performed without the consent of the Rogers Communications' customers, in breach of their privacy rights, and in breach of the contract the customers have with Rogers Communications.

[4] The claim was issued against Rogers Communications only on October 26, 2021. On April 13, 2022, Rogers Communications delivered a statement of defence which pleaded that soft credit checks were done to pre-approve customers for the Rogers Bank-issued credit cards. Rogers Bank was added as a defendant thereafter.

[5] In August 2022, the plaintiff's counsel learned that the Financial Consumer Agency of Canada had determined, in a decision released on March 31, 2021, that Rogers Bank had issued credit cards to consumers without their consent, in violation of certain sections of the *Negative Option Billing Regulations*, SOR/2012-23, regulations promulgated under the *Bank Act*, S.C. 1991, c. 46.

[6] The plaintiff argues that it is logical to conclude that the soft credit checks that were used to pre-approve customers for Rogers Bank-issued credit cards was also used to issue unsolicited Rogers Bank credit cards to Rogers Communications' customers. He seeks to amend his claim to propose a new sub-class of Rogers Communications' customers to whom a Rogers Bank credit card was issued without their consent. He seeks to plead that sub-class members did not authorize the defendants to run soft credit checks to evaluate them for issuance of a Rogers Bank credit card, and that the unconsented to pre-approval and issuance of unsolicited Rogers Bank credit cards harmed the sub-class members' credit scores, caused them to waste time in cancelling the unsolicited credit cards, and amounted to a highly distressing and embarrassing invasion of privacy. The plaintiff also seeks to plead that Rogers Bank breached the *Negative Option Billing Regulations*, which he pleads in connection with his breach of contract claim, and his claim for punitive damages.

[7] The defendants argue that the proposed amendments (with the exception of the amendments in paras. 43, 46, 48, 49, 59 (except for the subclass addition), 61(a) and 62, to which they consent) add a fundamentally new claim founded on breach of *Bank Act* regulations. They argue there is no cause of action for breach of statute. Moreover, they argue that the claim is out of time. The members of the proposed sub-class would have known of the claim when they received a credit card that they had not consented to receive. The decision of Financial Consumer Agency of Canada makes it clear that the last date when an unsolicited credit card could have been delivered was in February 2019, four years before this motion. Thus, they argue that the claim was discoverable on a class-wide basis well over two years ago, and the limitation period has expired.

Analysis

[8] Leave to amend a pleading is governed by r. 26.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which provides that, on motion at any stage of an action, the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[9] The onus is on the responding party to prove non-compensable prejudice: *1588444 Ontario Ltd. v. State Farm Fire and Casualty Company*, 2017 ONCA 42, at para. 25. Non-compensable prejudice will exist where an amendment adds a new claim that is out of time: *Klassen v. Beausoleil*, 2019 ONCA 407, at para. 26.

[10] If the proposed amendments would have been struck, leave to amend should be refused: *Alterna Savings and Credit Union v. Ching*, 2022 ONSC 2339 at paras. 20, 22.

[11] The parties agree that these principles apply to this class proceeding, which is at an early stage, and pre-certification.

[12] I have reviewed the proposed amendments and note the following:

- a. No free-standing cause of action is pleaded for breach of statute. Breach of the regulations is pleaded in support of a claim for punitive damages, and under the “breach of contract” section in the pleading, but it is not alleged to be a contractual term that the defendants would abide by any statutory or regulatory regime. Rather, it is pleaded as part of the factual matrix.
- b. The allegation that the credit check information was used to determine if a Rogers Communications customer should be issued a Rogers Bank credit card is made under the heading “Routine practice of obtaining credit information”, and as such, is directly linked to the alleged practice of conducting unauthorized soft credit checks. The issuance of an unsolicited credit card is a newly pleaded consequence to the existing pleaded wrong.
- c. The amendments plead that there was no agreement between the plaintiff or any sub-class member by which they consented to Rogers Bank accessing their credit score information to evaluate their qualifications for, and be issued a, Rogers Bank credit card.
- d. The amendments plead that the breach of their privacy caused the sub-class members to suffer distress, upset, anger and embarrassment, and that their private information was used to promote and advance the business interests of Rogers Communications and Rogers Bank.
- e. Under the heading “Breach of contract”, the amendments plead that it was an express or implied term of the class members’ contract that Rogers Communications would not conduct credit checks on its customers for purposes of providing that information to Rogers Bank so that Rogers Bank could assess whether to offer or issue a pre-approved Rogers Bank credit card to a class member or sub-class member. The amendments also allege that Rogers Communication breached the contract with the class members and sub-class members, including by providing their information to Rogers Bank so it could use it for marketing and promotional purposes, and to evaluate eligibility for, or issue, Rogers Bank credit cards without the customers’ consent.
- f. Under the section “Remedies”, the amendments plead that the proposed sub-class has suffered damages including the impairment of their credit ratings arising from the issuance of Rogers Bank credit cards, as well as lost or wasted time, frustration and inconvenience in rejecting or cancelling the unsolicited credit card and correcting their credit score information.

[13] In my view, the structure of the proposed amendments makes it clear that what is being alleged is not a new cause of action founded on breach of the regulations under the *Bank Act*. Rather, the new amendments are relevant to and particularize the claim for breach of contract. The wrong alleged is the wrongful accessing of private information through conducting unauthorized soft credit checks. The issuance of unsolicited credit cards by Rogers Bank is alleged to be a purpose and result of the wrongful access of information. The issuance of unsolicited credit cards is also alleged to have caused particular damages to members of the proposed sub-class, in the

form of impairment to their credit score, embarrassment, wasted time and inconvenience, and frustration.

[14] Because I do not find that the amendments add a new claim, but only particularize the existing claims, the defendants' argument that there is a limitation period issue fails.

[15] The defendants also argue that the proposed representative plaintiff is not a member of the proposed sub-class, and the proposed certification of the sub-class will proceed in an evidentiary vacuum at certification. In my view, this argument is premature. The plaintiff's certification motion record has not yet been delivered. It will be up to the plaintiff to prove the criteria for certification at the certification motion. I am not prepared to pre-judge certification of the sub-class and its particular claims at this juncture.

[16] In the result, I grant the plaintiff's motion to amend the statement of claim in the form of the proposed Fifth Amended Statement of Claim.

Costs

[17] The parties have agreed that the successful party on this motion shall be entitled to \$5,000 in costs, all-inclusive. The plaintiff is the successful party. The defendants shall pay the plaintiff his costs, fixed at \$5,000 all-inclusive.

Order

[18] Order to go in the form of the draft that I have signed.

J.T. Akbarali J.

Date: April 11, 2023