

**ONTARIO
SUPERIOR COURT OF JUSTICE**

In the matter of a Claim under the
Class Proceedings Act, 1992, S.O. 1992, c. 6

BETWEEN:

EDITH CARRIERE

Plaintiff

and

BELL CANADA

Defendant

AMENDED **STATEMENT OF CLAIM**

TO THE DEFENDANT(S)

AMENDED THIS 1ST DAY OF April 105
PURSUANT TO RULE 26.02 a
MODIFIÉ CE 20
CONFORMÉMENT À LA RÈGLE



LOCAL REGISTRAR
SUPERIOR COURT OF JUSTICE
GREFFIER LOCAL
COUR SUPÉRIEURE DE JUSTICE

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff.

The claim made against you is set out in the following pages.

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

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

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

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. If you wish to defend this proceeding but are unable to pay legal fees, legal aid may be available to you by contacting a local legal aid office.

A
Date: *July 22, 2004*

Issued by _____

Paul R. Risse

Local registrar

Address of court office:

45 Main Street East

Hamilton, Ontario

L8N 2B7, *suite 110* *SP*

TO: BELL CANADA
1000 rue de La Gauchetiere Ouest
Bureau 3700
Montreal, Quebec
H3B 4Y7

CLAIM

1. The Plaintiff claims on his own behalf and on behalf of all Class Members:

(a) Damages for negligence, failure to warn and breach of duty and breach of contract as set-out below;

(b) Reimbursement of all amounts paid to the Defendant for fraudulent long distance telephone charges for calls to foreign locations such as Sao Tome, the Cook Islands, Nauru, Guyana, Guinea-Bissau, Tuvalu and Tokelau, particulars of which are as set-out below;

(c) Reimbursement of all amounts paid to the Defendant for long distance telephone charges for calls said to have been made to foreign locations such as Sao Tome, the Cook Islands, Nauru, Guyana, Guinea-Bissau, Tuvalu and Tokelau, where those calls were in fact "short-stopped"/short-terminated at other locations with comparatively much lower per minute rates, particulars of which are as set-out below;

(d) As an alternative to the relief claimed in (c) above, adjustment and reimbursement of the difference between all amounts paid to the Defendant for calls said to have been completed to foreign locations and

the proper charges that apply where the calls were in fact "short-stopped"/short-terminated at other locations;

- (e) Punitive, aggravated and exemplary damages;
- (f) Pre and post-Judgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990 c. C.43 as amended;
- (g) Costs on a substantial indemnity basis, plus applicable G.S.T., and
- (h) Such further and other relief as this Honourable Court may deem just and appropriate in the circumstances.

THE PARTIES

2. The Plaintiff, Edith Carriere, is an individual residing in Monetville, Ontario.
3. The Defendant, Bell Canada, is a corporation incorporated pursuant to the laws of Canada and carries on business as a telecommunications company operating nationally and providing telephone service to customers as described below.

BACKGROUND INFORMATION

4. Bell Canada provides local telephone, long distance, wireless communication, internet access, data, direct-to-home satellite television and other services to residential and business customers through 26 million customer connections.
5. Bell Canada is Canada's leading provider of wireline services and internet access. Bell Canada provides more than 2.5 million internet connections through its infrastructure of telephone lines, most being high-speed internet access with the balance being dial-up connections.
6. As a telecommunications company, Bell Canada supplies local telephone service connections and receives revenue therefrom.
7. Bell Canada also provides long distance voice services to residential and business customers. It does so by providing connections from local telephone service customers to other telephone carriers for completion of long distance telephone calls in those areas.
8. Bell Canada collects long distance telephone call charges from customers and then makes settlement payments to other telephone carriers for completing customer long distance telephone calls in those areas. Bell Canada receives revenue from customers on these transactions.

MODEM HIJACKING

9. Modem hijacking, also known as internet dumping, can affect anyone with an internet telephone line connection who unknowingly downloads programs from certain internet websites or pop-up windows.
10. Modem hijacking occurs when a website prompts a user to access information, downloading a file via a pop-up window, accepting the website's terms and conditions or downloading a special viewer or dialer to access content. When the user downloads the file, often unknowingly, or accepts the terms and conditions, the downloaded file accesses software on the user's computer and causes the modem to dial phone numbers in foreign countries resulting in long distance telephone charges. This occurs without the knowledge or consent of the user.
11. Modem hijacking constitutes fraud and results in long distance telephone charges being accrued where the victims of the fraud did not initiate or place the long distance telephone calls in question.
12. Modem hijacking scams have increased significantly in Canada in recent years. The Plaintiff and Class Members state that Bell Canada has known about or ought to have known about modem hijacking scams since at least January 1, 2002.

SHORT-STOPPING/SHORT-TERMINATION OF LONG DISTANCE CALLS

13. While long distance telephone charges were charged and, in many instances, collected by Bell Canada from customers with respect to modem hijacked calls as described above, most, if not all, of the said calls were not actually completed to the destination locations for which Bell Canada charged and collected monies from customers. The calls were "short-stopped"/short-terminated at other locations for which the per minute rates were comparatively much lower.

DUTY OF BELL CANADA TO CLASS MEMBERS

14. The Plaintiff and Class Members state that Bell Canada has been aware or ought to have been aware that modem hijacking could occur and was in fact occurring with respect to its customers resulting in long distance telephone charges that were not and are not legitimate.
15. The Plaintiff and Class Members state that Bell Canada has been aware or ought to have been aware that most, if not all, modem hijacked telephone calls were in fact "short-stopped"/short-terminated and not actually completed to the destination locations for which Bell Canada charged and collected monies from customers.
16. The Plaintiff and Class Members state that Bell Canada is Canada's leading

provider of wireline services and internet access and, as such, is in a position to monitor and become aware of illegal, fraudulent schemes which use internet connections and telephone lines to perpetrate fraud.

17. The Plaintiff and Class Members state that Bell Canada had a duty to monitor, investigate and warn its customers with respect to modem hijacking and the possibility that its customers would incur long distance telephone charges that were not and are not legitimate.

18. The Plaintiff and Class Members state that Bell Canada is uniquely positioned to monitor, become aware of, investigate and take proactive steps to prevent such fraudulent schemes.

19. The Plaintiff and Class Members state that Bell Canada had a duty to warn customers in respect of modem hijacking.

20. The Plaintiff and Class Members furthermore state that Bell Canada was in a position to withhold settlement payments to other telephone carriers for completing customer long distance telephone calls to locations such as Sao Tome, the Cook Islands, Nauru, Guyana, Guinea-Bissau, Tuvalu and Tokelau since Bell Canada knew or ought to have known that said long distance telephone charges were not and are not legitimate and that calls were initiated only as a result of modem hijacking.

21. The Plaintiff and Class Members furthermore state that Bell Canada had a duty to block all long distance, direct-dialed telephone calls to said locations in order to reduce the risk of modem hijacking incidents.
22. The Plaintiff and Class Members furthermore state that Bell Canada was in a position to withhold settlement payment to other telephone carriers for completing customer long distance calls where it knew or ought to have known that most if not all, calls were not actually completed to the stated destination locations, but were in fact "short-stopped"/short-terminated at other locations.
23. The Plaintiff and Class Members furthermore state that Bell Canada has a duty to ensure that the charges levied by it to customers for long distance calls were accurate and proper and reflected charges for calls actually completed to the stated and billed-for destination locations.

SITUATION OF THE REPRESENTATIVE PLAINTIFF

24. The Plaintiff was the victim of a modem hijacking incident.
25. Same occurred in or about March/April, 2004 with the result that fraudulent long distance telephone charges were charged to the Plaintiff's Bell Canada telephone billing.

26. The total of the fraudulent long distance telephone charges charged to the Plaintiff's Bell Canada telephone billing were \$996.61.
27. After numerous complaints and follow-ups with Bell Canada, the charges were eventually reduced to \$370.00, being an example of Bell Canada's "best rate" compromise which holds customers responsible for the long distance telephone charges but at the "best rate" for those calls.
28. The Plaintiff has paid approximately \$370.00 to Bell Canada in respect of fraudulent long distance telephone charges at Bell Canada's "best rate", however, said payment was made by the Plaintiff without any admission of liability, without acknowledgment that the long distance telephone charges were in fact due and owing and without prejudice to the Plaintiff's right to claim reimbursement of those charges.

NEGLIGENCE, FAILURE TO WARN AND BREACH OF DUTY

29. The Plaintiff and Class Members state that Bell Canada was negligent, failed to warn and breached its duty to its customers, particulars of which are as follows:
- a. It failed to monitor, become aware of and properly investigate modem hijacking incidents in timely fashion;

- b. It failed to warn its customers of the dangers of modem hijacking and the possibility of illegal long distance telephone charges brought about by fraud;
- c. It failed to take proper and/or adequate steps to install systems to protect its customers from modem hijacking and fraudulent long distance telephone charges;
- d. It failed to properly inform its customers of measures that ought to be taken to minimize the risk of modem hijacking resulting in fraudulent long distance telephone charges being incurred by its customers;
- e. It failed to monitor long distance telephone calling patterns of customers with a view to identifying unusual/extraordinary charges as possible signs of attempted fraud;
- f. It failed to implement and operate proper security systems to protect its customers from fraudulent long distance telephone charges;
- g. It failed to withhold settlement payments to other telephone carriers for long distance telephone calls made to various locations referred to above when it knew or ought to have known that the charges were not legitimate and were indeed fraudulent;

- h. It failed to investigate "short-stopping"/short-termination of modem hijacked telephone calls and continued to charge customers for calls when it knew or ought to have known that the said calls were not actually completed to the stated destination locations;

- i. It failed to withhold settlement payments to other telephone carriers for long distance telephone calls said to have been made to destination locations referred to above when it knew or ought to have known that calls were not actually completed to the stated destination locations.

- j. It was complicit in the fraud being perpetrated upon its customers in making settlement payments to other telephone carriers where it knew or ought to have known of the fraudulent long distance telephone charges;

- k. It failed to take proper steps to protect its customers from fraud and to prevent said fraud by making settlement payments to other telephone carriers when it knew or ought to have known of the fraud;

- l. It failed to report modem hijacking incidents to the appropriate authorities for investigation and prosecution of the fraudsters.

30. The Plaintiff and Class Members state that Bell Canada received multiple complaints of modem hijacking incidents from customers.
31. The Plaintiff and Class Members state that instead of responding to these complaints in a responsible manner and following-up as it ought to have done, Bell Canada demonstrated a cavalier, arbitrary and inconsistent approach in dealing with complaints of customers.
32. The Plaintiff and Class Members state that upon receiving complaints from customers, Bell Canada indicated that the long distance telephone charges were the responsibility of customers in question, arose as a result of the customers' accessing pornographic websites via the internet, arose as a result of customers knowingly downloading dialer programs and furthermore indicated that Bell Canada was not in any way responsible.
33. These allegations by Bell Canada were unfounded. They were intended to embarrass customers with a view to terminating the complaints without any responsibility on the part of Bell Canada.
34. The Plaintiff and Class Members state that in some cases Bell Canada advised customers that failure to make payment of the fraudulent long distance telephone charges would result in suspension or termination of local telephone services

despite knowing that same was not permitted pursuant to regulatory authority (CRTC).

35. The Plaintiff and Class Members state that in some instances, Bell Canada offered its complaining customers a reduced rate for the fraudulent long distance telephone charges but continued to maintain that responsibility for payment remains with the customers, i.e. Bell Canada's "best rate" proposal as referenced above.

36. The Plaintiff and Class Members state that despite receiving numerous complaints, Bell Canada has not implemented a fair, reasonable, structured, consistent and just complaint resolution mechanism and compensation plan for customers.

BREACH OF CONTRACT

37. The Plaintiff and Class Members state that Bell Canada is in breach of its own Terms of Service which set out the basic rights and obligations of both Bell Canada and its customers in respect of provision of telephone services.

38. The Plaintiff and Class Members state that Bell Canada has specifically levied long distance telephone charges for modem hijacked calls where Bell Canada knew or ought to have known that the charges are excessive, improper and inaccurate.

39. The Plaintiff and Class Members state that the modem hijacked calls were actually completed to locations for which per minute rates were comparatively much lower than the stated and billed-for foreign locations.

UNJUST ENRICHMENT

40. The Plaintiff and Class Members state that Bell Canada received revenue from customers in respect of fraudulent long distance telephone calls.

41. The Plaintiff and Class Members state that Bell Canada received revenue from customers in respect of long distance telephone calls that were in fact "short-stopped"/short-terminated and not completed to the stated destination locations.

42. The Plaintiff and Class Members state that Bell Canada has been unjustly enriched without juristic reason in respect of receipt of all such revenues, and that customers have been correspondingly deprived.

DAMAGES

43. The Plaintiff and Class Members state that they have been charged and have paid long distance telephone charges for calls not made or initiated by them where charges were incurred as a result of fraud due to modem hijacking.
44. The Plaintiff and Class Members state that they have been charged and have paid long distance telephone charges for calls not completed to the stated and billed-for destination locations as the modem hijacked calls were in fact "short-stopped"/short-terminated in other locations, a pattern of activity which was known to Bell Canada.
45. The Plaintiff and Class Members state that despite knowing that the modem hijacked calls were not completed to the stated and billed-for destination locations, Bell Canada nevertheless continued to levy charges as if the calls had been completed to those stated destinations and continued to collect long distance telephone charges from customers.
46. The Plaintiff and Class Members state that they are entitled to reimbursement of all amounts paid to Bell Canada in respect of all such fraudulent long distance telephone charges.

47. The Plaintiff and Class Members furthermore state that they are entitled to reimbursement of all amounts paid to Bell Canada in respect of calls “short-stopped”/short-terminated, as described above.
48. The Plaintiff and Class Members state that Bell Canada was in the best position to prevent and terminate this fraudulent activity and failed to do so by making settlement payments to other telephone carriers when it was aware of or ought to have been aware of the fraud.
49. The Plaintiff and Class Members state that in light of the cavalier, arbitrary and inconsistent approach of Bell Canada, punitive, aggravated and exemplary damages are appropriate in the circumstances.

THE CLASS

50. The Plaintiff proposes that the Class herein be defined as follows:

Any person in Canada who paid Bell Canada for long distance telephone charges for calls to locations such as Sao Tome, the Cook Islands, Nauru, Guyana, Guinea-Bissau, Tuvalu and Tokelau, incurred as a result of modem hijacking perpetrated by fraudsters.

LEGISLATION

51. The Plaintiff and Class Members plead and rely upon the provisions of the *Class Proceedings Act 1992*, S.O. 1992, c. C.6, and the provisions of the *Competition Act*, R.S.C. 1985, c. C.43.

SERVICE OUTSIDE ONTARIO

52. The Plaintiff anticipates that it might be necessary to serve this Statement of Claim on Bell Canada outside the Province of Ontario and in that regard pleads and relies upon the provisions of Rule 17.02 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 as amended, and in particular:

1. Rule 17.02 (g) - a tort committed in Ontario;
2. Rule 17.02 (h) - damages sustained in Ontario, arising from a tort and breach of duty;

3. Rule 17.02(p) - Bell Canada carries on business in Ontario.

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EDITH CARRIERE v. BELL CANADA

Court File No. *04-132861* CP

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SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT HAMILTON

AMENDED **STATEMENT OF CLAIM**

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