

Court File No.

CV-08 00359525-010

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

AVI JAKOBOWITCH

Plaintiff

-and-

BELL CANADA ENTERPRISES INC.

Defendant.

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: July 25, 2008

Issued by: H. Hallett
Local Registrar

Address of Court office:

393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

TO: BELL CANADA ENTERPRISES INC.
181 Bay Street
Suite 4700
Toronto, Ontario
M5J 2T3

1. The plaintiffs claim:
 - a. an order certifying this proceeding as a Class proceeding and appointing the Plaintiff named herein as the representative plaintiff for the Class;
 - b. an order pursuant to section 24 of the *Class Proceedings Act, 1992*, directing an aggregate assessment of damages;
 - c. an order pursuant to section 23 of the *Class Proceedings Act, 1992*, admitting into evidence statistical information, including but not limited to putative class members usage of Defendant's Services;
 - d. \$20 million in general damages for the Class, or such other sum as this Honourable Court deems just;
 - e. an interlocutory and a final mandatory order directing that Defendant comply with the *Competition Act, R.S.C. 1985, c. C-34* (the "*Competition Act*");
 - f. an interlocutory and a final mandatory order directing that Defendant comply with the *Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A* (the "*Consumer Protection Act*");
 - g. pre-judgment and post-judgment interest on the amounts payable pursuant to subparagraphs (b), and (d) pursuant to the *Courts of Justice Act, R.S.O. 1990, c. C.43*;
 - h. punitive, aggravated and exemplary damages in the amount of \$5 million, or such other amount as this Honourable Court deems just;

- i. costs of this action on a substantial indemnity basis plus Goods and Services Tax;
- j. damages and costs of investigation of this action pursuant to section 36 of the *Competition Act*;
- k. the costs of administering the plan of distribution of the recovery in this action in the sum of \$1 million or such other sum as this Honourable Court deems appropriate; and
- l. such further and other relief as may be required by the *Class Proceedings Act, 1992*, or as this Honourable Court may deem just.

Summary of the Action

2. This class action is brought pursuant to the *Consumer Protection Act* and other similar legislation throughout Canada, and the *Competition Act*, and for claims of unjust enrichment arising out of Defendant's false, misleading and/or deceptive advertising and/or representations of the rates of its Residential Long Distance Services (sometimes referred to as "Services") throughout Canada.
3. Plaintiff pleads that to induce consumers to use its Services, Bell during all relevant times employs and/or employed false, misleading and/or deceptive advertising or promotional practices designed to misrepresent and conceal Bell's practice of charging the customers of its Services for a full minute of telephone usage even if a caller is connected for mere seconds; i.e., Plaintiff pleads that if a Services customer talks for one

minute and two seconds he/she is billed for two full minutes of talk, instead of the appropriate fraction of the second minute.

4. Plaintiff pleads herein, that concealing and misrepresenting this billing practice is unconscionable, and is a deceptive and unfair business practice designed to increase Defendant's already massive profits at the Plaintiff's and Class Members' expense.
5. Plaintiff pleads that the Defendant affirmatively misrepresents and conceals this practice of rounding up in various ways through media advertising campaigns, and associated brochures, literature and on the Defendant's web-site on the world-wide web. In such advertisements and/or representations to the public, Bell represents that the charges for its Services are for example, 5 cents "a minute" or as 5cents/minute or other fixed rate, as per the applicable plan.
6. Plaintiff pleads that such statements are misleading because the actual charge for a one minute one second call is 10 cents (in the case of a "5 cents a minute" rate), a substantial discrepancy from the represented cost of the call.
7. The Services are deregulated and thus are not subject to tariffs that are required to be published with the CRTC. Accordingly, the Plaintiff does not seek to change, diminish, or modify the rates being charged by Bell pursuant to any governmental regulatory agency.

8. The practices complained of herein are of a universal and uniform nature, and equally affect all members of the Plaintiff class.

The Parties

9. Plaintiff is resident of Toronto, Ontario resident and is a customer of Bell's home phone and long distance services.
10. The Defendant is a Canadian corporation headquartered in Montreal, Quebec and maintains a place of business in Toronto, Ontario.
11. Defendant earned over \$20 billion CAD in revenues in 2007, approximately \$310 million of which were earned as a result of long-distance charges in the first quarter.

Class Definition

12. Plaintiff brings this action on behalf of all residents of Canada ("Class Members") who:
 - a. Since July 2002 ("Class Period");
 - b. Are or were residential long-distance customers of the Defendant; and
 - c. Have been billed directly or otherwise by Bell in a manner that reflects rounding up to the next full minute.
13. The exact number and identity of Class Members is within the knowledge of the Defendant.

Plaintiff's Details

14. Throughout the Class Period, including on or about October, 2007, Plaintiff placed one or more phone calls to Israel. Pursuant to Defendant's advertised rate as being charged "per-minute", Plaintiff believed he would have been charged the applicable portion of the per-minute charge for the duration of the calls.

15. Plaintiff pleads that in actuality, Plaintiff was charged additional airtime charges over and above the airtime he used, corresponding to the amount that Defendant "rounded up" the duration of his calls to the next applicable full minute.

16. Plaintiff pleads that Defendant charged him, and some other Class Members a monthly fee for the "privilege" of receiving a specific rate for long distance phone calls.

Allegations

17. Bell engages in extensive advertising and marketing campaigns in print and other media, promoting the use of its Services and to inform consumers of the price of its Services.

18. Plaintiff pleads that these advertisements and/or representations as to the price of the Services are false, misleading and/or deceptive in the manner in which they describe the rate that Defendant charges consumers for the Services.

19. Defendant's advertising, marketing methods and/or its representations to the public, including but not limited to Defendant's brochures and on Defendant's web-site,

represent that its Service charges are billed at “5 cents a minute” or “5cents/minute” or other applicable rate “a minute” or rate “/minute.”

20. Plaintiff pleads that these advertisements and/or representations conceal and/or do not adequately disclose the material fact that when a customer’s call lasts for a fraction of a minute, even one second, a full minute charge will be imposed.

21. Plaintiff pleads that Bell misrepresents and does not disclose that it always rounds up to the next full minute when it calculates total long-distance call time for residential customers.

22. Furthermore, exacerbating Defendant’s false, misleading, and/or deceptive advertising practices (including but not limited to Defendant’s above-mentioned misrepresentations in its brochures and web-site), the Defendant has represented at all relevant times through advertisements, associated brochures, and its web-site certain other of its phone services that are billed monthly (Monthly Services) as being billed as x\$/mo. alongside the advertisements and/or representations for the Services.

23. However, in contradistinction to Bell’s billing practice for the Services, when consumers of the Monthly Services use such services for only a fraction of the month, Bell does not round up and charge such customers for a full month, rather they are only charged for the appropriate usage of the Monthly Services.

24. Defendant's practice of advertising and/or its representations to the public, including but not limited to Defendant's brochures and Defendant's web-site, representing rates that are pro-rated by the billing period (Monthly Services) alongside rates that are not pro-rated by the billing period (the Services) using the same language is misleading and is a deceptive and an unfair business practice.
25. The false, misleading and/or deceptive: a) advertising, b) marketing practices, and/or c) representations to the public, of Bell, have the capacity, tendency and effect of deceiving and/or misleading the Plaintiff and Class Members as to the basis of their Service charges.
26. Plaintiff pleads that Bell has the capacity to bill, at least, to the nearest 1/10 of one minute, a practice known as incremental billing, or to the nearest second.
27. As a result of its false, misleading and/or deceptive: a) advertising, b) marketing practices, and/or c) its representations to the public, including but not limited to Defendant's brochures and Defendant's web-site, coupled by Defendant's inadequately disclosed and/or concealed billing practices of rounding up, Bell has been unjustly enriched by charges that residential consumers overpaid and to which it is not entitled.

Breach of Consumer Protection Act

28. Section 14 of the *Consumer Protection Act* provides in relevant part:

14(1) It is an unfair practice for a person to make a false, misleading or deceptive representation. 2002, c. 30, Sched. A, s. 14 (1).

29. Section 17 of the *Consumer Protection Act* provides in relevant part that:

17. (1) No person shall engage in an unfair practice. 2002, c. 30, Sched. A, s. 17 (1).

30. The false, misleading and/or deceptive advertisements and/or representations to the public were made by Bell on the World Wide Web and were able to be seen by any person, at any time.

31. Plaintiff pleads that Defendant's provision of the Services to the Plaintiff or Class Members pursuant to a specific rate plan, at an advertised rate, or pursuant to Defendant's standard per-minute rate for long distance charges, amounts to a Consumer Agreement to provide the Services at the advertised rate or pursuant to the applicable "per minute" rate, and that the Deregulated Terms of Service coupled with Defendant's advertisements and representations to the public related to the Services, as delineated herein, constitute a part of the same Consumer Agreement as between the Defendant and the Class Members for purposes of the *Consumer Protection Act*.

32. Plaintiff pleads that Defendant's practice of "rounding up" when the same is not adequately disclosed to consumers constitutes an unfair business practice in respect of the Consumer Agreement, in that Defendant did not provide its Services for the rate that

Defendant advertised and/or Defendant represented, i.e., the Services were not provided at a rate of x/c per minute, as applicable.

33. Plaintiff further pleads, in the alternative only, and without any admission, that to the extent that any term of the Consumer Agreement is ambiguous, that such ambiguity is to be construed for the benefit of the consumer pursuant s. 11 of the of the *Consumer Protection Act*, that provides that “*any ambiguity that allows for more than one reasonable interpretation of a consumer agreement provided by the supplier to the consumer or of any information that must be disclosed under this act shall be interpreted to the benefit of the consumer.*”

34. If any such ambiguity in the advertised rate is construed for the benefit of the consumer, the Consumer Agreement shall be deemed to provide that Defendant shall provide its Services at the Defendant advertised and/or Defendant represented rate of x/cents per-minute, as applicable, and accordingly, Defendant shall only charge the appropriate portion of the per-minute rate for a fraction of a minute of airtime.

35. Accordingly, Defendant’s practice of rounding up in contravention to the provisions and/or construed provisions in the Consumer Agreement, as described above, constitutes an unfair practice in respect of the Consumer Agreement.

36. Plaintiff pleads that accordingly, Plaintiff and the Class Members are entitled to damages pursuant to S 18(2) of the same Act, which provides in relevant part that:

18. (1) Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages. 2002, c. 30, Sched. A, s. 18 (1).

Remedy if rescission not possible

(2) A consumer is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both, if rescission of the agreement under subsection (1) is not possible,

37. Accordingly, Plaintiff pleads that he and the Class Members are entitled to damages as contemplated by Section 18(2) of the Consumer Protection Act arising out of Defendant's unfair practice of rounding up, as pleaded above.

Breach of the Competition Act

38. Section 52(1) of the *Competition Act* provides that:

No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

39. Plaintiff pleads that Defendant's conduct described above is a violation of section 52(1) of the *Competition Act*, in that the representations regarding the rate for the Services:

- a. Were made to the public, in the form of advertising brochures and website statements;

- b. Were made to promote the supply or use of a product or for the purpose of promoting the business interests of the Defendant; and
 - c. Were false and misleading in a material respect.
40. The Plaintiff pleads that Bell's advertising materials and/or its representations to the public in respect of the rates for its services in conjunction with the non-disclosure and/or inadequate disclosure in of its rounding up billing practices constitutes false and/or misleading representations for the purposes of section 52(1) of the *Competition Act*.
41. As a result of Defendant's breach of Section 52 of the *Competition Act*, the Plaintiff and Class Members have suffered damages and are entitled to recover damages pursuant to section 36(1) of the same.

Unjust Enrichment

42. By its wrongful advertising and deceptive omissions set out above, Bell was unjustly enriched at the expense of the Plaintiff and Class Members in the form of increased profits resulting from the excess billing of long-distance calls through the practice of rounding up in contravention of the *Consumer Protection Act* and the *Competition Act*.
43. Defendant was further unjustly enriched in the amount of fees Defendant received for charging some of its customers an additional monthly fee in return for supplying long

distance services at a specific per-minute rate, being that Defendant did not bill its customers in accordance with the advertised rate.

44. Plaintiff and the Class Members have suffered a corresponding deprivation by paying the charges for the Services in excess of the advertised rate as a result of Defendant's practice of "rounding up".

45. There is no juristic reason for Defendant's enrichment and the Class Members' corresponding deprivation in light of Defendant's deceptive advertising practices and/or its false, misleading and/or deceptive representations to the public, and in light of its breaches of the *Consumer Protection Act* and the *Competition Act*.

46. It would be inequitable for Bell to retain any profits arising from its practice of rounding up and/or its profits arising monthly fees for specific long distance rates, being that Defendant's false, misleading and/or deceptive advertisements and/or representations to the public, in respect of such Services, violate the *Consumer Protection Act* and the *Competition Act*, as alleged above.

47. Accordingly, Plaintiff seeks restitution on behalf of himself and the Class Members of all profits derived by Bell from their long distance services, including the per-minute billing fees and the monthly fees relating to the various service plans.

Legislation

48. The Plaintiff pleads and relies upon the following statutes on behalf of himself and Class

Members:

- d. *Consumer Protection Act*, 2002, S.O. 2002, c. 30, sch. A;
- e. *Competition Act*, R.S.C. 1985, c. C-34; and
- f. *Class Proceedings Act 1992*, S.O. 1992 c. 6.

Respectfully Submitted

July 25/08

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JAKOBOWITCH v. BELL CANADA ENTERPRISES INC.

Plaintiff

Defendant

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PROCEEDING COMMENCED AT TORONTO

PROCEEDINGS COMMENCED UNDER THE
CLASS PROCEEDINGS ACT, 1992

STATEMENT OF CLAIM

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