CITATION: Trueman v. Rogers Communications Canada Inc., 2025 ONSC 5972
COURT FILE NO.: CV-21-00670953-00CP
DATE: 2025-10-23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
DAVID TRUEMAN	*Margaret Waddell and Maria Arabella Robles*, Lawyers for the Plaintiff
Plaintiffs	
-and-	
ROGERS COMMUNICATIONS CANADA INC. and ROGERS BANK	*Linda Plumpton, Shalom Cumbo-Steinmetz, Natasha Williams and Alison Schwenk*, Lawyers for the Defendants
Defendants	
	HEARD: July 21 and 22, 2025

REASONS FOR DECISION

Leiper, J.

INTRODUCTION AND OVERVIEW

[1] David Trueman (the "plaintiff" or "Mr. Trueman"), is a former customer of Rogers Communications Canada Inc. ("Rogers Communications"). He brings this action against Rogers Communications and Rogers Bank (collectively "Rogers" or the "defendants") alleging that the defendants breached their contractual obligations owed to millions of their Canadian customers, committed privacy torts, and breached the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*CCQ*") relative to Rogers Communications customers in Quebec.

[2] The essence of the plaintiff's claim is that Rogers Communications assisted Rogers Bank in obtaining credit reports of Rogers Communications customers from Canadian credit reporting agency, Trans Union Canada Inc. ("TransUnion"), without those customers' knowledge or consent.[1] Rogers Bank then used the credit checks to decide whether to promote its credit cards to Rogers Communications customers who met defined financial criteria.

[3] The plaintiff alleges on behalf of the class of Rogers Communications customers, that Rogers Bank, a separate legal entity, had no lawful authority to access their private credit information.

[4] The plaintiff considers these corporate promotions to be a serious breach of privacy, not only because of the regular accessing of detailed customer financial information without meaningful consent, but also because the defendants concealed their data-sharing practices. The plaintiff seeks to certify this proceeding as a class action on behalf of all persons currently or previously residing in Ontario, Quebec, and Alberta who had consumer service contracts with Rogers Communications between May 1, 2011, to the date of certification. He also seeks to certify a subclass of all class members to whom Rogers Bank issued a credit card without express consent, such offers being based on information about those customers that Rogers Bank, in the name of Rogers Communications, accessed from TransUnion.

[5] The defendants object to certification and raise several issues. These include the plaintiff's failure to allege damages arising from the breaches, the inapplicability of several of the torts alleged to data privacy cases and other objections to certification based on s. 5(1)(a) of the *Class Proceedings Act 1992*, S.O. 1992, c. 6 (the "*CPA*").

[6] Rogers anticipates defending this action on the basis that it did not act in breach of the agreements with its customers. At this stage, the defendants submit that even if there was a breach, that the class members did not suffer any tangible harm that would lead to a claim in damages. The defendants acknowledge that the soft credit check practices are a usual practice that Rogers Bank

[1] The credit checks in question are referred to in the material filed as "soft" credit checks and the evidence describes the differences between what the industry refers to as "soft" and "hard" credit checks. For ease of reference, I use the term "credit checks" unless the difference is germane to the context in which the terms is used.

used for marketing to Rogers Communications customers. Nevertheless, the defendants submit that the credit checks did not impact a customer's credit score, and there was no harm to any of the customers whose credit information was obtained for promotional purposes.

[7] The defendants further submit Mr. Trueman has not met his onus to show that a class proceeding is a preferable procedure to other available procedures. The defendants rely on the fact that the plaintiff has complained to the Office of the Privacy Commissioner of Canada (the "OPC"). As a result of that complaint, the OPC is investigating the defendants' access to the plaintiff's credit information which is at issue in this litigation. They rely on the changes to the customer agreements, which the plaintiff acknowledges by using the April 2025 version as the marker for the end of the class period. Thus, the defendants argue that behaviour modification has been achieved.

[8] The defendants characterize the damages claimed as exorbitant, given that there is no pleaded impact on the finances or creditworthiness of its customers. The defendants characterize the plaintiff's claim as an "attempt to leverage privacy interests to generate a multimillion-dollar damages claim in circumstances where no class member has suffered any harm." The defendants' "no-harm" theme stems from a rejection of any value in intrinsic privacy rights. In contrast, the plaintiff alleges mass privacy breaches, such as that in the case at bar, cause inherent harm. Certification is not the place for resolving this debate, where there is reasonable merit on both sides. The task at hand is to apply the test for certification under the *CPA*.

The Two Motions: Certification and the Motion for Summary Judgment

[9] In accordance with case management directions issued by my colleagues, Akbarali J. and before that, Belobaba J., I heard the plaintiff's motion for certification and the defendants' motion for partial summary judgment at the same time.

Summary of Findings

[10] I grant the plaintiff's motion for certification for the reasons set out below. He has met the test within s. 5 and s. 5(1.1) of the *CPA*. His evidence provides some basis in fact that the claim meets the test for certification. His claim should not be screened out as being clearly inappropriate or unmeritorious. While the defendants have previewed several of their intended defences at trial, the existence of viable defences do not defeat certification. This flows from the nature of the test under the *CPA* and the jurisprudence applying that test.

[11] I dismiss the defendants' motion for partial summary judgment based on an exclusion clause in the Rogers Communications consumer agreements. While the exclusion clause may provide the defendants with a defence to the claim in damages, this is not a matter for summary judgment. The three-part test for applying an exclusion of liability clause in a contract of adhesion engages issues of unconscionability and public policy. Those parts of the test will benefit from a complete record and should be left to the trial judge.

THE BACKGROUND FACTS

The Parties and the Genesis of this Action

[12] The background to the certification motion comes from the pleadings and affidavit evidence tendered by the parties.

[13] According to those materials, the plaintiff was a Rogers Communications customer from May 2, 2011, until December 7, 2021. He was not a customer of Rogers Bank.

[14] In the summer of 2019, Mr. Trueman pulled his credit report from TransUnion. He learned that although his account with Rogers Communications had been in good standing, the company had accessed his credit information on at least three separate occasions.

[15] Mr. Trueman contacted Rogers Communications to find out why his credit information was being accessed, and to ask that Rogers Communications cease doing so. Representatives from Rogers Communications told him that his end user agreement authorized the credit checks, for "marketing and promotional purposes."

[16] Mr. Trueman escalated his complaint to Rogers' Office of the President. The "Advisor at the Office of the President" provided the following response to his complaint, in correspondence dated January 9, 2020:

> a. I can confirm that a soft credit check was performed on your account for marketing and promotional purposes.
>
> b. I have advised you that a soft credit check has no impact on your credit.
>
> c. I have also advised that as per the Rogers end user agreement, Rogers can perform periodic soft credit checks for marketing and promotional purposes.
>
> d. I have advised that we are unable to request a removal of soft credit checks.

[17] Rogers Bank continued the credit checks over Mr. Trueman's objections, relying on their interpretation of the consumer agreement. The credit checks continued through 2020 and into 2021, until he terminated his Rogers Communications account.

[18] On October 26, 2021, Mr. Trueman issued a statement of claim in the Superior Court of Justice against Rogers Communications.

[19] On December 20, 2021, Mr. Trueman complained to the OPC, describing the practices of Rogers Communications:

> I was never aware that Rogers would access my credit information for "marketing and promotional purpose" and never would have consented to it if I had known. I

> was furious and embarrassed that Rogers was prying into my credit information for these purposes on a routine basis (apparently, multiple times per year).

[20] Mr. Trueman asked the OPC to consider whether these practices, which relied on "vague language contained in [Rogers'] standard form user agreements is sufficient to justify this privacy intrusion." He sought an investigation to end the practice, which he flagged as potentially affecting the privacy interests of millions of Canadians.

[21] On April 13, 2022, Rogers Communications filed its statement of defence, which revealed that Rogers Bank was the corporate entity accessing customer financial data from TransUnion to promote its credit cards. The plaintiff added Rogers Bank as a defendant to the action.

[22] In January of 2023, counsel to Mr. Trueman spoke with a Senior Privacy Investigator at the OPC about the status of his complaint. Counsel followed up in a letter dated February 21, 2023. That correspondence urged a full investigation due to the fresh information about Rogers Bank's role in accessing Mr. Trueman's financial information, the application of the *Personal Information Protection and Electronic Documents Act,* S.C. 2000, c. 5 (the "*PIPEDA*") to these practices, and Mr. Trueman's lack of informed consent. In that correspondence, counsel to the plaintiff described the proposed class action and the defendants' position that his claim is barred by the exclusion clause in the Rogers Communications consumer agreement which limits its liability.

[23] In December of 2023, the OPC wrote to plaintiff counsel confirming that it was investigating the privacy practices of Rogers Communications under the *PIPEDA*. The investigator confirmed that the OPC "intended to investigate whether Rogers obtained valid and meaningful consent from you to use, and/or disclose your personal information to credit bureaus, for the purposes of assessing your eligibility for, and subsequently marketing to you, a Rogers Bank credit card."

[24] In his affidavit filed in the record for certification, Mr. Trueman stated that he was "repulsed" by the idea of the defendants monetizing his credit information. He said that he does not appreciate people that he does not know learning whether he is financially flourishing or vulnerable. He testified that he was "upset" and "embarrassed" by the conduct of the defendants.

[25] In preparation for these motions, the plaintiff requested copies of the defendants' written submissions to the OPC. The defendants refused to produce their submissions based on relevance and privilege. The plaintiff did not pursue a refusals motion for those submissions. Instead, he seeks to have an adverse inference drawn against the defendants on the preferability issue of the OPC investigation. I deal with those arguments below.

The Rogers Communications Agreements

[26] If this action is certified, the defendants will argue that Rogers Communications provided adequate notice to customers in its customer service agreements that they would receive marketing

for Rogers Bank credit cards. The defendants describe the plaintiff as being uniquely "fixated" on the fact that Rogers Bank and Rogers Communications are separate corporate entities. The defendants submit that these are entities that use similar branding, corporate colours and that the consumer agreements with Rogers Communications describe Rogers Bank as being part of the Rogers group of companies, who "co-market" their products.

[27] Turning to those agreements, Rogers Communications varied the wording over the proposed class period. The relevant portions are similar enough for the purposes of the analysis. The iterations of those agreements are included in the record.

[28] The plaintiff pleads that the consumer contract agreements with Rogers Communications between May 5, 2011, and February 8, 2019, included language which required express consent to disclosure of customer confidential information, except for certain circumstances which did not include credit checks by Rogers Bank via Rogers Communications.

[29] During the period from February 8, 2019, to September 16, 2020, the plaintiff pleads that there was similar language placing limits on the disclosure of customer personal information outside the "Rogers entity named in the service agreement".

[30] The plaintiff's claim pleads that during the period between October 9, 2014, to February 8, 2019, the contracts affirmed that "Rogers' privacy practices are in accordance with all federal and provincial laws" and that "Rogers does not use or disclose personal information for purposes other than those for which it was collected, except with the consent of the individual or as required by law."

[31] In a 2023 version, the Rogers Communications standard form agreement for wireless and residential services discloses to its customers that:

> By entering into this service agreement, you acknowledge and that you have read, understood and agree to all of the details in your agreement; and in addition you expressly:
>
> > i. Authorize Rogers or any other member of the Rogers Communications Inc. organization to obtain information about your credit history to create and manage your account and assess your eligibility for other Rogers products and services. You acknowledge that Rogers may share your credit experience and credit information with others including credit bureaus, credit grantors, and collection agencies.
> >
> > ii. …
> >
> > iii. Agree and account information may be disclosed to other members of the Rogers Communications Inc. organization, and to our agents or

> contractors, authorized dealers and distributors, to service your account, respond to your questions, telemarket (including by way of automatic dialing and announcing devices), and promote additional products and services offered by members of the Rogers Communications Inc. organization.

[32] The Rogers Communications standard form agreements include a privacy policy. The plaintiff will argue at trial that although Rogers Communications committed to comply with all privacy legislation in its contracts with customers, it did not do so. The plaintiff relies on legislation including: *Consumer Protection Act,* R.S.A. 2000, c. C-26.3, s. 44; *Consumer Reporting Act,* R.S.O. 1990, c. C.33; the *CCQ*, arts. 35-37; the *Negative Option Billing Regulations,* SOR/2012-23, s. 3 under the *Bank Act*, S.C. 1991, c. 46; the *PIPEDA*, Schedule 1, Principles 4.1-4.3, 4.3.2, 4.3.4, 4.3.6, 4.4-4.5, and 4.8.

[33] The 2020 privacy policy includes language, which the defendants will rely on at trial to support their position that, in agreeing to the agreement, its customers consented to the credit checks for marketing purposes:

> Why does Rogers collect my personal information?
>
> Rogers collects personal information for many different reasons in order to provide you with the products and services we offer, including but not limited to the following:
>
> … To understand your needs and offer you products and services from members of the Rogers Communications Inc. organization including Rogers, Rogers Bank and our agents dealers and related companies or trusted third parties that may be of interest to you
>
> … We may collect information to manage credit and business risks, collecting outstanding debt, detect prevent manage, and investigate fraud or other unauthorized or illegal activity. This may require us obtain information from credit agencies or members or affiliates of the Rogers communication Inc. organization such as Rogers Bank.
>
> Your information may also be collected to evaluate eligibility or other Rogers products and services, and to assist members or affiliates of the Rogers Communications Inc. organization to assess your eligibility for their products or services.

[34] The privacy policy informed Rogers Communications customers that they could ask to be opted out from Rogers Bank marketing or to be assessed for eligibility for a Rogers Bank credit card.

[35] In January of 2020, Rogers Communications amended its privacy policy to include a promise that it would seek "express consent" before obtaining sensitive information, such as that obtained by way of a credit check. This version reads:

> Consent
>
> How does Rogers obtain consent?
>
> Your consent to the collection, use or disclosure of personal information may be implied or express, through written, oral, electronic or any other method.
>
> For example, when you provide us your address, it is implied that it is used for billing purposes and service provisioning. However, if we are dealing with more sensitive information, such as performing a credit check, we will seek your express consent. We will also obtain your express consent for marketing purposes.

[36] In April of 2025, Rogers Communications updated its privacy policy again. The April 30, 2025, iteration tells Rogers Communications customers that Rogers Bank may conduct credit checks to assess whether those customers would qualify for preapproval for a Rogers Bank credit card in these terms, and permitting customers the right to opt out:

> Rogers Bank may obtain your credit score and other information to see if you are pre-approved for a Rogers Bank credit card. You can opt out of this practice at any time.

[37] The plaintiff proposes that the end date for the class period coincide with the April 30, 2025 version. Prior to that version, the plaintiff alleges that the defendants breached the privacy rights of the class members.

The Credit Checks

[38] Rogers Bank conducted credit checks through data maintained by TransUnion. These credit checks, or "pulls" as they are sometimes described, were shown on the customer report as having been done for Rogers Communication, which is why Mr. Trueman did not know that his information was being shared with Rogers Bank.

> Rogers Bank uses a set of criteria, which it shares with TransUnion, to decide whether to market its credit cards to Rogers Communications customers. TransUnion carries out the inquiry and sends a list of qualified customers to Rogers Bank based on pre-determined criteria set by Rogers Bank. TransUnion sends a backup copy of the underlying data to Rogers Bank to verify that TransUnion has properly applied the criteria. In the normal course, the evidence from the defendants is that one person within Rogers Bank reviews that data, although not always. Rogers Bank holds on to that data for 90 days, after which, its staff delete the data.

[39] Rogers Bank relies on the fact that the data is not shared widely among its employees, and that it deletes the customer information to reduce the seriousness of any privacy breach, which it does not admit. In contrast, the plaintiff characterizes the privacy breaches as being widespread, involving detailed financial information being accessed improperly by Rogers Bank, and affecting approximately eight million customers living in Ontario, Alberta and Quebec. These arguments risk an analysis of whether the claim will succeed as a class action, which is not the correct question on certification, as set out below.

THE ISSUES ON THE MOTIONS

[40] The parties have defined the issues on the motion to certify as follows:

> 1. Have the plaintiffs established under s. 5 of the *CPA* the following:
>
> i) Do the pleadings disclose a cause of action?
>
> ii) Is there an identifiable class of two or more persons that would be represented by the representative plaintiffs?
>
> iii) Does the claim of the class members raise common issues?
>
> iv) Is a class proceeding the preferable procedure for the resolution of the common issues?
>
> v) Is there a representative plaintiff who:
>
> a) would fairly and adequately represent the interests of the class?
> b) has produced a plan that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> c) does not have on the common issues of the class, an interest in conflict with the interests of the class members?

[41] The issues on the defendants' motion for summary judgment are:

i) did the case management judge decide the exclusion clause issue?

ii) If the issue has not been decided, should the court give effect to the exclusion clause in relation to the Rogers defendants and should the court dismiss the action on a motion for summary judgment?

THE TEST ON CERTIFICATION

Certification under the Class Proceedings Act, 1992

[42] The *CPA* is remedial legislation that is to be interpreted broadly and liberally to promote the objectives of class proceedings – access to justice, judicial economy, and behaviour modification: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 15-16.

[43] The certification stage of class proceedings is a procedural step, meant to screen out inappropriate or unmeritorious claims. It begins with a consideration of whether the pleadings disclose a cause of action. Unless it is "plain and obvious" that there is no claim on the face of the pleading, then the action should not be struck: *Hollick*, at para. 25.

[44] Once the plaintiffs satisfy the pleadings hurdle, their task is to show "some basis in fact" that the remaining certification requirements are met: *Hollick*, at para. 25; *McCracken v. Canadian National Railway,* 2012 ONCA 445, 111 O.R. (3d) 745, at para. 75.

[45] In considering certification, the court is not assessing the value of the evidence or resolving substantive questions. This informs the approach to the evidence filed on certification. The question at trial is: has the plaintiff proved the claim on a balance of probabilities? In contrast, at certification the question is different: have the plaintiffs shown that the preferred forum for the action is with a representative plaintiff on behalf of several claimants because they have common questions to be determined in the litigation? See *Hollick*, at para. 16.

[46] The evidentiary threshold for certification is not onerous, and the court must not impose undue technical requirements on plaintiffs. As Warren K. Winkler et al., *The Law of Class Actions in Canada* (Toronto: Canada Law Book, 2014), at p. 24, sums it up: the question for a judge on a certification motion is not "will it succeed as a class action?" but rather "can it work as a class action?" This is important guidance for certification motions such as this one, in which the parties have at times debated the likelihood of substantive success, versus whether this action as pleaded can "work' as a class action based on a commonality of issues, preferability and a defined class with an appropriate representative plaintiff.

[47] That said, the court at the certification stage must engage in more than a "superficial level of analysis into the sufficiency of the evidence" in support of the certification requirements: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at paras. 99, 102-105. The certification analysis has a role to play to promote judicial economy and correct results: *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17-25.

[48] Under s. 5(1)(a) of the *CPA*, the motion judge applies the test of whether it is "plain and obvious" that the claim cannot succeed, assuming all facts pleaded are true (unless patently ridiculous or incapable of proof), and thus it has no reasonable prospect of success: *Wright v. Horizons ETFS Management (Canada) Inc*., 2020 ONCA 337, 448 D.L.R. (4th) 328, at para. 58; *Anderson v. Wilson* (1999), 44 O.R. (3rd) 673 (C.A.), at p. 679, leave to appeal refused, [1999] S.C.C.A. No. 476.

[49] The motion judge reads the claim generously at this stage. No evidence is admissible: *Lilleyman v.* Bumblebee *Foods LLC*, 2023 ONSC 4408, at para. 270, aff'd *Lilleyman v. Bumble Bee Foods LLC,* 2024 ONCA 606, 173 O.R. (3d) 682, leave to appeal refused, [2024] S.C.C.A. No. 406; *Thompson-Marcial v. Ticketmaster Canada LP*, 2024 ONSC 2305, at para. 96, leave to appeal refused, 2024 ONSC 4920 (Div. Ct.).

[50] For the remaining certification criteria, the motion judge asks if there is some basis in fact for each requirement: *Pro-Sys*, at paras. 63, 100; *Hunt v. Carey*, [1990] 2 S.C.R. 959, at p. 980.; *Fehr v. Sun Life Assurance Co*, 2018 ONCA 718, 84 C.C.L.I. (5th) 124, at para. 86, leave to appeal refused, [2018] S.C.C.A. No. 489.

Analysis of the Certification Requirements

Section 5(1)(a) – Do the pleadings disclose a cause of action?

[51] The plaintiff's claim contains four causes of action: breach of contract, breach of confidence, the tort of intrusion upon seclusion, and breaches of the CCQ. I examine each in turn to determine whether the facts pleaded disclose a cause of action in accordance with the statutory test.

Breach of Contract

[52] The plaintiff has established a cause of action in breach of contract. He has pleaded a contract of adhesion with Rogers Communication. The principles used to interpret contracts of adhesion have been described in *Douez v. Facebook,* 2022 BCSC 914 at paras. 95-97, *Bergen v. WestJet Airlines Ltd*., 2021 BCSC 12 at para. 75 aff'd 2022 BCCA 22; and *Corless v. Bell Mobility Inc*., 2015 ONSC 7682 at para. 23 (Div. Ct.). These principles may be summarized as:

a. The contract must be reviewed as a whole;

b. The court should interpret a contract of adhesion in the context of the power imbalance between the contracting parties, and the inability of the weaker party to negotiate;

c. Although interpretation of a contract is an issue of mixed fact and law, this does not mean there must be any individual inquiry into the circumstances each time a standard form contract is entered into by parties;

d. The interpretive exercise may require investigating the purpose of the contract, the relationship created, and the environment in which the contract operates; and

e. Ambiguity is construed against the party that drafted the contract.

[53] The plaintiff pleads that his entire consumer agreement (composed of the service agreements, terms of service, privacy policy, and acceptable use policy), with Rogers Communication, created a contract of adhesion. The contract included his prior agreement for Rogers Communications to collect his personal credit information to determine his eligibility for products and services, at his request. He pleads that the contracts included Rogers Communications' commitment to respect applicable privacy legislation.

[54] The plaintiff has pleaded terms from that agreement which he contends Rogers Communications breached, including:

a. That Rogers Communications would handle the personal information of the plaintiff, and the class members, in accordance with applicable privacy standards, legislative standards, and Rogers's privacy policy;

b. That Rogers Communications would seek express consent from customers before performing a credit check for marketing purposes;

c. That Rogers Communication would obtain consent prior to collecting personal information about its customers from third parties, such as a credit bureau;

d. That Rogers Communications would only retain personal information collected for as long as necessary to fulfil the purpose for which it was collected;

e. That Rogers Communications would not conduct credit checks on its customers for the purpose of sharing that information with Rogers Bank, without first obtaining the informed consent of the plaintiff or the class members; and

f. That Rogers Communications would not conduct credit checks on its customers for the purposes of providing such information to Rogers Bank so that Rogers

> Bank could use that information to offer, and at times issue, unsolicited Rogers Bank credit cards to class members.

[55] The claim pleads that from October 9, 2014, until February 8, 2019, the contract contained terms that provided: "Rogers privacy practices are in accordance with all federal and provincial laws" and "Rogers does not use or disclose personal information for purposes other than those for which it was collected, except with the consent of the individual or as required by law."

[56] The statement of claim pleads language from later versions of the contract, including terms in the versions in force between January 2020 and December 4, 2021, which represented to its customers that "if we are dealing with more sensitive information, such as performing a credit check we will seek your express consent. We will also obtain your express consent for marketing purposes."

[57] The plaintiff has pleaded Rogers Communications was bound by these terms to comply with:

a. The PIPEDA;

b. Sections 8(2) and 10(2) of the *Consumer Reporting Act*, R.S.O. 1990, c. C.33;

c. Section 44 of Alberta's *Consumer Protection Act,* R.S.A. 2000, c. C-26.3;

d. Sections 12-14 of Quebec's *Act Respecting the Protection of Personal Information in the Private Sector*, C.Q.L.R., c. P-39.1 (the "*PPIPS*"); and

e. *Negative Option Billing Regulations*, SOR/2012-23 under, inter alia, the *Bank Act*, S.C. 1991, c .46.

[58] The plaintiff claims that Rogers Communications contracted to protect class members' private credit information and breached its contract by assisting Rogers Bank in collecting and using confidential customer credit information in an unauthorized manner. On the face of the pleading, the plaintiff has asserted an adequate breach of contract claim. At this stage, the court's role is not to interpret the contract but merely to assess the pleadings without evidence. For this reason, breach of contract claims are readily certifiable: *Donegani v. Facebook*, 2024 ONSC 7153, at paras. 82-89.

[59] The defendants submit that although the plaintiff has adequately pleaded his claim in breach of contract, he has not pleaded expectation damages, but only nominal damages. Thus, the defendants submit that because the plaintiff did not plead that he suffered a quantifiable loss, this ought to bar certification for the alleged breach of contract.

[60] I do not agree. Paragraph 58 of the statement of claim[2] asserts damages that include the loss of privacy arising from the acts of Rogers Communications. Where there is a sufficiently serious breach of a *Charter* right, such as the right to privacy, general damages may be awarded for an injury to intangible interests: *Insurance Corporation of British Columbia v. Ari,* 2025 BCCA 131, 46 C.C.L.I. (6th) 173, at paras. 48-49. I cannot conclude on the fact of the pleadings that the action in breach of contract for damages to the loss of privacy of the members of the class is certain to fail.

[61] Harm arises from the loss of control or autonomy that a person has when others intrude into their private information: *Insurance Corporation of British Columbia* ("*ICBC*"), at paras. 30-32.

[62] This is not the stage to determine trial issues such as the scope and seriousness of the alleged privacy breach, the conduct that led to the breach, or the merits of the damages related to whatever breach may be established by the evidence at trial.

[63] I find that the pleading of breach of contract is sufficient. It is not plain and obvious that it cannot succeed on the facts as pleaded.

Breach of Confidence

[64] A breach of confidence may be remedied as a matter of equity to protect individuals against the unauthorized use or disclosure of confidential information: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, at paras. 19-28.

[65] To make out a breach of confidence, the plaintiff must show that:

1) the information conveyed was confidential;
2) the information was communicated in confidence; and
3) the information was misused by the party to whom it was communicated, to the detriment of the party who communicated the information in confidence.

Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, at pp. 635-636; *Tar Heel Investments Inc. v. H.L. Staebler Company Limited*, 2022 ONCA 842, at para. 26.

[2] In the balance of these reasons, references to "statement of claim" refer to the most recent amended version of the pleading, unless otherwise indicated.

[66] The plaintiff has pleaded an alleged breach of confidence suffered by the proposed class on the basis:

a. That the plaintiff and members of the class agreed to provide Rogers Communications with access to his sensitive credit information for a limited purpose, that is, to assess information about his credit worthiness for a specific product or service purchased from Rogers Communications;

b. That the plaintiff and the class members provided access to this information on the implicit understanding that it would be protected and used only to assess his eligibility for designated services, and to manage risk within that relationship;

c. That they did not consent to the soft credit checks that were performed for Rogers Bank to conduct marketing or promote products on behalf of Rogers Bank; and

d. That the defendants misused the plaintiff's personal credit information, even after he complained about the practice of ongoing soft credit checks.

[67] The plaintiff pleads the inherent privacy and desire for confidentiality in information about individual credit scores, payment patterns, and levels of debt. A reasonable consumer would expect that this information would not be obtained under false pretenses or shared with a separate non-contracting corporate entity to support its marketing.

[68] The plaintiff pleads that he was "shocked and angry" to discover this information-sharing practice. He pleads that his "distress, upset, anger and embarrassment" was exacerbated by Rogers Communications' refusal to tell him how it was using his credit information, and continuing to access his credit information after he asked them to stop.

[69] Mr. Trueman has pleaded that the class members subject to these practices similarly suffered "distress, upset, anger and embarrassment." For those in the subclass who were issued a Rogers Bank credit card, based on the credit data sharing practices, they must cancel unwanted cards to avoid a negative impact on their credit scores.

[70] In *Lac Minerals*, LaForest J. viewed the concept of "detriment" as being broad enough to include the distress that accompanies a breach of confidence: see *Cadbury*, at para. 53. The defendants urge the court to reject this argument. They submit that the breach of confidence claim is doomed to fail. For this proposition, the defendants rely on several recent decisions declining to certify claims for breach of confidence where the plaintiffs failed to plead consequential detriment.

[71] In *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (C.A.), the plaintiff alleged a professional detriment arising from a disclosure, made to his CEO, about his confidential negotiations with the Canadian Football League for the position of Commissioner. The Court of Appeal upheld the decision of the motions judge, who found that there was no professional detriment, or

consequential damage, because the plaintiff had successfully obtained the Commissioner position despite the breach of confidentiality: *Lysko*, at paras. 17-20.

[72] However, in *Lysko*, the Ontario Court of Appeal accepted that the concept of detriment may be broad, based on *Lac Minerals*: *Lysko* at para. 18.

[73] Although the plaintiff in *Lysko* was embarrassed and felt humiliated by his current employer learning that he was engaged in confidential negotiations to become the Commissioner of the CFL, the Court of Appeal found that he had failed to plead any facts that showed any other kind of detriment arising from the alleged breach of confidence. The Court of Appeal noted that "the pleading also fails to disclose the kind of emotional or psychological distress that would result from the disclosure of intimate information referred to in *Cadbury*": *Lysko*, at para. 20.

[74] In *John Doe v. Canada*, 2023 FC 1636, the plaintiff brought a proposed class action on behalf of participants in Health Canada's "Marihuana Medical Access Program" on the grounds that a mass mailing using a clear window on the envelope identified the recipients as participants in the medical program. The plaintiffs alleged a breach of confidence, among other causes of action.

[75] Kane J. concluded that the plaintiff had not sufficiently pleaded "detriment" as required by the *Lac Minerals* test, acknowledging that detriment is a broad concept, at para. 88:

> As noted in *Cadbury Schweppes SCC,* detriment is a broad concept and is "large enough for example to include the emotional or psychological distress that would result from the disclosure of intimate information" (*Cadbury Schweppes* at para. 53, citing *Argyll (Duchess) v Argyll (Duke)*, [1967] Ch 302). However, the Plaintiffs' description falls far short of evidence of emotional or psychological distress as described in *Cadbury Schweppes*. The evidence of the representative Plaintiffs dating back to 2014 and 2016 refers to vague and speculative concerns, including stress and anxiety and feeling dumbfounded. Nothing more recent or specific has been provided to prove class-wide detriment.

[76] In *Donegani,* a certification decision arising from the monetizing of user data by Facebook, Akbarali J. found that the plaintiffs had not adequately pleaded a detriment arising from the use of their confidential information. Following her review of the test in *Lac Minerals*, as applied by the Ontario Court of Appeal in *Lysko* and the Federal Court in *John Doe*, Akbarali J. concluded, at para. 97:

> … the statement of claim does not adequately plead the required element that the plaintiffs or the class suffered detriment as a result of the alleged breach of confidence. Based on the law I have already canvassed, distress and worry is insufficient to plead the detriment element of the tort.

[77] I conclude that the development of the case law, from commercial confidential information cases such as *Lac Minerals* and *Cadbury,* through to information privacy cases such as *Donegani* and *John Doe*, recognizes that detriment is a broad but finite concept. Detriment may include emotional distress but, as several decisions since *Lac Minerals* have concluded, the plaintiff must plead distress sufficient to amount to detriment in law. For example, in *John Doe*, "vague and speculative" allegations of stress and anxiety were insufficient: at para. 188. In *Donegani,* at para. 97, the motion judge concludes that allegations of "distress and worry" was insufficient.

[78] Here the plaintiff pleads that his emotional distress included being "shocked" and "angered" by the defendants' conduct. He pleads that he has continued to experience distress, upset, anger and embarrassment that Rogers repeatedly, unilaterally and surreptitiously invaded his privacy. Unlike the facts in *Lysko*, this was not the breach of a professional confidence without any impact on the plaintiff's prospects for the position he was negotiating. I find that unlike the circumstances in *John Doe*, Mr. Trueman's pleading goes beyond "vague and speculative" allegations of stress. His pleading goes further than "distress and worry" as in *Donegani*. While this is a case specific analysis, I am also careful to avoid treading into degrees of trial questions. The ongoing practices, the steps taken by the plaintiff and the pleadings bring the case at bar past vague or speculative concerns over a single event. To that extent I distinguish the pleaded facts from those in *Lysko, John Doe* and *Donegani.*

[79] The analysis at this stage is limited. Certification is a procedural step. The plaintiff need not prove the level of "emotional or psychological distress" nor, at this stage, must he even establish that he has a *prima facie* case. The pleadings analysis rests on the principles that have been applied and recognized since *Lac Minerals*, measured against the content of the pleadings in each case.

[80] I find that the cause of action alleging breach of confidence, as pleaded, meets the test in s. 5(1)(a).

The Tort of Intrusion Upon Seclusion

[81] The common law tort of intrusion upon seclusion requires the plaintiff to demonstrate:

a. that the defendant's conduct was intentional or reckless;

b. that the defendant invaded the plaintiff's private affairs or concerns without lawful justification; and

c. that a reasonable person would regard the invasion of privacy as highly offensive, causing distress, humiliation, or anguish.

Jones v. Tsige, 2012 ONCA 32, 108 O.R. (3d) 241, at paras. 70-71.

[82] The question of whether the intrusion is highly offensive to the reasonable person requires the court to examine the alleged degree of the intrusion, the context, conduct and circumstances of the intrusion, the tortfeasor's motives and objectives, and the expectations of those whose privacy is invaded: *Jones*, at para. 58.

[83] The Court of Appeal has limited the tort of intrusion upon seclusion to circumstances involving "deliberate and significant invasions of personal privacy… into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively… can be described as highly offensive": *Jones*, at para. 72; *Stewart v. Demme*, 2022 ONSC 1790 (Div. Ct.), 161 O.R. (3d) 21, at para. 22.

[84] Here the plaintiff has pleaded such deliberate and significant breaches relative to financial records. He asserts that the defendants intentionally and frequently accessed the credit reports of their customers on a recurring basis and without their express knowledge or consent, which meets the first criteria for the tort.

[85] On the second element of the tort, the plaintiff pleads that the credit checks were not justified by the contractor for any valid service-related purpose and were conducted after the original customer relationship had been established.

[86] Finally, on the third element, the plaintiff has pleaded that the information collected was a significant intrusion because one's credit information is highly sensitive and detailed. The credit information accessed was, as noted, shared with Rogers Bank, a separate corporate entity, and used by the bank to promote its credit cards to Rogers Communications customers.

[87] This tort is only available for those Rogers Communications customers who reside in Ontario. The tort of intrusion upon seclusion is not available in Alberta or in Quebec.

[88] The defendants submit that the proposed pleading does not meet what it describes as the "high standard" for this tort under Ontario law, citing recent appellate authority claims for intrusion upon seclusion in data breach cases: *Owsianik v. Equifax Canada Co*., 2022 ONCA 813, 164 O.R. (3d) 497, leave to appeal refused, [2023] S.C.C.A. No. 33; *Del Giudice v. Thompson*, 2024 ONCA 70, 169 O.R. (3d) 731, leave to appeal to S.C.C. refused, 41202 (September 19, 2024).

[89] While I agree that there should be appropriate scrutiny at the pleadings test phase, I do not accept that this tort carries a higher standard at the pleadings stage than other torts. As with any cause of action, the pleaded elements must be measured against the requirements of the tort.

[90] In a group of appeals heard together, involving a data breach of information collected and stored by the corporate defendants followed by data breaches committed by outsiders, the Court of Appeal upheld the dismissals of those actions on the basis that the tort claim of intrusion upon seclusion in "hacker" type cases is certain to fail at trial: *Owsianik*, at para. 57; *Obodo v. Trans Union of Canada, Inc*., 2022 ONCA 814, 164 O.R. (3d) 520 at paras. 22-23, leave to appeal to S.C.C. refused, 40555 (July 13, 2023); *Winder v. Marriot International, Inc.*, 2022 ONCA 815, 164 O.R. (3d) 528, at paras. 20-21, leave to appeal to S.C.C. refused, 40573 (July 13, 2023).

[91] As the motions judge explained in *Winder v. Marriott International, Inc.*, 2022 ONSC 390 at para. 13, while the hacker might be liable for the tort of inclusion upon seclusion, he would not extend liability in tort onto the keeper or custodian of the information, in this case Marriott International.:

> However, a reading of the Court of Appeal's decision in *Jones v. Tsige* reveals that both the letter and spirit of the Court's decision and the policy reasons behind it, prescribe a narrow – to not open the floodgates of liability – ambit for the tort of intrusion on seclusion. The ambit of the tort does not extend to constructive intruders and is limited to real ones. (Emphasis added.)

See also *Winder (ONCA)*, at para. 16.

[92] In a similar factual context, albeit after some rearranging of the pleadings pursuant to a failed certification motion, the Court of Appeal upheld the dismissal of a proposed class action claim involving information stored on an external third-party server that was successfully hacked by a former employee: *Del Giudice*.

[93] Perell, J., who heard the certification motion in *Winder (ONSC)*, was also the motion judge in *Del Giudice.* At paras. 4-5 of *Winder (ONSC)*, Perell J. distinguished the facts from those in *Del Giudice*. Perell J. also distinguished the facts in *Winder* from a hypothetical claim against an unauthorized taker of personal information as distinct from the information custodian:

[94] The hacker most certainly would be liable for the commission of the tort of intrusion on seclusion. However, relying on *Owsianik v. Equifax Canada Co*., *Del Giudice v. Thompson,* and *Obodo v. Trans Union of Canada Inc.*, Marriott submits that it is not liable for intrusion on seclusion. Those cases are authority for the proposition that the tort of intrusion on seclusion is doctrinally restricted to defendants who are "intruders." Marriott's argument is that it is a victim of the hacker and not a hacker encompassed by the tort of intrusion on seclusion.

[95] Structurally or doctrinally, apart from Mr. Winder's clever argument, discussed below, the pleaded material facts of the immediate case are quite similar to the pleaded facts in *Del Giudice v. Thompson,* and I would follow that decision, which as it happens is one of my own decisions.

The outcome of the immediate motion would then be that Mr. Winder has not pleaded a legally viable action for intrusion on seclusion against Marriott.

[96] As the Court of Appeal noted in *Del Giudice,* whether the defendant's misdeeds are characterized as (i) mistakes in safeguarding information or (ii) improper retention and misuse of that information, "neither characterization satisfies a key element of intrusion on seclusion: that the conduct be of a highly offensive nature causing distress, humiliation or anguish to a reasonable person.": *Del Giudice*, at para. 35.

[97] The defendants rely on the holding in *Del Giudice* and reason that the corporate relationship between the two Rogers entities makes the pleaded facts here less serious, as the data was not accessed by an external hacker. This miscasts the pleading at bar.

[98] This pleading involves the alleged ongoing access to detailed financial information held by TransUnion for the purposes of marketing by an unauthorized corporate entity, contrary to privacy legislation. This case is not about the negligent storage of aggregate data, which has been subsequently hacked but has not been exposed to public or private view: *Del Giudice*, at para. 35.

[99] In the case at bar, the plaintiff alleges that Rogers Bank and Rogers Communications together unlawfully accessed confidential financial information of Rogers Communications customers, without permission, for marketing purposes. Having pleaded that the alleged acts of the defendants caused "distress" to the proposed representative plaintiff, and given the differences in the underlying facts pleaded, I decline to dismiss this cause of action as bound to fail.

[100] This cause of action requires a subclass of Ontario-only residents, because the tort of inclusion upon seclusion is not available in Alberta or Quebec.

The Statutory Claims under the Quebec Civil Code and the Québec Charter

[101] The plaintiffs have pleaded that Rogers breached several provisions of the CCQ, s. 49 of the *Charter of Human* Rights *and Freedoms*, C.Q.L.R., c. C-12 (the "*Charter of Rights*") and the *PPIPS*.

[102] The allegations in the statement of claim relative to the Quebec statutory claims read:

> 58. On behalf of the Class Members resident in the province of Québec, if any, the Plaintiff pleads that Rogers breached arts. 35-37 of the *Civil Code of Quebec* ("*CCQ*") by failing to obtain the consent of those Class Members to collect and disclose their personal information and violating their right to privacy without lawful authorization.

59. As a result of the breaches of the *CCQ*, the Class Members resident in Québec are entitled to moral and material damages pursuant to arts. 1457 and 1463-1464 of the *CCQ*.

60. In addition, Class Members resident in Québec are entitled to injunctive relief and punitive damages pursuant to art. 49 of the Québec *Charter of Human Rights and Freedoms.*

61. On behalf of the Class Members resident in Québec, the Plaintiff pleads that Rogers breached arts. 3.1, 4-8, and 12-15 of the *PPIPS* by failing to obtain the consent of such Class Members to collect, use, and disclose their personal information for purposes that were not disclosed.

62. As a result of these breaches of the *PPIPS*, the SubClass Members resident in Québec suffered injuries and are entitled to punitive damages pursuant to article 93.1 of the *PPIPS* of not less than $1000 each.

[103] The plaintiff seeks damages in these terms:

i. Loss of their right to privacy in respect of their personal information;

ii. Loss of privacy and injury to dignity;

iii. Humiliation, distress, upset, anxiety, embarrassment and anguish arising from the unauthorized collection, usage, storage and/or disclosure of their personal credit information without their knowledge or consent;

iv. Uncertainty surrounding nature and scope of the unauthorized credit checks;

v. Uncertainty surrounding nature and scope of the disclosure of their personal credit information;

vi. Lost or wasted time, frustration, and inconvenience in responding to the unauthorized credit checks,

vii. Impairment of the Sub-Class Members' credit ratings arising from the issuance of the Rogers Bank credit cards, as well as lost or wasted time, frustration, and inconvenience in rejecting or cancelling the unsolicited credit card and correcting credit score information.

[104] The amended statement of claim describes in detail the plaintiff's discovery, monitoring and complaints to Rogers Communications about the use of his private credit data. Further, despite

explicitly refusing to provide consent to the practice of credit checks, Rogers Communications continued the practice until the plaintiff terminated his contract with Rogers Communications.

[105] The defendants submit that there is no cause of action for the alleged breaches of articles. 35-37 of the CCQ, nor is there a cause of action for alleged breaches of sections 3.1, 4-8, and 12-15 of the *PPIPS* without an accompanying claim for compensable damages: *Cleaver v. the Cadillac Fairview Corporation Limited*, 2025 BCSC 910, at para. 161, citing *Sofio c. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2015 QCCA 1820, at paras. 21-23.

[106] Similarly, the defendants submit that the allegation of a breach of Article 1457 of the CCQ, as applied to contractual relationships, also requires a concomitant pleading of compensable harm: *Union des Consommateurs c. Air Canada*, 2025 QCCA 480, at paras. 89, 92.

[107] More broadly, the defendants rely on commentary from the Quebec Court of Appeal in *Lamoureux v. Organisme Canadien de Réglementation du Commerce des Valeurs Mobilières*, 2022 QCCA 685, at para. 13, for the proposition that lost personal information does not support a claim for compensable damage.

[108] I disagree that the statutory claims pleaded under Quebec law are certain to fail and should be struck.

[109] In *Sofio*, the plaintiff sought class proceedings authorization for a negligence claim. The court applied the factors for authorization found in art. 1003 of the *Code of Civil Procedure*, C.Q.L.R., c. C-25 (now art. 575 of the *Code of Civil Procedure*, C.Q.L.R., 25.01). The motion judge in *Sofio* discussed whether moral damages were available in the context of those pleaded facts (a lost laptop by an employee of a securities regulator containing personal information of third parties), and was upheld in deciding that the damages claimed did not reach beyond the threshold discussed by the Supreme Court of Canada in *Mustapha v. Culligan*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 9. This decision did not concern the CCQ or *PPIPS.* The motions judge considered the precise contours of the pleading and the stress pleaded by the plaintiff caused by the lost laptop. He concluded that the plaintiff's pleaded losses involved with the need to follow up and monitor their credit information were insufficient to establish compensable prejudice.

[110] The facts pleaded here are quite different from those in *Sofio, Union de Consommateurs* and *Lamoureux*. *Sofio* and *Lamoureux* involved losses of information through the alleged negligence of the defendants in failing to safeguard the personal data of third parties in their possession. In *Union des Consommateurs*, the plaintiff alleged that the defendant listed misleading purchase prices. Here, the plaintiff alleges an intentional scheme to access personal data of millions of customers to support the parallel marketing efforts of a related corporation. The pleading alleges intentional breaches, harm and damages related to the cost of follow-up and mental distress.

[111] Class actions have been certified where the claims involved alleged breaches of Quebec statutory privacy provisions. For example, in Ontario, Glustein, J. certified a class action which alleged breaches of the CCQ in the context of a hacker breach of credit data. The claim sought damages for both out of pocket expenses and mental distress. Glustein, J. found that the plaintiff had adequately pleaded his claim under articles 35-37 of the CCQ: *Obodo v Trans Union of Canada, Inc*, 2021 ONSC 7297 at paras. 226-232.

[112] In another case considered in *Cleaver, Homsy c. Google*, 2024 QCCS 1324, the court found that the plaintiff's pleading, which included stress and anxiety relative to the defendant's misconduct relative to personal biometric data, was sufficient for authorization. The court concluded that it should be left to the merits stage for testing the evidence of damages. The motion judge wrote that the "undisclosed use of personal data by a third party is not a normal inconvenience of life, unlike the elements at stake in the decision in *Li. c. Equifax inc."*: *Homsy*, at para. 49 [translated by author]. In the cited decision of *Li c. Equifax inc.*, 2019 QCCS 4340, at paras. 29-31, Bisson J. who was also the motions judge in *Homsy,* found that in a case of a data breach which required the plaintiff to cancel credit cards and monitor their credit scores, was more in the nature of a "normal inconvenience" that is part of modern life.

[113] In *Zuckerman c. MGM Resorts International*, 2022 QCCS 2914, the court certified an action based on a security breach of data held by luxury hotels. The plaintiff sought damages based on the data breaches, the posting of information for sale on the dark web and the associated stress involved with the breach, as well as out of pocket expenses.

[114] In *Zuckerman*, Courchesne, J. discussed the threshold for damages claims which may be sought in privacy breach cases:

> [51] In *Mustapha*, the Supreme Court has provided guidance on the distinction between minor and transient upsets and compensable injury. Compensable injury must be "serious and prolonged" and rise above the ordinary annoyances, anxieties and fears that a person living in society may experience.
>
> [52] In similar cases of data security incidents, the courts have determined that the alleged inconveniences did not exceed the threshold of ordinary annoyances.
>
> [53] However, in *Zuckerman c. Target*, the authorization judge considered that "other matters such as setting up credit monitoring and security alerts, obtaining credit reports, and cancelling cards or closing accounts and replacing them are not "ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept" but may amount to something more. These are potentially matters for which class members would be entitled to compensation." [Citations omitted.]

[115] In authorizing the class action, Courchesne, J. noted that section 49 of the Quebec Charter authorizes stand-alone punitive damages where there has been an intentional interference with the rights and freedoms protected by the *Charter*: *Zuckerman*, at para. 67.

[116] The issue of whether the damages claimed here, on the facts that may be found, amount to compensable damages is clearly a trial issue. The plaintiff has pleaded an intentional scheme to defeat class members privacy interests in favour of the marketing interests of the defendant, Rogers Bank. I decline to find on the fact of these pleadings, as required, that the Quebec statutory claims are certain to fail. The plaintiff has pleaded statutory obligations, breaches and damages for loss of time, stress, anxiety, as well as punitive damages pursuant to the Quebec *Charter*. He monitored his credit reports, escalated his complaint to the Office of the President, and ultimately cancelled his contract and replaced his service provider. Whether he can establish these as compensable damages at trial is a live question but given the range of jurisprudence on damages relative to privacy breaches, I am not satisfied that it is "plain and obvious" that he will be unable to succeed.

[117] The plaintiff acknowledges that while he has pleaded a general breach of the Quebec *Charter*, he did not plead specifically a breach of s. 5 and seeks leave to amend to include that breach. I grant leave to amend the pleading to particularize the section claimed to have been breached.

Is the Subclass claim out of time and should it be struck at this stage?

[118] The defendants submit that the claim on behalf of the entire subclass of plaintiffs who received unsolicited credit cards is certain to fail because it is out of time. They rely on the pleaded fact that the last customers to receive unsolicited credit cards received them in February of 2019. This was more than two years from the date on which this action was commenced, and more than four years prior to the plaintiff's amendment including the subclass.

[119] In Ontario, under s. 5(1)(a)(iv), the limitation period runs from the day on which the person with the claim first knew that the injury, loss or damage had occurred, and having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it: *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B. See also *Sosnowski v. MacEwen Petroleum Inc,* 2019 ONCA 1005, 441 D.L.R. (4th) 393, at paras. 15-19.

[120] The defendants submit that class periods must respect limitation periods wherever possible. They rely on jurisprudence which suggests that if a claim is plainly time-barred, this should be decided at the pleadings stage: *Bernstein v. Peoples Trust Company,* 2017 ONSC 752, 97 C.P.C. (7th) 286, paras. 100-101; *Hoy v. Expedia Group Inc*, 2022 ONSC 6650, paras. 232-3, aff'd 2024 ONSC 1462, 171 O.R. (3d) 114 (Div. Ct.); *Sankar v. Bell Mobility Inc*, 2013 ONSC 5916, 52 C.P.C. (7th) 75, at para. 17, leave to appeal refused, 2013 ONSC 7529 (Div. Ct.); *Pro-Sys Consultants Ltd v. Microsoft Corp*, 2015 BCSC 74 ("*Pro-Sys (BCSC)*"); *Francis v. Ontario*, 2020 ONSC 1644, 456 C.R.R. (2d) 1, para. 5, aff'd 2021 ONCA 197, 463 D.L.R. (4th) 99.

[121] I disagree. The harm alleged is not in the issuance of the credit cards, whether they were solicited or not. The plaintiff's pleadings describe credit checks which were not disclosed to Rogers' Communications customers for the use and benefit of Rogers' Bank. That would be the knowledge required for the subclass to know that they had a claim. The issuance of the credit cards alone does not logically set the limitation period clock running from the date of issue.

[122] While the defendants assert that it would have been "obvious" that a claim existed once those customers received a credit card, they do not explain how that could be. The only thing obvious would be the receipt of the card, but not the rationale or steps taken by Rogers Bank to determine that customer's eligibility with the assistance of Rogers Communications. Given that the credit checks were in the name of Rogers Communications Inc., the recipients of credit cards from Rogers Bank may not have been in a position to connect the decision to provide those cards to them with any soft credit checks done on them.

[123] The limitation period issue is more properly available as a trial issue and is not a basis at this stage to find that the claim of the subclass is certain to fail.

Section 5(1)(b) – is there an identifiable class of two or more persons that would be represented by the representative plaintiff?

[124] The test under s. 5(1)(b) of the *CPA*, as articulated by Glustein, J. in *Farrell v. Attorney General of Canada*, 2023 ONSC 1474, 165 O.R. (3d) 652, at paras. 229-32, is:

> [229] The plaintiffs have an obligation, "although not an onerous one", to show that the class is not "unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues": *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 21; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 45.
>
> [230] The proposed class must be identifiable. Defining a class "is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment": *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 38.
>
> [231] The plaintiffs must establish some basis in fact that: (i) the class can be defined by objective criteria; (ii) the class can be defined without reference to the merits of the action; and (iii) there is a rational connection between the common issues and proposed class definition: see *Hollick*, at paras. 9, 17-19.
>
> [232] Where the class could be defined more narrowly, the court should either disallow certification or allow certification on the condition that the class definition be amended: see *Hollick*, at para. 21.

[125] The criteria in s. 5(1)(b) of the *CPA* are met here. The plaintiff has filed a workable litigation plan and there is an identifiable class of two or more persons to be represented by the representative plaintiff.

[126] The plaintiff proposes to define the class and sub-class with reference to objective criteria, bounded by contractual relationship with Rogers Communications, location and time.

[127] The plaintiff proposes that the class be defined as:

> All persons currently or previously residing in Ontario, Quebec and Alberta who had consumer service contracts for post-paid services with Rogers Communications between January 1, 2015, and April 30, 2025, (the Class); and,
>
> a Sub-Class of all Class Members to whom Rogers Bank issued a Rogers Bank-branded credit card without first receiving express written consent from the Sub-Class Member or without providing confirmation in writing that Rogers Bank had received the Class Member's prior express or consent to be issued such a credit card.

[128] The defendants object to the class definition. They submit that it is overbroad because it includes customers who received unsolicited credit cards and activated them, as well as customers who received those offers more than two years prior to the plaintiff initiating his claim. Both submissions conflate offer and acceptance of a Rogers Bank credit card with customer knowledge of the alleged privacy breach at issue. I would not give effect to this submission.

[129] I conclude that the class is neither open-ended nor over-broad. It is rationally connected to the proposed common issues which center on the actions of the defendants in accessing detailed personal financial information to assist Rogers Bank in its marketing efforts without disclosure or consent from the Rogers Communications customers.

Section 5(1)(c) – Does the claim of the class members raise common issues?

[130] Section 5(1)(c) of the *CPA* requires the proposed representative plaintiff to show that "the claims or defences of the class members raise common issues".

[131] This is a low evidentiary standard. Certification is not the stage to analyze the sufficiency of evidence for proof of the claim at trial. The evidence on certification must establish some "basis in fact" that common issues exist: *Price v. H. Lundbeck A/S*, 2018 ONSC 4333, at para. 83, rev'd on other grounds, 2020 ONSC 913, 51 C.P.C. (8th) 351 (Div. Ct.); *Richard v. The Attorney General of Canada*, 2024 ONSC 3800, 561 C.R.R. (2d) 178, at para. 314.

[132] Issues that are common mean that the claim avoids the need for duplicative fact-finding or legal analysis. To be "common," each class member's claim will depend on the same factual and/or legal question: *Hollick*, at para. 18.

[133] The plaintiff seeks to certify the common issues as follows:

Definitions

In these common issues,

a) "Credit Information" means credit information as defined in s. 1(1) of the *Consumer Reporting Act*, RSO 1990, c C.33;

b) "Rogers Communications" means the Defendant Rogers Communications Canada Inc.;

and,

c) "Soft Credit Check Practices" means the collection, and the subsequent use, storage, and/or disclosure by of Class Members' Credit Information as obtained by one or both of the Defendants from credit reporting agencies following account review inquires by one or both of the Defendants.

Intrusion Upon Seclusion

1. Did the Soft Credit Check Practices amount to an intentional or reckless intrusion without lawful justification into the Class Members' private affairs or concerns by one or both of the Defendants?

2. If yes, did the intrusion occur in a manner that a reasonable person would regard as highly offensive?

3. If yes, are the Defendants, or either of them, liable to the Class Members for damages for intrusion upon seclusion?

4. If yes, can the all or part of the Class Members' damages for intrusion upon seclusion be assessed in the aggregate? If yes, in what amount?

Breach of Confidence

5. Was any of the information collected through the Soft Credit Check Practices confidential? If yes, which information?

6. If yes, was the confidential information communicated in confidence to the Defendants, or either of them?

7. If yes, was this confidential information misused by the Defendants, or either of them, to the detriment of the Class Members?

8. If yes, are the Defendants, or either of them, liable to the Class Members for damages for breach of confidence?

9. If yes, can the all or part of the Class Members' damages for breach of confidence be assessed in the aggregate? If yes, in what amount?

Breach of Contract

10. Was it a term, either express or implied, of Rogers Communications' contracts with the Class Members that the Soft Credit Check Practices were authorized only if Class Members provided their express consent to them?

11. Was it a term, either express or implied, of Rogers Communications' contracts with the Class Members that Rogers Communications would comply with all governing privacy laws and regulations regarding the acquisition, use, storage, and/or disclosure of the Class Members' Credit Information?

12. Was it a term, either express or implied, of Rogers Communications' contracts with the Class Members that Class Members' Credit Information obtained through the Soft Credit Check Practices would not be conveyed to Rogers Bank for the purposes unrelated to the business of Rogers Communications?

13. If any of questions #10, 11 or 12 are answered affirmatively, were any of these contractual terms breached by Rogers Communications?

14. Did the Soft Credit Check Practices otherwise amount to a breach of Rogers Communications' contracts with the Class Members? If so, how?

15. If any of questions #10, 11 or 12 are answered affirmatively, is Rogers Communications liable to the Class Members for damages for breach of contract?

16. If yes, can the all or part of the Class Members' damages for breach of contract be assessed in the aggregate? If yes, in what amount?

Breach of the Civil Code of Québec

17. Did the Soft Credit Check Practices violate articles 35, 36, or 37 of the *Civil* Code *of Québec*?

18. If yes, are the Defendants, or either of them, liable to the Class Members for damages pursuant to article 1457 of the *Civil Code of Québec*?

19. If yes, can the all or part of the Class Members' damages for breach of articles 35, 36, or 37 of the *Civil Code of Québec* be assessed in the aggregate? If yes, in what amount?

Issuance of Unsolicited Credit Cards

20. Did the Defendants, or either of them, use the Credit Information obtained through the Soft Credit Check Practices for the purpose of identifying those Class Members to whom Rogers Bank was prepared to offer pre-approval for its credit cards?

21. If yes, did Rogers Bank offer pre-approved credit cards to such Sub-Class Members?

22. Did the Defendants, or either of them, use the Credit Information obtained through the Soft Credit Check Practices for the purpose of identifying those Class Members to whom Rogers Bank was prepared to issue a credit card, and then did Rogers Bank issue a credit card to the Sub-Class Members, without obtaining these customers' prior express written or oral consent?

23. If yes, can all or part of the Sub-Class Members' damages be assessed in the aggregate? If yes, in what amount?

24. Are the Defendants, or either of them, liable to pay prejudgment or post-judgment interest on the Class Members' damages? If yes, in what amount?

25. Does the conduct of the Defendants, or either of them, justify an award of aggravated, exemplary and/or punitive damages?

26. If yes, can those damages be assessed on an aggregate basis? If yes, in what amount?

[134] These factual and legal questions share a starting point: the content of the impugned consumer agreements relied on by Rogers Communications for sharing customer lists and access to customer credit information with Rogers Bank for its marketing purposes.

[135] The proposed common questions inquire into what Rogers Communications represented to its customers in those contracts about their "Credit Information" as defined, and how it conducted itself having made those representations. The alleged misconduct flows from the impugned contract wording until the April 30, 2025. Accordingly, the plaintiff proposes April 30, 2025, as the end date for the class.

The Pavlović Opinion on Contract Readability

[136] As part of establishing some basis in fact for that common issue, the plaintiff tendered expert evidence from a specialist in consumer contracts, telecommunications, and access to justice. That expert, Professor Marina Pavlović, reviewed the language in the various versions of Rogers' standard-form contracts, concluding that "[i]n their current form, the provisions are too obscure to

be comprehensible to the majority of Canadians" and "require readers to have a level of literacy commensurate with some form of post-secondary education."

[137] Professor Pavlović assessed the consumer contracts in accordance with several standardized tests as to word count, length and readability which are available in word processing programs. Those programs were the "Flesch-Reading Ease" and the "Flesch-Kincaid" readability score. During cross-examination, Professor Pavlović agreed that these are standard tests which anyone with a computer can apply to text and that she has no special expertise in interpreting the results of those tests.

[138] In addition, Professor Pavlović applied the "Pavlović-Cavanagh integrated comprehensibility checklist" a tool which she developed with a colleague, and later refined. In her report, Professor Pavlović describes the development of the Pavlović-Cavanagh checklist in these terms:

> [66] Genuine comprehensibility is conditional on both the basic comprehensibility of a document (measured by its readability), length and presentation of the document, as well as the higher cognitive skills required to understand the document, its meaning, and implications. I analyzed the genuine comprehensibility of the Terms of Service and the Residential Service agreement using the Pavlović-Cavanagh Integrated Comprehensibility Checklist.
>
> [67] From 2016 to 2019, I was a co-principal investigator with Dr Mary Cavanagh (currently Director of the School of Information Studies at the University of Ottawa) on a Law Foundation of Ontario Major Responsive Grant that researched legal information-seeking practices of telecommunications consumers. As part of our research project, we designed a comprehensive integrative checklist for assessing the comprehensibility of consumer contracts. Our project focused on wireless (mobile) telecommunications services, but the checklist applies to any consumer-facing contract.
>
> [68] While Dr Cavanagh and I jointly designed the list, I carried further the work on the list and its testing. I presented the checklist at a peer-reviewed conference—Clarity 2018 international conference in Montreal. Clarity is the world's largest organization focused on promoting plain legal language and design.
>
> [69] The checklist is intended to be used in addition to and complements the standard readability scores. The checklist measures the effectiveness of using language, structure, design, and content to convey intended messages in a way that meets the needs of the intended audience. The checklist assesses whether, after reading the contract, the consumers understand the text, are aware of important information (such as rights and obligations), are able to find the relevant information, understand, and use that information when appropriate.
>
> [70] The checklist measures the following four categories of a document/contract:

> ● **Language**: vocabulary, use of definitions, consistent terminology, the use of active and
> passive voice, personal pronouns, and the length of sentences used.
>
> ● **Organization of the document**: overall organization and ease of navigation of the document, including the use of descriptive headings and numbering, amount of cross-referencing and referrals to additional documents and sources, and the overall organization and grouping of the document.
>
> ● **Design and layout**: font type and size, length of paragraphs and other blocks of text, color scheme, use of white space, and use of other visual tools to represent and navigate users through complect concepts.
>
> ● **Content and audience**: whether the rights and obligations of the parties are effectively explained to a general audience, the use of tone, vocabulary, and use of examples to explain complex concepts. While the checklist uses high-school literacy level (12 years of education, equivalent to Level 3 literacy as described above in section 5.2.3), this section should equally apply to Level 2 literacy. Please note that this section focuses both on the readability and comprehensibility of the information.
>
> [71] The checklist uses both qualitative and quantitative assessment. In total, 28 different observations are measured on a Likert-type quantitative scale from 0-5 points (non-existent to excellent), per element.

[139] Professor Pavlović is an Associate Professor of Law at the University of Ottawa. Her areas of research and expertise are consumer rights in contemporary digital society, grouped around themes of consumer contracts, telecommunications, and access to justice.

[140] The defendants challenge the admissibility of the Pavlović opinion. I consider that issue next.

Is the Pavlović Opinion Admissible on the Common Issue Analysis under s. 5(1)(c)?

[141] The defendants submit that the Pavlović opinion is irrelevant to the common question of breach of contract. They submit that the average Canadian's literacy levels, and whether the average Canadian could understand the Rogers Communications customer service agreements, are not issues in this litigation and are not relevant to the test for certification under s. 5 of the *CPA*.

[142] The defendants also challenge the necessity of this expert evidence, because it usurps the court's expertise in interpreting contracts. Finally, they challenge Professor Pavlović's credentials on the basis that her training is in law and not in linguistics, semantics or readability. They submit that one cannot assess the reliability of the tools used by Professor Pavlović, including the software-generated tools for readability or the "Pavlović-Cavanagh integrated comprehensibility checklist".

[143] The plaintiff submits that the expert evidence is not tendered to interpret the contracts but instead to "assess the comprehensibility of the relevant provisions of the alleged Contract between Rogers Communications Canada Inc. and the Plaintiff."

[144] The plaintiff submits that Professor Pavlović's report assists the court by providing the social and factual context relevant to whether there is some basis in fact for the proposed common issues, particularly given that this is a standard form agreement used in the consumer mass-market. It highlights the fact that the opinion establishes that the consumer agreements were beyond the comprehension of the average Canadian consumer.

[145] To be admissible, expert evidence must meet the test from *R. v. Mohan*, [1994] 2 S.C.R. 9, at p. 20, that is the evidence must be:

a. relevant;
b. necessary to assist the trier of fact in determining the truth of the facts;
c. given by an expert witness qualified to give the opinion by virtue of study, training or experience; and
d. not otherwise inadmissible by virtue of an exclusionary rule.

[146] Where the opinion is based on novel science, the party tendering the evidence must also establish the reliability of the underlying science: *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 23.

[147] At the second stage of the analysis, the court exercises a gatekeeping role, considering the costs and benefits to admitting the proffered evidence: *White Burgess*, at para. 24.

[148] I conclude that the Pavlović opinion evidence is not relevant to the issues on certification and shall not be admitted. The plaintiff has framed the proposed common issues for breach of contract as questions about content of the consumer agreements and whether the defendants breached the express or implied terms of the contract. These are questions of contractual interpretation. They are not questions that require evidence as to what the average Canadian consumer would understand if they were to read those contracts. The opinion evidence does not respond to the issue on certification, because even if that evidence proved that the average Canadian would not understand the meaning of these contracts, how would that answer a common question in litigation which alleges breach of those contracts?

[149] The proposed evidence relates to the contracts, but it is not probative to the issues on this motion. This action is not about what makes a good or fair contract that is accessible to the average Canadian. The common issues involve questions of what those contracts were, and whether the defendants breached the terms of the contracts. Questions of ambiguity can readily be resolved through the well-established principles of contractual interpretation, including the case law on standard form contracts found in *Douez v. Facebook*, 2017 SCC 33, [2017] 1 S.C.R. 751. *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.,* 2024 SCC 20, 492 D.L.R. (4th) 389, at paras.

61-65; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at paras. 50-51.

[150] To that extent, the evidence is irrelevant and does not assist the court in determining whether there are common issues on the question of whether to certify this class proceeding in breach of contract.

[151] I do not admit this evidence and will not consider it on the test for certification. I turn next to the common issues proposed for certification.

The Proposed Common Issues in Breach of Contract (Questions 10-15)

[152] The impugned standard form contracts that are at the heart of the claim for breach of contract are key common features of this aspect of the plaintiff's claim. The Divisional Court has described a claim involving a breach of a standard form contract by a telecommunications company as "a prototypical case for application of the procedures and protections found in the *Class Proceedings Act, 1992*. Thousands of individual users, with what are small individual claims, facing off against large corporate entities": *Corless v. Bell Mobility Inc*, 2015 ONSC 7682, at para. 21.

[153] The defendants have four objections to the proposed common issues in breach of contract which I summarize as:

i. Too many versions of the contract;

ii. Improper reliance on prior OPC decisions to establish "some basis in fact" for the common issues;

iii. Unavailability of expectation damages; and

iv. Subclass variations which will bog down discovery.

a. Objection 1: Too many versions of the contract

[154] The defendants submit that because there are (by their count) 21 different versions of the standard form contracts during the class period, a class proceeding would be too unwieldy. I disagree.

[155] While Rogers Communications may have changed its standard form contracts over time, the commonality lies in the fact that these were standard form documents applied to thousands of customers during various periods. The trial judge will apply an objective interpretation to these iterations of the contract within a context that is typical across the class: *Wellman and Corless v. TELUS and Bell*, 2014 ONSC 3318, 63 C.P.C. (7th) 50, at paras. 57-59, aff'd 2017 ONCA 433, rev'd on other grounds, 2019 SCC 19, [2019] 2 S.C.R. 144. Requiring individual claims to proceed, for nominal or relatively small individual claims for breach of privacy would be

exponentially unwieldy in comparison to a single claim involving several versions of Rogers Communications' privacy policy, user agreement and consumer information about the uses to be made of their private information. There are a finite set of contracts involved.

[156] I would not give effect to this objection from the defendants.

b. Objection 2: Improper reliance on prior OPC decisions to establish "some basis in fact" for common issues

[157] In support of there being "some basis in fact" that a common issue exists in breach of contract, for misrepresenting its compliance with privacy legislation, the plaintiff relies upon prior findings of the Office of the Privacy Commissioner of Canada ("OPC") from 2015.

[158] On April 7, 2015, the OPC concluded that Bell Canada breached s. 5(3) of *PIPEDA* through its use of its customers' credit information for marketing purposes without obtaining sufficiently express, informed consent for that purpose: Office of the Privacy Commissioner, *PIPEDA Report of Findings #2015-001* (Office of the Privacy Commissioner, 2015). The OPC found that Bell required express consent to use the information, given its sensitivity and the reasonable expectations of Bell customers. The OPC criticized Bell for using credit measures for purposes beyond those with "important financial implications for the consumer and the organization concerned": *PIPEDA Report of Findings #2015-001*, at para. 58.

[159] In 2015, the OPC reported on another investigation into an unidentified telecommunications provider, that had conducted periodic "soft" credit checks to determine customer eligibility for the provider's products, services, and promotions: Office of the Privacy Commissioner, *PIPEDA Report of Findings #2015-018* (Office of the Privacy Commissioner, 2015).

> In this case, the telecommunications company had conducted bi-monthly "soft" credit checks on the consumer complainant to obtain information used to market its services and develop new products and marketing campaigns. During the OPC investigation, the telecommunications company relied on permissive language in its service agreement with the complainant. The OPC concluded that a reasonable person would not consider the soft credit checks appropriate in the circumstances. It found that the soft credit checks collected personal information, and the practice violated the principle that "measures of credit worthiness, such as credit scores, are only to be used for certain limited purposes directly related to decisions with important financial implications for the consumer and the organization concerned": *PIPEDA Report of Findings #2015-018* at para. 29, citing 2015-001.

[160] The OPC commented that it was unlikely that the company's customers would have "meaningfully understood" from the language in the agreement upon which the company relied "that their credit information would be used to deliver tailored promotions.": *PIPEDA Report of Findings #2015-018*, at para. 34.

[161] The defendants challenge the admissibility of the OPC findings in 2015 on this motion for certification, because their contents are inadmissible hearsay. I disagree. The plaintiff's burden on a certification motion is not to establish the proof of the claim. Here the plaintiff seeks a limited use of the OPC reports, that is to demonstrate some basis in fact as to his ability to lead evidence and persuade a trial court that the defendants breached their standard form contracts with their customers by adopting a practice of facilitating soft credit checks for the marketing purposes of Rogers Bank. He leads the evidence of prior findings of the OPC for the purpose of showing the potential knowledge of the defendants that they were acting in a way that violated *PIPEDA*. This is not a hearsay use: *Strathdee v. Johnson & Johnson*, 2025 ONSC 3738, at paras. 132-44; *Cleaver* at para. 66

[162] On this limited use, the prior decisions of the OPC are relevant and admissible on the certification issues.

c. Objection 3: Unavailability of expectation damages

[163] The defendants alternatively submit that the proposed common issues for damages in breach of contract assume the plaintiffs would be entitled to expectation damages if they prove a breach of contract, but that they have only made out a claim for nominal damages on the facts pleaded here. They submit that as a result, questions 15 and 16 should not be certified, because there are no expectation damages that would logically flow from a breach of the class members' collective privacy rights.

[164] Further, the defendants submit that if that portion of the claim leads to only nominal damages, such a proceeding does not serve the objectives of class proceedings. They rely on prior findings in different circumstances that a class action without compensatory harm does not provide access to justice and is a "waste of judicial resources": *Atlantic Lottery Corp Inc v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 68.

[165] For context, I repeat here questions 15 and 16:

> 15. If any of questions #10, 11 or 12 are answered affirmatively, is Rogers Communications liable to the Class Members for damages for breach of contract?
>
> 16. If yes, can all or part of the Class Members' damages for breach of contract be assessed in the aggregate? If yes, in what amount?

[166] The plaintiff has not limited his claim to nominal damages, although the trial court might find that this is the sole entitlement established after a trial. However, as far as damages linked to a breach of privacy are concerned, there is some basis in fact to find that damages could flow from findings of fact at trial arising from breaches of the terms of the contracts.

[167] Compensation by way of general damages can flow from privacy breaches. The British Columbia Court of Appeal observed in *ICBC* that general damages are available for an injury to

an intangible interest such as a privacy right. Further, the BCCA noted that the right to control one's personal information is harmed by an intrusion whether there is any mental distress or upset, or even knowledge by the person concerned that the breach has taken place: *ICBC* at paras. 48-49; *Insurance Corporation of British Columbia v. Ari*, 2023 BCCA 331, 485 D.L.R. (4th) 505, at para. 167, citing *Pootlass v. Pootlass* (1999), 32 C.P.C. (4th) 70 (B.C. S.C.), at para. 62.

[168] I am persuaded that there is some basis in fact to certify the common issues in breach of contract, including the claims for damages. This is not the stage to find that the plaintiff will be unable to establish a sufficiently serious breach of the class members' privacy interests to justify an award of general damages for breach of contract.

d. Objection 4: Subclass variations will bog down discovery

[169] The defendants argue that there is no common issue as among the subclass members to whom Rogers Bank issued credit cards. The defendants submit that for each class member, the parties will need to determine who had cards issued, who cancelled them and which of those had their credit scores negatively affected. The defendants rely on evidence from Rogers Chief Operating Officer, Mr. DiFelice, that members of the subclass have been remediated by cancelling those cards and removing the related hard inquiries, which can affect credit scores.

[170] This submission ignores the pleaded wrongdoing and the common issue that applies to the subclass, that is the wrongful accessing of private information through conducting unauthorized soft credit checks. The issuing of the cards was the result of the alleged wrongdoing, and depending on the impact on those individuals, could result in several categories of customers entitled to consequential damages. For example, it is conceivable that among that group there could be customers who were issued cards and suffered consequential damages, such as impairment to their credit score, embarrassment, wasted time and inconvenience, and frustration. That said, this does not remove the common question that also applies to the subclass: the alleged privacy breaches that provided Rogers Bank with data it relied on to market to the subclass and issue them unsolicited credit cards.

[171] The defendants will have records of the credit cards issued, complaints and cancellations during the class period. Given that the plaintiff has established a common question on behalf of the subclass, I do not agree that the need to produce those records will constitute an unreasonable drag on the discovery process that should defeat certification of the common questions arising from the contracts that were used to justify the credit checks and used as a basis to issue the unsolicited credit cards to members of the subclass.

The Proposed Common issues in the Claim for Intrusion upon Seclusion (Questions 1-3)

[172] The plaintiff submits that the issue common to the class underlying his claim in the tort of intrusion upon seclusion is whether the defendants' conduct was a "highly offensive, unjustified intrusion into the class members' private affairs." The factual foundation for this tort, as with breach of contract, is the systemic practice employed by the defendants to access the credit

information of Rogers Communications' customers. This is a question in common across the class because it relies on the plaintiff's allegation of the defendants' actions in accessing private, detailed customer data, without justification for marketing purposes. Whether this type of program, in these circumstances, is "highly offensive" and "unjustified" can be determined in common across the class as defined.

[173] The defendants tendered two opinions from experts in support of their position that the court should decline to certify common questions for the tort of intrusion upon seclusion. These reports are from:

a. Professor Christopher Sears, a psychology professor who gave an opinion on the reaction a typical person would experience when receiving marketing offers for a credit card from their telecommunications provider. Professor Sears opined that it is unlikely that the typical person with knowledge of the Rogers incident would experience a psychological reaction that is serious and prolonged, rising about the ordinary emotional disturbances of ordinary life; and

b. Brett Reynolds, a credit expert, who explained the distinction between soft and hard credit inquiries. Mr. Reynolds discussed how the various types of credit checks affect credit scores, the variability of those scores over time and differences among individuals.

[174] The plaintiff submits that little to no weight should be given to the Sears opinion, because it relies on research into psychological reactions to data breach or hacking-type incidents. Professor Sears used that research to measure the reaction of a typical person to receiving marketing offers from their own telecommunications providers, with knowledge of the type of privacy breach alleged on the pleaded facts in this case. The plaintiff submits that there are three issues in relying on this opinion. First, the Sears opinion lacks a foundation in research that involves the misuse of data as part of a corporate marketing program. Second, the research contemplates how a "typical" person might react. The tort considers whether the "reasonable" person would consider the defendants' conduct "highly offensive." Finally, the plaintiff submits that the Sears opinion addresses a trial issue: whether the plaintiff has proved his case for the tort of intrusion upon seclusion.

[175] I agree. Not only does the opinion rely on a different factual foundation from that pleaded here, the question posed is similar but not the test for the tort of intrusion upon seclusion. Professor Sears concluded that "it is unlikely that the typical person with knowledge of the [undefined] Rogers incident would experience a psychological reaction that is serious and prolonged, rising above the ordinary emotional disturbances of ordinary life". This is not the test for the tort of intrusion upon seclusion.

[176] The defendants have tendered the type of expert evidence that goes to answering the common questions on the tort. This is trial-type evidence, designed to defeat the claim. The Sears opinion does not assist with whether there is some basis in fact to find that there are common questions on whether the Rogers defendants committed the tort of intrusion upon seclusion, affecting a class of people. Thus, to that extent, while it may be relevant at trial, although with the potential foundational issues reducing its weight at that point, it is not relevant to the issues on certification.

[177] Accordingly, I do not give the Sears report any weight on the issue of whether there are common questions for the tort of intrusion upon seclusion.

[178] The Reynolds expert opinion explains the distinction between hard and soft credit checks, and their impact on the creditworthiness of those exposed to them. The opinion is of marginal assistance on determining questions in common. As with the Sears opinion, this evidence focuses more on a trial question of harm, rather than the certification question of commonality. However, it is not inadmissible, as it provides some factual context to the nature of the common questions, and thus is relevant.

[179] However, to the extent that the Reynolds opinion suggests there may be variability in the impact of the various credit checks done on Rogers' customers, the fact that there may be individualized damages inquiries needed once the common issues are determined is not necessarily a reason to deny certification. It is enough if the class members benefit from the prosecution of the class action, even if not to the same extent: *Thompson-Marcial v. Ticketmaster Canada LP,* 2024 ONSC 2305, at para. 344, leave to appeal refused, 2024 ONSC 4920, citing *Price*, at paras. 104-11; *Pro-Sys Consultants*, at paras. 106-108

[180] I find that the plaintiff has established that the questions proposed for the tort of inclusion upon seclusion are questions in common worthy of certification, with question 2 requiring an amendment to complete that aspect required to prove the tort. Question 2 shall be amended to read: "If yes, did the intrusion occur in a manner that a reasonable person would regard as highly offensive, causing distress, humiliation, or anguish?"

The proposed common issues in the claim for breach of confidence (Questions 5-8)

[181] The plaintiff's proposed questions 5-8 focus on whether the credit information was confidential, communicated in confidence, and misused in a way that caused harm. Like the tort of intrusion upon seclusion, these questions flow from the common factual assertion that the defendants accessed the class members' information in the same way across the class for the same purpose. That issue, and the legal issue of whether any duty was breached are questions suited to resolution on a class-wide basis.

[182] The defendants submit that there is no common issue to be certified on this tort, relying on its evidence on the motion that the financial information of the class members was kept within

Rogers Bank, using a pre-programmed checklist to make marketing decisions, and that Rogers Bank deleted customer data within 90 days. This evidence foreshadows Rogers' defence of the tort, or it is evidence of mitigation of any damages sought.

[183] The defendants rely on evidence that goes to the merits of the claim in breach of confidence, but not to whether this is a question in common. As discussed above, at this stage the court is not to make substantive decisions, including making a pre-emptive decision on the common issues. The court's task is to determine whether there is "some basis in fact" to conclude that the issue is capable of resolution on a class-wide basis, but it is an error in principle to use merits-type evidence to resolve the claim on a motion for certification: *Fehr,* at para. 86.

[184] As the Supreme Court of Canada observed in *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 61, "the certification motion is not the proper setting to delve into the likely success of [the claims] …"

[185] I find that the plaintiff has established that there are common issues that may be certified as part of the claim for breach of confidence by the defendants.

The Proposed Common Issues in the Quebec Statutory Claims (Questions 17-18)

[186] The plaintiff has established that there are questions in common arising from the defendants' standard practices around soft credit checks. The question of compliance with the CCQ is a uniform question that applies across the class.

[187] The defendants submit that there is no common question in the absence of any entitlement to a compensable loss or evidence of harm. This repeats the submission that these portions of the claim should be struck as certain to fail. I have discussed decisions of the court considering the merits of privacy breach cases and the role of damages, so I will not repeat that analysis here. There may be live trial issues as to the extent, if any, of the damages to be assessed if the plaintiff can establish the privacy breaches. At this stage, the plaintiff has provided some basis in fact for common issues relative to the alleged breach of the CCQ.

The Proposed Common Issues in Damages (4, 9, 16, 19, 23-26)

[188] Punitive damages and damages without proof of individual loss may be certified in breach of privacy cases: *Obodo (ONSC)*, at para 272.

[189] Aggregate damages are available in cases of privacy breaches or wherever there is a reasonable possibility that an aggregate assessment may be made with respect to at least part of the compensatory damages claimed: *ICBC*, at paras. 69-70; *Good v. Toronto (Police Services Board),* 2016 ONCA 250, 130 O.R. (3d) 241, at paras. 81-82, leave to appeal refused, [2016] S.C.C.A. No. 255.

[190] The defendants submit that aggregate damages should not be certified as a common question, given that Professor Sears opined that there is considerable variation in how people react

to a privacy breach. As I determined above, the foundation for the Sears report is not factually aligned with the pleaded harms here, nor does it rely on research findings in similarly situated circumstances. I gave that report no weight. While I am prepared to accept as a matter of common sense that people do not react in a uniform way to a breach of their privacy rights, this does not mean that an aggregate award of damages, whether subdivided by general, nominal or punitive damages, cannot be determined in common with reference to the impugned conduct, if the plaintiff can establish any or all of the breaches pleaded at trial.

The Proposed Common issues for the Unsolicited Issuing of Credit Cards (Questions 20-22)

[191] The question of whether Rogers Bank's practices as pleaded relative to the issuing of credit cards without the consent of the sub-class members can be answered on a common basis. The plaintiff has pleaded an alleged class-wide harm, flowing from the defendants' access to each class member's credit data.

[192] The defendants submit they have tendered evidence that any harms to the subclass have now been remediated. If there is no remaining need for a remedy, the defendants submit that these questions should not be certified. This argument assumes that any steps taken to remediate those members of the subclass affected is sufficient, without the benefit of any findings on the contours of the harm. While this may be evidence of mitigation of damages in favour of the defendants at trial, it does not defeat the common issues available for questions 20-22.

Section 5(1)(d) and Section 5(1.1) – Is a class proceeding the preferable procedure for the resolution of the common issues?

[193] The plaintiff must establish that in the context of the common issues, and taking into account the goals of class proceedings, namely judicial economy, behaviour modification and access to justice:

i. the class proceeding would be a fair, efficient and manageable method of advancing the claim; and

ii. A class proceeding would be preferable to other proceedings.

Hollick, at paras. 29-30; *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.), at para. 62; and *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at paras. 22-23.

[194] Section 5(1.1) of the *CPA* adds additional features to the preferability analysis within s. 5(1)(d) by requiring the court to find "at a minimum" that a class proceeding is:

i. superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative

proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and

ii. the questions of fact or law common to the class members predominate over any questions affecting only individual class members.

[195] The plaintiff in these proceedings complained to the OPC about the privacy practices of Rogers Communications. The OPC has opened an investigation. That investigation is ongoing.

[196] The defendants submit that this administrative proceeding, is a "reasonably available means of determining the entitlement of the class members to relief or to address the impugned conduct of the defendants." Not only is such an investigation capable of responding to the plaintiff's concerns, but the goal of behaviour modification has also been accomplished by the April 30, 2025 amendment to Rogers Communications' standard form contracts, which the plaintiff accepts is responsive to the issues raised in this litigation, and is the logical end date for the proposed class period.

[197] The defendants also rely on the fact that Rogers Bank was the subject of a 2017 investigation report by the Federal Consumer Agency of Canada ("FCAC"). The FCAC imposed a fine for the sale of credit cards to new customers: *Rogers Bank* (March 31, 2021), Decision #140, online: FCAC <canada.ca>. They submit that the FCAC investigation and decision fulfilled the class action goals for the subclass claim. I would not give effect to this submission.

[198] The completed FCAC investigation, according to the defendants' submissions on the common issues, is unrelated to the conduct underlying this claim. It pre-dated the impugned conduct, so it cannot be said to have achieved any behaviour modification. Further, because it deals with different conduct than that involved in this claim, the FCAC findings and fine do not determine relief for the class members. At best, it responded to similar conduct, and provided a measure of redress or behaviour modification to a different group of customers. Thus, I conclude that the results of the 2017 FCAC investigation are relevant to the preferability analysis required for this proceeding.

[199] While there is another, active FCAC complaint against the defendants, they have refused to produce their response to that complaint on the basis that it is irrelevant and privileged. I infer from their response that the active FCAC complaint is unrelated to the subject matter of this claim and thus it is irrelevant to the preferability analysis.

[200] However, the OPC investigation is a different matter, and is capable at first impression of being a reasonably available alternative to a class proceeding. I consider that question next.

[201] In determining whether the OPC provides redress to the class members for the alleged wrongs, I have considered several principles from the decided cases on conducting the preferability analysis, including the following:

i. If the alternative process effectively resolves the class member's claims, then it need not determine the precise legal and factual questions raised by the plaintiff: *AIC Limited*, at para. 19.

ii. Regulatory proceedings can pose an effective alternative to a class proceeding: *Hollick*, at para. 35; *Hoy*, at para. 282; *Setoguchi*, at paras. 112-3; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, 87 C.P.C. (6th) 276, at para. 207.

iii. Preferability is assessed against the three class actions goals: access to justice, behaviour modification, and judicial economy: *Hollick,* at para. 27.

iv. A class proceeding may be found to be preferable following a parallel administrative proceeding which achieves some measure of redress to the plaintiffs, where substantive access to justice concerns remain: *AIC Limited*, at paras. 56, 58-63.

v. In undertaking the preferability analysis under the new test, "the common issues – taken together - must predominate over the individual issues": *Banman v. Ontario*, 2023 ONSC 6187, at para. 322.

vi. The purpose of the determination of whether the common issues predominate is that a "class action will not be preferable if, at the end of the day, claimants remain faced with the same economic and practical hurdles that they faced at the outset of the proposed class action": *Banman*, at para. 321.

vii. Section 5 (1.1) requires a rigorous preferability analysis which requires the motion judge to determine "through the lens of judicial economy, behaviour modification, and access to justice:

    a. whether the design of the class action is manageable as a class action;

    b. whether there are reasonable alternatives;

    c. whether the common issues predominate over the individual issues;

    d. whether the proposed class action is superior (better) to the alternatives.

Vistoli v. Haventree Bank, 2024 ONSC 1887 at para. 19.

[202] The OPC is a regulator with a mandate to enforce the *PIPEDA*, whose appointment is made under the *Privacy Act*, R.S.C. 1985, c. P-21, s. 53: see also *PIPEDA*, s. 2(1), "Commissioner". The OPC has the authority to receive complaints against entities that are subject to the *PIPEDA*: s. 11. Under *PIPEDA*, it may investigate (s. 12) and make recommendations (s. 13), although the OPC does not have the power to award damages, grant declaratory relief, or interpret and enforce contracts. The OPC has statutory powers of investigation (s. 12(1)), including entry (s. 12.1(1)(d)), and examine or obtain documents found in any premises entered that are relevant to the investigation (s. 12.1(1)(f)). The Commissioner has the power to discontinue an investigation (s. 12.2), take a party's complaint that it did not initiate, with their permission, to Federal Court (s. 15(1)), including applying separately for a hearing (s. 15(a)), appearing on behalf of a complainant (s. 15(b)), or appearing for any party, with leave of the Federal Court (s. 15(c)).

[203] A complainant may seek a court order based on a finding of the OPC within one year of receiving an OPC report: *PIPEDA*, ss. 14(1)-(2). In this case, Mr. Trueman's complaint was made four years ago. The defendants have not provided a copy of their response to the OPC, as noted above. While I would not draw an adverse inference against the defendants as to their position on the preferability analysis from their refusal to do so, I find that their choice to keep their correspondence to the OPC from the record on certification leaves a question mark about the OPC process.

[204] The OPC can make recommendations and can apply to the Federal Court to have those recommendations made into binding orders: *PIPEDA*, s. 15, 16 (a)-(b); see *Canada (Privacy Commissioner) v. Facebook, Inc.*, 2024 FCA 140, leave to appeal to S.C.C. granted, 41538 (June 12, 2025). The Federal Court is also able to make an order for damages in favour of the complainant: *PIPEDA*, s. 16(c). Such orders could address the conduct of the entity and could remediate the plaintiff. However, these measures would not address the claims of the class members, who would each need to make individual complaints to the OPC for relief. Given the class size, this militates against any finding of economy: *Haikola v. The Personal Insurance Company*, 2019 ONSC 5982, 97 C.C.L.I. (5th) 73 at paras. 65-67.

[205] The question of whether an OPC report can provide a route to relief in the Federal Court by way of a class proceeding has not been litigated, although this question arose in *Haikola.* The OPC issued recommendations which the plaintiff sought to vindicate in Federal Court by way of a class proceeding. The defendants in *Haikola* disputed the jurisdiction of the Federal Court. Ultimately the class proceeding in the Superior Court of Justice settled: *Haikola* at paras. 15-29.

[206] The Court of Appeal has discussed the limits of *PIPEDA* oversight in relation to tort claims in *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241, at paras. 50-51. The Court of Appeal noted that the regulatory regime under *PIPEDA* involves federal oversight of that statute but does not "speak to the existence of a civil cause of action" in Ontario: *Jones*, at para. 50. In *Jones,* the Court of Appeal recognized that the plaintiff, who worked for the bank, could be understandably reluctant to lodge a complaint against her employer: at para. 50.

[207] This reasoning applies here. For those class members who continue to use Rogers Communications as their service providers, they could likewise be reluctant to use the OPC complaint mechanism. And, given the length of time to date that the OPC has required to process the plaintiff's complaint, there is a real concern that any critical mass of complaints, could overwhelm the OPC and prevent timely resolution of those complaints.

[208] The defendants submit that the OPC procedure is also preferable because the breach of privacy alleged does not give rise to any "real" damages. As I have discussed above, this is a significant disputed issue between the parties. I decline to assume at this stage that there are no "real" damages suffered by the class in the case of a privacy wrong. Doing so would amount to making a substantive choice and applying that choice to the preferability analysis.

[209] The OPC regulatory process focuses on investigating and reporting on *PIPEDA* breaches. It does not provide substantive access to justice to the class members as a group. It does not address the common law tort claims. I do not assume that a trial court will conclude that the class is not entitled to damages. If they are, the OPC procedure is not the practical mechanism for awarding damages.

[210] The extent to which the OPC procedure can achieve meaningful behaviour modification, this is unknown. The defendants have chosen to withhold their response to the OPC which could have shed light on their attitude towards the process. I do not infer from the amendment to the consumer contracts in April of 2025, that this was in response necessarily to the OPC's decision to investigate the plaintiff's complaint. Finally, I have considered the fact that the OPC generally makes recommendations which are not binding unless additional steps are taken via the Federal Court.

[211] I conclude that the OPC complaint procedure does not represent a preferable alternative to a class proceeding for the members of the class.

[212] Additionally, the goal of judicial economy as well as access to justice are served by a class proceeding where there are standard form contracts in issue involving a large class and claims that may be nominal and are unlikely to be litigated individually.

Do the Common Issues Predominate? (s. 5. (1.1)(b))

[213] As part of the preferability analysis, I must also consider whether the common issues predominate over the individual issues. I find that they do. This is because each cause of action and theory of liability involves standard form contracts and a systemic practice of using customer financial data through soft credit checks to inform the marketing decisions of Rogers Bank. The question of breach is therefore a common issue, across the class.

[214] There are potentially individual issues, depending on the findings of breach that may affect the assessment of damages, but not necessarily so. The trial judge is capable of awarding aggregate damages that represent a nominal figure applied across the class, general damages for breach of

privacy across the class or punitive damages linked to any findings of misconduct: *ICBC* at paras.48-49.

Section 5 (1)(e) The Requirement of an Adequate Representative Plaintiff

[215] Under section 5(1)(e) of the *Class Proceedings Act*, the representative plaintiff must:

> (a) fairly and adequately represent the interests of the class;
>
> (b) provide a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and
>
> (c) have no interests in conflict on the common issues with the other class members.

[216] Mr. Trueman meets these requirements. He has sworn an affidavit in which he states he has no conflicts with the common issues or other class members. His litigation plan describes a proposed means of advancing the case through each litigation stage. This includes a plan for notifying prospective members of the class, document exchange and discovery.

Conclusion on Certification

[217] I find that the plaintiff has met the criteria for certification on the common questions and for the class proposed subject to the amendments noted above.

[218] Having made that finding, I consider the defendants' motion for summary judgment.

Motion for Summary Judgment: Analysis of the Issues

Introduction

[219] The defendants seek summary judgment to enforce the exclusion clause in the Rogers Communications' standard form agreement with its customers. The contract excludes damages claimed, including punitive damages and "breach of privacy" damages, "relating to the Offering or any advertisements…" The defendants submit that this clause applies to the claims against both defendants.

[220] The plaintiff submits that the motion should be dismissed on the basis that Belobaba, J. has already ruled that the exclusion clause does not apply to circumstances pleaded in this action. The defendants submit that they were given leave to bring their motion for relief at the same time that the motion for certification was heard. Thus, it is illogical to find that there has been a ruling on this issue. I begin with that preliminary issue.

Did the Case Management Judge Determine the Issue of the Exclusion Clause?

[221] The defendants sought to schedule a summary judgment motion to dismiss the claim prior to the motion for certification. The former case management judge, Belobaba, J., gave directions

on whether the defendants could schedule a motion for summary judgment based on the exclusion clause in advance of the motion for certification.

[222] His endorsement reads:

> D.'s request to sequence its SJ motion before the cert[ification] motion is declined. Having reviewed the parties initial and supplementary written submissions and as discussed with counsel, I am satisfied that there is no need to do so because [t]he (badly-drafted) Exclusion Clause does not apply to the facts herein and does not preclude the proposed breach of privacy claim.
>
> D is not precluded from repeating the same submissions or making other submissions re the Exclusion Clause at the certification hearing. If it turns out that there is need to consider P's refusals motion (unlikely) this will be addressed at that time. At this point, however, both motions and any related costs issues are deferred to certification.
>
> ---
>
> 1.The Exclusion Clause does not apply here because any promotions or statements that were or may have been offered or provided to P following the alleged breach of privacy related to the availability of a Rogers Bank credit card and did not relate to the topic of breaches of privacy as required in the clause.

Trueman v. Rogers Communications Inc. and Rogers Bank (2 February 2023) Toronto, CV-21-670953 (Ont. S.C.)

[223] It is clear from the February 2, 2023 endorsement that the parties made written submissions in support of the defendants' request to argue the exclusion clause on a motion for summary judgment before certification. Belobaba, J. denied the request for a separate motion. He also expressed his view on the merits of the proposed motion in support of his procedural decision. However, Belobaba J. did not find that the defendants could not raise the exclusion clause at the time of certification. To the contrary he approved of the defendants making the "same submissions" about the exclusion clause that they put before him. They have now done so. The plaintiff has filed material responding to the merits of the motion.

[224] I turn to the merits of the defendants' motion for summary judgment. The remaining issues to be decided are:

i. Is this an appropriate matter for summary judgment?

ii. If the answer to i. is yes, should the exclusion clause be enforced and the action be dismissed?

i. Is this an appropriate matter for summary judgment?

[225] The Rogers defendants submit that this is an appropriate case for summary judgment. The exclusion clause applies and is enforceable. They seek an order dismissing the action on that basis.

[226] I disagree. This is not an appropriate case for summary judgment. The plaintiff has put in play valid questions of interpretation, unconscionability and public policy, which form aspects of the applicable test. As I explain below, the trial judge will be best equipped to decide whether to enforce or invalidate the exclusion clause, informed by the trial evidence and findings at trial as to the proven misconduct, if any, by the defendants.

[227] I begin the analysis with the applicable framework and legal principles on summary judgment and exclusion clauses.

Legal Framework: Summary Judgment

[228] Under Rule 20.04(2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the court shall grant summary judgment if there is no genuine issue requiring a trial.

[229] If summary judgment can provide a "fair and just process", it may be preferable to the expense and delay of a trial. A fair and just process is achieved when:

> (a) the court can make the necessary factual findings;
>
> (b) the court can apply the law to those facts; and
>
> (c) the result is proportionate, more expeditious, and less expensive than a trial.

Hryniak v. Mauldin, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49; *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, at paras. 32-33, aff'd 2014 ONCA 878, leave to appeal refused, [2015] S.C.C.A. No. 97.

[230] Summary judgment is a "legitimate alternative means for adjudicating and resolving legal disputes": *Hryniak*, at para. 36. In resolving a dispute by way of summary judgment, a judge must be confident that they can fairly resolve the dispute: *Hryniak*, at para. 57.

[231] I must focus on whether the summary judgment process will ensure "a fair determination on the merits in light of the record presented by the parties": *Moffitt v. TD Canada Trust*, 2023 ONCA 349, 483 D.L.R. (4th) 432, at para. 50. The Court of Appeal in *Moffit*, at para. 51, explains that:

> At some point, the number of findings of material fact required to determine a case's "live issues", the number of witnesses needed to provide the evidence upon which those findings can be made, the centrality of issues of credibility and reliability to making those findings, and the presence or absence of a documentary record against

> which to measure affidavit or oral evidence may move the needle past the point where the summary judgment process could reach a fair and just determination on the merits.

Legal Framework: Exclusion Clauses

[232] Exclusion clauses may be given full force and effect on a motion for summary judgment: *Ritchie v. Castlepoint Greybrook Sterling Inc*., 2020 ONSC 3840, 27 R.P.R. (6th) 218, at paras. 40-49, aff'd 2021 ONCA 214, 16 B.L.R. (6th) 40, leave to appeal to S.C.C. refused, 39696 (January 20, 2022).

[233] Broadly worded exclusion clauses may be given full force and effect: *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, 492 D.L.R. (4th) 389, at para 92; *Chuang v. Toyota Canada Inc*, 2016 ONCA 584, 403 D.L.R. (4th) 529, at para. 34.

[234] The test applied to the application of exclusion clauses comes from *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 121-23, as follows:

> (a) As a matter of contract interpretation, does the exclusion clause apply to the claim? If it does not, this is the end of the inquiry.
>
> (b) If the exclusion clause applies, was the clause unconscionable at the time the contract was made, as might arise from situations of unequal bargaining power between the parties?
>
> (c) If the exclusion clause covers the claim and is not unconscionable, should the Court nevertheless refuse to enforce it because of an overriding public policy "that outweighs the very strong public interest in the enforcement of contracts"?

[235] Binnie, J. observed that it will be rare for a court to decline to enforce an exclusion clause, in the "interest of certainty and stability of contractual relations": *Tercon*, at para. 117. Circumstances which could override the public policy favouring freedom of contract include "serious criminality or egregious fraud", but before doing so "all of the circumstances should be examined very carefully by the court:" *Tercon*, at para. 120. At this stage of the analysis, proof lies on the party seeking to avoid the exclusion clause being applied.

Analysis of the Issue as to the Suitability of Summary Judgment to the Exclusion Clause

[236] The defendants submit that the exclusion clause should be given effect to form part of the plaintiff's initiating contract with Rogers Communications. It is found in the "Warranties and Limitation of Liability" section. I reproduce the relevant portions (underlined below) in their immediate context. The text boxes on the right describe the content in the underlined passages and the defendants' position on what those paragraphs mean:

9. Warranties and Limitation of Liability

This paragraph defines what is meant by "Rogers Parties." The defendants argue that these include "Rogers Bank" as a Rogers' affiliate.

Please note that the term "**Rogers Parties**" includes Rogers and its affiliates, partners, licensors, dealers, representatives, suppliers and agents (and their respective employees, officers, directors, shareholders and representatives).

Are there any warranties on the Equipment?

The Equipment may be covered by a manufacturer's or other warranty Please see the materials accompanying your Equipment for warranty information and details, including coverage, duration and how you may make a claim under the warranty. There may also be optional Equipment protection programs made available to you from time to time.

Are there any warranties on the Services?

The Services that Rogers provides may be impacted by factors beyond Rogers' reasonable control. For this reason, you acknowledge and understand that the Services or access to the Services, including 9-1-1, public alerts or accessibility services, may not function correctly or at all in the following circumstances:

i. if your Equipment fails, is not configured correctly or does not meet Rogers' requirements;

ii. if you install certain third party applications on your Equipment;

iii. in the event of a network outage or power failure;

iv. if you tamper with or, in some cases, move the Equipment; or

v. following suspension or cancellation of your Services or account.

To the maximum extent permitted by applicable law:

This paragraph defines the term "Offering," a term that is used in the exclusion of liability clause.

i. the Rogers Parties do not guarantee or warrant the performance, availability, coverage, uninterrupted use, security, pricing or operation of the Services, the Equipment **(except towards residents of Québec** in accordance with statutory warranties)** or any products, content, applications, software, services, facilities, connections or networks used or provided by us or third parties (collectively, the "**Offering**");

ii. Rogers may limit the amount of an Offering that you may purchase;

iii. you bear the entire risk as to the use, access, transmission, availability, reliability, timeliness, quality, security and performance of the Offering;

iv. the Rogers Parties do not make any express or implied representations, warranties or conditions, including warranties of title or non-infringement, or implied warranties of merchantable quality or fitness for a particular purpose, with regard to the Offering.

Not applicable to residents of Québec:**

v. all representations, warranties and conditions of any kind, express or implied, are excluded;

vi. no advice or information, whether oral or written, that you obtain from the Rogers Parties creates any term, condition, representation or warranty not expressly stated in an Agreement.

c. 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 Parties 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;

ii. **Applicable only to residents of Québec**:** any 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; or property damage) resulting or relating directly or indirectly from or relating to the Offering;

These paragraphs, underlined, contain the exclusion clause applicable in and outside of the province of Quebec.

The defendants submit that the "Offering or any advertisements, promotions or statements relating to any of the foregoing" apply to their alleged conduct in sharing client lists with Rogers Bank for soft credit checks so that Rogers Bank could market products to Rogers Communications customers, and thus, the exclusion clause applies.

iii. any Offering provided to you or accessible by you through the Services, any charges incurred in connection with such Offering or anything that is or can be done with such Offering even if you

are billed for such Offering;

iv. the performance, availability, reliability, timeliness, quality, coverage, uninterrupted use, security, pricing or operation of the Offering;

v. any error, inclusion or omission relating to any telephone listings or directories;

vi. the denial, restriction, blocking, disruption or inaccessibility of any Services, including 9-1-1, public alerts or accessibility services, Equipment or identifiers (including phone numbers);

vii. any lost, stolen, damaged or expired Equipment, identifiers, passwords, codes, benefits, discounts, rebates or credits;

viii. any unauthorized access or changes to your account or Equipment, or the use of your account or Equipment by others to authenticate, access or make changes to an account you may have with a third party, such as a social media or financial account, including changing passwords or transferring or withdrawing funds.

ix. any error, omission or delay in connection with the transfer of phone numbers to or from another telecommunications service provider, or any limitation connected to that transfer or that telecommunications service provider;

x. any acts or omissions of a telecommunications carrier whose facilities are used to establish connections to points that we do not serve; or

xi. any claims or damages resulting directly or indirectly from any claim that the use, intended use or combination of the Offering or any material transmitted through the Services infringes the intellectual property, industrial, contractual, privacy or other rights of a third party.

Not applicable to residents of Québec:** These limits are in addition to any other limits on the Rogers Parties' liability set out elsewhere in an Agreement and apply to any act or omission of the Rogers Parties, whether or not the act or omission would otherwise be a cause of action in contract, tort or pursuant to any statute or other doctrine of law.

[237] The Rogers defendants submit that the exclusion clause is clear, broadly written and enforceable. Further, such exclusions clauses are a standard practice used in the

telecommunications market to allocate risk, in a commercially reasonable matter. They submit that the plaintiff signed the agreement and is bound by its terms, including the exclusion clause.

[238] As part of their submissions on interpretation, the Rogers defendants submit that Rogers Bank is one of the Rogers Communications "affiliates" and has the protection of the exclusion clause.

[239] The term "affiliates" is not defined in the agreement. In the privacy policy section, there is a reference to examples of affiliates which could assist the interpretation of the term "affiliate" in the Warranties and Exclusion of Liability section. This clause reads:

> **Scope & Application of this Policy**
>
> **Who does this policy apply to?** All customers and users of the products, services, websites, apps, and other digital services offered by Rogers and other members and affiliates of the Rogers Communications Inc. organization. These include our wireless services (Rogers, Fido, Chatr, Cityfone and its branded entities), Rogers Media brands, our Connected Home services (TV, Internet, Home Phone and Smart Home Monitoring), and Rogers for Business. In some instances, our products and services or those offered by a third-party service provider to our customers or users have their own specific privacy policies. [Emphasis added.]

[240] "Rogers Bank" is mentioned in several places in the agreement in a different context. The privacy policy section of the agreement states that "This [privacy] policy does not apply to those who are interacting with the Toronto Blue Jays or customers of Rogers Bank."

[241] Rogers Bank is mentioned again under the section headed, "How & Why We Collect Personal Information" and sub headed, "Why does Rogers collect my personal information?" The second bulleted paragraph explaining "why" Rogers collects customer personal information reads, in this version of the agreement: To understand your needs and offer you products and services from members of the Rogers Communications Inc. organization including Rogers, Rogers Bank and our agents, dealers and related companies, or trusted third parties that may be of interest to you.(emphasis added).

[242] Further on in the privacy policy, customers are informed that:

> We may collect information to manage credit and business risks, collect an outstanding debt, detect, prevent, manage, and investigate fraud or other unauthorized or illegal activity. This may require us to obtain information from credit agencies or members or affiliates of the Rogers Communications Inc. organization, such as Rogers Bank (emphasis added).

[243] Finally, under the "Disclosure" heading and introductory paragraph, the final bullet point also mentions Rogers Bank:

Disclosure
When is my personal information disclosed?

Unless we have your express consent or pursuant to a legal power, we will only disclose your personal information to organizations outside Rogers without your consent in the following limited circumstances:

…

iii. Your personal information may also be shared with members or affiliates of the Rogers Communications Inc. organization, such as Rogers Bank.

[244] The defendants submit that the exclusion clause applies to the alleged conduct in the statement of claim. Their logic follows these interpretative steps:

i. The clause exists within the contract between Mr. Trueman and Rogers Communications—it clearly applies to these two parties;

ii. Rogers Bank is covered by the exclusion clause because it states that it applies to "Rogers Parties," which is broadly defined to include Rogers Communications "affiliates" and "partners." Rogers Bank is part of the Rogers group of companies and an affiliate of Rogers Communications;

iii. The clause covers the claim because it excludes all damages, including "punitive damages" and damages for "breach of privacy," resulting from or relating "directly or indirectly" to: (a) The "Offering" – a term that is broadly defined to include Rogers Communications services and "any products" or "services" "provided by" RCCI and third parties, which includes Rogers Communications' affiliate Rogers Bank; and (b) "any advertisements, promotions or statements relating to any of the foregoing" – *i.e.*, the contract excludes damage claims related to advertising for the products of Rogers Communications and Rogers Bank;

iv. The action is covered by the exclusion clause because the action alleges breach of privacy based on Rogers Communications' and Rogers Bank's collection and use of credit information to determine whether to market a Rogers Bank credit card to him. It is a claim:

(a) for damages for breach of privacy related "directly or indirectly" to both a RCCI product (Mr. Trueman's home Internet service, which made him

> eligible for Rogers Bank offers) and a Rogers Bank product (a Rogers Bank credit card, for which Mr. Trueman was considered as a candidate for preapproval);
>
> or
>
> (b) alternately, for damages related directly or indirectly to "advertisement" or "promotion" of a Rogers Bank credit card, because the allegation is that Mr. Trueman did not consent to having information about him collected and used in a computer algorithm to make a decision about whether a Rogers Bank credit card should be marketed to him.

[245] The plaintiff, to the contrary, argues that the exclusion clause plainly applies only to the "Offering" or "any advertisements, promotions or statements" relating to any of the elements of the "Offering." They submit that when the extraneous language is pruned from the exclusion clause, it means:

> The Rogers Parties will not be liable to [Mr. Trueman] for any damages resulting from or relating to the Offering or any advertisements, promotions or statements relating to [the Offering], even if [the Rogers Parties] were negligent or were advised of the possibility of such damages.

[246] The plaintiff submits that neither his claim, nor the damages sought, relate to the "Offering" or any advertisements or promotions "relating to the Offering". He submits that it is obvious he does not seek damages resulting from or relating to the "Services or Equipment provided by Rogers Communications." Nor is he seeking damages resulting from or relating to any advertisements, promotions or statements relating to those "Services or Equipment."

[247] Moreover, the plaintiff submits that the credit check scheme was neither "marketing" nor an advertisement, promotion, or statement by either defendant. It was a process through which Rogers Bank sifted personal and private financial data to find possible consumers to whom it would offer its credit cards.

[248] The plaintiff also argues that the agreement does not support a finding that Rogers Bank is an "affiliate" of Rogers Communications.

[249] If the interpretation of the exclusion clause under the first step of the *Tercon* analysis was the only issue on the motion for summary judgment, this would be an appropriate issue for summary judgment. It would rely on the principles of statutory interpretation and the wording of the contract.

[250] However, there are two other steps to the test which must also be applied, assuming, without deciding, that the exclusion clause applies to this claim.

Are the issues of unconscionability and public policy appropriate to decide on a motion for summary judgment?

[251] The plaintiff has identified inconsistencies in the evidence that would inform the analysis of the second and third branches of the *Tercon* test. The first of these is the question of the market dominance of Rogers Communications. The defendants' affiant, Ms. Sewlochan, declined to confirm that Rogers Communications has a dominant position in the marketplace. The plaintiff points out that in its 2020 annual report, Rogers Communications described itself as a "critical service provider."

[252] In a public statement made on July 25, 2022, Rogers Communications Inc. CEO Tony Staffieri stated to the Standing Committee on Industry and Technology:

> [W]e know just how critical the wireless phone and Internet services that Rogers provides are. Canadians need to be able to reach their families, businesses need to be able to accept payments and, most importantly, emergency calls to 911 simply have to work every time.
>
> House of Commons, Standing Committee on Industry and Technology, *Evidence*, 44-1, No. 31 (25 July 2022) at 12:10 (Tony Staffieri).

[253] For the purposes of this motion, the defendants' affiant declined to answer questions about whether Rogers Communications offers an "essential service."

[254] The plaintiff has tendered evidence on the motion about the binary choice presented by such exclusion of liability clauses, the asymmetry of information and lack of bargaining power on the part of the consumer of telecommunications services, which have become increasingly necessary as a feature of navigating modern life and society.[3] The Supreme Court has acknowledged that contracts of adhesion are vulnerable to abuse by the dominant party: *Uber Technologies Inc. v. Heller,* 2020 SCC 16, [2020] 2 S.C.R. 118, at paras. 89-91.

[255] In addition to the unconscionability analysis, the third step of the *Tercon* test is whether there are public policy considerations that militate against enforcing an exclusion clause.

[256] As I flagged above, the nature of the alleged breach plays a critical role at this stage: *Tercon*, at paras. 115-120. At this stage, there are allegations against the defendants that they intentionally breached the following statutes:

> (i) *PIPEDA*, ss. 5(3), 6.1, 7, and Schedule 1, Principles 4.1.3, 4.2, 4.3, 4.3.2 – 4.3.4, 4.3.6, 4.4, 4.5, 4.8. The plaintiff points out that in 2015, the OPC published two

[3] Professor Pavlovic authored the report on readability. The defendants challenged its admissibility on this motion. Given my findings that this is not an appropriate case for summary judgment, I have not ruled on the admissibility of that opinion in that context. I specifically leave that question for the trial judge, if the exclusion clause is raised at trial.

decisions finding that Bell and another major telecommunications provider breached *PIPEDA* when they misused customer credit information for marketing purposes;

(ii) *Consumer Reporting Act*, R.S.O. 1990, c. C.33, which prohibits credit checks without written instructions from the consumer, unless the person seeking the credit report meets one of seven specified criteria, none of which the plaintiff alleges apply to the facts here, particularly not to the collection of the personal financial information by Rogers Bank;

(iii) *Consumer Reporting Act*, R.S.O. 1990, c. C.33, which prohibits a person from requesting or obtaining a consumer report containing personal information about a consumer or on the basis that the person is considering extending credit to a consumer who has not, at the time of the request, made an application for credit, without first giving written notice to the consumer of the fact that the request is being made.

(iv) *Personal Information Protection Act*, S.A. 2003, c. P-6.5, which similarly proscribes the collection of personal information without consent. Subsection 7(2) expressly prohibits an organization from requiring an individual to consent to the collection, use or disclosure of personal information "beyond what is necessary to provide the product or service" as a condition of supplying a service. The plaintiff alleges that the disclosure of credit information to Rogers Bank "grossly exceeded" what Rogers Communications required to provide its services to its customers.

(v) *Civil Code of Québec*, S.Q. 1991, c. 64, prohibits a person who establishes a file on another person from gathering information beyond the stated objective of the file, and the collecting person may not communicate the information in the file to third persons or use it for purposes inconsistent with the purposes for which the file was established. It includes an express prohibition against invading the privacy of the subject individual. The plaintiff alleges that Rogers Communications, being the entity that established the file in respect of its customers, could not use the personal credit information for a purpose inconsistent with the purposes of the provision of equipment and services to its customers. Sharing credit information with Rogers Bank far exceeded the purposes for which the file was created.

(vi) The Quebec *Act respecting the protection of personal information in the private sector*, C.Q.L.R., c. P-39.1, which obliged Rogers Bank to inform all the Rogers Communications customers whose credit reports it consulted with the object of entering into a credit contract that it had accessed the credit report. The plaintiff alleges that no such notice was given to the Quebec class members.
(vii) Article 49 of the Quebec *Charter of Rights and Freedoms.*

(viii) The Alberta *Consumer Protection Act,* RSA 2000, c C26.3, which obliges Rogers to only obtain consumer credit reports with that individual's verifiable, express consent.

[257] In litigating the issues of his claim, the plaintiff seeks to apply the policy values expressed by the Supreme Court of Canada in *Douez (SCC)*, at para. 58:

> Canadian courts have a greater interest in adjudicating cases impinging on constitutional and quasi-constitutional rights because these rights play an essential role in a free and democratic society and embody key Canadian values. There is an inherent public good in Canadian courts deciding these types of claims. Through adjudication, courts establish norms and interpret the rights enjoyed by all Canadians.

[258] I find that the issues at stake in the second and third parts of the *Tercon* test should be decided on a complete record, based on findings, evidence and not allegations. I am not able to determine the facts necessary to do justice to this important legal and policy decision on the defendants' motion for summary judgment.

[259] I conclude that this is not an appropriate issue for summary judgment and dismiss the defendants' motion. Given this finding, I need not consider issue ii, that if I had found that this was an appropriate matter for summary judgment, whether the exclusion clause should be enforced and the action be dismissed.

Conclusion

[260] The plaintiff's motion for certification is granted. The defendants' motion for summary judgment is dismissed.

[261] If the parties are not able to agree upon the costs of the motions, they may propose a mutually agreeable timetable for the exchange of submissions.

Leiper, J.

Leiper, J.

Date: 23 October 2025

CITATION: Trueman v. Rogers Communications Canada Inc., 2025 ONSC 5972
COURT FILE NO.: CV-21-00670953-00CP
DATE: 2025-10-23

BETWEEN:

BETWEEN:

DAVID TRUEMAN

Plaintiffs

-and-

ROGERS COMMUNICATIONS CANADA INC. and ROGERS BANK

Defendants

REASONS FOR DECISION

Released: 23 October 2025