

AMENDED THIS Aug.25/21 PURSUANT TO
MODIFIÉ CONFORMÉMENT À

RULE/LA RÈGLE 26.02 (A)

THE ORDER OF _____
L'ORDONNANCE DU _____
DATED/FAIT LE _____

REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

Court File No. CV-20-00635778-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

(Court Seal)

VANESSA FAREAU and RANSOME CAPAY

Plaintiffs

and

BELL CANADA and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AMENDED FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

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.

IF YOU PAY THE PLAINTIFFS' CLAIM, and \$750 for costs, within the time for serving and filing your Statement of Defence you may move to have this proceeding dismissed by the Court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiff's claim and \$400 for costs and have the costs assessed by the Court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date _____ Issued by _____
Local Registrar

Address of court office: Superior Court of Justice
330 University Ave, Toronto
ON M5G 1R8

TO: **Bell Canada**
1050 côte du Beaver Hall
Montréal, Québec
H2Z 1S4

AND TO: **Her Majesty the Queen in right of Ontario**
Crown Law Office (Civil Law)
Ministry of the Attorney General
720 Bay St. Toronto, Ontario
M7A 2S9

A. DEFINED TERMS

1. In this Fresh as Amended Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) “**Bell**” means the defendant Bell Canada;
- (b) “**CJA**” means the *Courts of Justice Act*, RSO 1990, c C.43, as amended;
- (c) “**Class Period**” means the period of time between June 1, 2013 and the certification of this lawsuit as a class action or such other time as the Court deems appropriate;
- (d) “**Class**” or “**Class Members**” means the **Consumer Payor Class** and the **Prisoner Class**, collectively;
- ~~(e) “**Collect Call**” means telephone calls that were billed to and payable by a person other than the initiator of the call, here by a member of the **Consumer Class**, through a separate bill issued by a local carrier;~~
- (f) “**Commissions**” means any payment made by **Bell** to the **Crown** pursuant to the **Contract**, including but not limited to, the percentage specified in section 4.01 of the **Contract** of the gross revenue generated by all calls that **Class Members** have made through the **OTMS**;
- (g) “**Consumer Payor Class**” means all persons in Canada who ~~accepted and paid~~ for a **Collect Call** originating from a member of the Prisoner Class ~~person in~~

~~eustody or otherwise in an Ontario correctional Facility at any time during the~~
Class Period;

- (h) “**Consumer Protection Act**” means the *Consumer Protection Act, 2002*, SO 2002, c 30, Sched A and its regulations, as amended;
- (i) “**Contract**” means a contract between the **Crown**, as represented by the **Minister**, and **Bell** signed on January 18, 2013 numbered COS-0009 for the purposes of the **OTMS**;
- (j) “**CPA**” means the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended;
- (k) “**Crown**” means the defendant Her Majesty the Queen in right of Ontario;
- (l) “**CRTC**” means the Canadian Radio-television and Telecommunications Commission;
- (m) “**Defendants**” means the defendants **Bell** and the **Crown**, collectively;
- (n) “**Equivalent Consumer Protection Legislation**” means: *Consumer Protection Act*, CQLR c P-40.1; *Business Practices and Consumer Protection Act*, SBC 2004, c 2; *Consumer Protection Act*, RSA 2000, c C-26.3; *The Consumer Protection and Business Practices Act*, SS 2014, c C-30.2; *The Business Practices Act*, CCSM c B120; *The Consumer Protection Act*, CCSM c C200; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1; *Business Practices Act*, RSPEI 1988, c B-7; *Consumer Protection Act*, RSPEI 1988, c C-19; all as amended;

- (o) “**Excluded Persons**” means **Bell** and its officers and directors, and their heirs, successors and assigns;
- (p) “**Facility**” or “**Facilities**” means the institutions in Ontario referenced and identified in section 1.01 of the **Contract**;
- (q) “**MCS Act**” means the *Ministry of Correctional Services Act*, RSO 1990, c M.22, as amended;
- (r) “**Minister**” or “**Ministry**” means the Minister and Ministry of Community Safety and Correctional Services of Ontario and/or its successor the Solicitor General and the Ministry of the Solicitor General, and is used interchangeably with the **Crown** in this claim;
- (s) “**OTMS**” means the Offender Telephone Management System—the system through which **Bell** provided telephone services to **Prisoners** in Ontario’s correctional **Facilities**;
- (t) “**Plaintiffs**” means the plaintiffs Vanessa Fareau and Ransome Capay;
- (u) “**Prisoner**” means a person serving a custodial sentence in a **Facility**, a person detained on remand, awaiting trial or awaiting sentencing in a **Facility**, a person awaiting transfer to a federal correctional facility and any other person who was incarcerated at a **Facility** during the **Class Period**;
- (v) “**Prisoner Class**” means all **Prisoners** whose option for making a phone call at any time during the **Class Period** was through the **OTMS**;

- (w) “**Proposal**” means a proposal dated November 20, 2012 that **Bell** submitted to the **Minister** for an **OTMS**, responding to a Request for Proposals numbered COS-0009 issued by the **Minister** to procure a contract for the purposes of the **OTMS**;
- (x) “**Representations**” means the representations described at paragraphs 25, 27-28; and
- (y) “*Telecommunications Act*” means the *Telecommunications Act*, SC 1993, c 38, as amended.

B. RELIEF SOUGHT

2. The Plaintiffs, on their own behalf and on behalf of all Class Members, seek:

- (a) an order certifying this action as a class proceeding and appointing the Plaintiffs as the representative plaintiffs;
- (b) a declaration that Bell engaged in unfair practices contrary to Part III of the *Consumer Protection Act* and analogous parts of the Equivalent Consumer Protection Legislation;
- (c) a declaration that it is not in the interests of justice to require that notice be given pursuant to section 18(15) of the *Consumer Protection Act* and analogous provisions of the Equivalent Consumer Protection Legislation, and waiving any such notice requirements;

- (d) an order rescinding the consumer transactions between Bell and all ~~Consumer~~ Payor Class members who were consumers as defined in the *Consumer Protection Act* and analogous provisions of the Equivalent Consumer Protection Legislation;
- (e) a declaration that the Crown breached the fiduciary duty that it owed the Prisoner Class members;
- (f) a declaration that the Commissions constitute an unlawful tax;
- (g) a declaration that the Defendants violated the *Telecommunications Act* in failing to disclose in advance or display to the Class Members the rates to be charged on Collect Calls and, amongst others, any surcharge, markup, or location charges not included in the price of the call;
- (h) statutory and general damages in an amount not exceeding \$152,000,000 for loss and damage suffered as a result of the conduct of the Defendants particularized herein;
- (i) restitution for unjust enrichment against the Defendants in an amount equivalent to the monies paid by the Class to make phone calls through the OTMS, and the disgorgement of the defendants' ill-gotten profits;
- (j) punitive, exemplary, and aggravated damages in the amount of \$10,000,000;
- (k) an equitable rate of interest on all sums found due and owing to the Plaintiffs and other Class Members or, in the alternative, pre- and post-judgment interest pursuant to the *CJA*;

(l) costs of this action pursuant to the *CPA*, or alternatively, on a full or substantial indemnity basis plus the cost of administration and notice pursuant to section 26(9) of the *CPA* plus applicable taxes; and

(m) such further and other relief as this Honourable Court may deem just.

C. NATURE OF THE ACTION

3. This action arises from unconscionable telephone service rates imposed on the Plaintiffs and the Class Members.

4. Bell entered into the Contract with the Crown in 2013. Under the Contract, Bell obtained the exclusive right to provide telephone services to Prisoners in jails, detention centres, and other similar correctional Facilities operated by the Crown. Bell paid the Crown undisclosed Commissions based on a percentage of all gross monthly revenue generated from the Contract.

5. The Defendants exercised exclusive control over the OTMS to their mutual benefit and the detriment of the Class Members. The Crown provided a captive population in need of phone services, while Bell charged excessive rates and funnelled Commissions to the Crown. To maintain phone contact with family and the outside world, Prisoners had one option, and one option only: Collect Calls to landlines at exorbitant and unconscionable prices extracted from anyone who accepted the calls or otherwise paid for them.

6. Bell falsely represented that the calls cost the same as what Bell charged the general public and specifically Bell's residential customers. In so doing, Bell engaged in unfair practices contrary to section 15 of the *Consumer Protection Act* and analogous provisions of the Equivalent Consumer Protection Legislation. Bell imposed agreements on the ~~Consumer~~ Payor

Class that were unconscionable and invalid contrary to statute and equity.

7. The Crown has a statutory and fiduciary duty to rehabilitate Prisoners. Phone contact between the Class Members is essential to rehabilitation. The Crown financially benefitted from the Commissions and had an interest in higher rates to generate higher Commissions. The receipt of Commissions was an explicit or tacit support of Bell's conduct. The Crown preferred its interests to those of the Prisoners and in doing so, breached its statutory and fiduciary duties to the Prisoner Class.

8. The Defendants did not disclose the cost of phone calls to Class Members, increasing the Defendants' mutual financial gain. Bell's failure to disclose or display telephone rates and related charges for the OTMS calls violated the *Telecommunications Act*. The Crown directed, authorized, consented to or participated in Bell's acts and omissions in violation of the *Telecommunications Act*.

9. The Defendants made millions of dollars from vulnerable Class Members under their control and subject to their imposed monopoly. The Defendants profited from their breaches at the expense of the Class Members and in doing so, unjustly enriched themselves at the expense of the Class Members.

10. The Commissions that the Crown received were undisclosed and unrelated to the provision of a service. The Commissions were an unlawful and unconstitutional tax imposed on the Class Members.

D. PRISONERS' RELIANCE ON TELEPHONES AND THEIR ACCESS

11. Communication between Prisoners, family members, and members of the community is fundamental to Prisoners' mental health, wellbeing, rehabilitation, and successful reintegration into society. The telephone is the primary method by which Prisoners maintain contact with others.

12. Mental illness rates are up to seven times higher in jails than in the general population in Canada. For Prisoners with mental health problems, communication with their family and support network sometimes means the difference between life and death. The Verdict of Coroner's Jury in the death of Cleve Gordon Geddes, a Prisoner with mental illness at the Ottawa-Carleton Detention Centre ("**OCDC**"), emphasized the vital importance of telephone communications for Prisoners.

13. The Crown has recognized in its Institutional Services Policy and Procedures Manual regarding the OTMS dated July 4, 2013 ("**OTMS Manual**") "that communication between the inmates and members of the community is important for rehabilitation and successful reintegration into society. The telephone is the primary method by which inmates maintain contact with others."

14. Nevertheless, during the Class Period, the Defendants only allowed Prisoners to call a person with a standard North American 10-digit landline capable of being billed for Collect Calls, provided that the recipient of the call was willing and able to accept the undisclosed exorbitant charges. Prisoners were not permitted to call cell phones, use calling cards or institutional pre-paid accounts, which are standard practices in virtually all other penal institutions in Canada. In or about May of 2020, the Defendants first enabled a debit-calling

feature to allow Prisoners to make prepaid local and long-distance calls to land or cell phones up to a certain pre-set dollar value determined by the Crown. Over the Class Period, the Defendants always had the ability to change the OTMS in the same manner as occurred in or about May 2020.

E. THE PLAINTIFFS AND CLASS

15. The plaintiff Ransome Capay is a resident of the Lac Seul First Nation and registered status member of the Lac Seul First Nation. During the Class Period, Mr. Capay's son was held in pre-trial custody at the Thunder Bay Correctional Centre and Kenora Jail, 400 and 250 kilometres from Lac Seul, respectively. Mr. Capay's son was held in solitary confinement for approximately 4.5 years, from June 4, 2012, until December 6, 2016. The Defendants' conduct ensured that the only option Mr. Capay's son had for limited social contact was phone calls to family through the OTMS. Mr. Capay was charged \$1 a minute for calls limited to 20 minutes. On some days, Mr. Capay needed to speak to his son up to 5 times. Mr. Capay could spend \$100 a day to maintain basic social contact with his son.

16. During the Class Period and as a result of the unconscionable rates charged through the OTMS, Mr. Capay's monthly phone bills often ranged from \$700 to over \$1000. In order to pay the phone bills, Mr. Capay had to take on extra work, such as chopping firewood. Paying phone bills became a source of crushing stress, anxiety, and financial difficulty for Mr. Capay and his family. The stress and anxiety was compounded by the complete lack of choice and unknown cost each month. The cost of phone calls negatively impacted Mr. Capay's ability to maintain contact with his son.

17. A court eventually found that the solitary confinement of Mr. Capay's son was in

violation of the *Charter of Rights and Freedoms* and stayed all charges against Mr. Capay's son. For 4.5 years, the defendants profited off of the complete isolation of Mr. Capay's son and the *Charter* violations.

18. Mr. Capay seeks to represent the Class.

19. The plaintiff Vanessa Fareau is a resident of Gatineau, Quebec. She spent time in at least one Facility during the Class Period. Ms. Fareau was most recently incarcerated at the OCDC, while pregnant. Ms. Fareau was not convicted, but denied bail for approximately two months. During this period of detention, Ms. Fareau faced significant challenges in maintaining contact with her family and support network, for her own wellbeing while pregnant and that of her two other children. Throughout her incarceration, Ms. Fareau experienced significant financial and emotional hardship in making phone calls to her loved ones because of the amounts charged by the Defendants through the OTMS. Even from inside the Facility, Ms. Fareau struggled to make arrangements to pay her own phone bills so that she could remain connected to her children. Ms. Fareau's phone bills were often in the range of \$200-\$300, or more.

20. Currently, Ms. Fareau receives Collect Calls from her nephew, who is held in OCDC. As a result, she has paid thousands of dollars for Collect Calls during the Class Period to maintain familial connections.

21. Ms. Fareau seeks to represent the Class.

22. The unnecessary and unjustifiably high cost of Collect Calls had a material impact on the Class Members' rehabilitation and finances.

F. THE DEFENDANTS

23. The defendant Bell is a communications and multimedia company headquartered in Montreal, Quebec. It is the dominant “incumbent local exchange carrier” for telephone services in most of Canada, including Ontario. Bell is a public company and subsidiary of the holding company BCE Inc. Bell is a party to the Contract with the Crown under which Bell exercised a monopoly over the provision of telephone services to Class Members at Facilities across Ontario.

24. The defendant Crown is the government of the Province of Ontario, involved in this matter through the Ministry under authority granted thereto in legislation, including the *MCS Act*, to operate correctional Facilities in Ontario.

G. THE PROPOSAL AND THE CONTRACT

25. In the Proposal to obtain the Contract, Bell acknowledged the need to “[p]rovide offenders with reasonable access to telephone services for the purpose of maintaining family, friend and community ties, and supporting rehabilitation”. Bell represented in the Proposal specifically: “Bell is providing identical call rate and connection fees including all time of day and mileage discounts as are experienced by Bell residential customer” [*sic*]. These representations were false and misleading.

26. Under the Contract, Bell became the exclusive “Supplier” of telephone services to the Class Members in Facilities throughout Ontario. Section 1.01 of the Contract expressly included the Proposal as part of the Contract’s terms.

27. The Contract required Bell to charge fees for all calls that “would apply to comparable calls connected and billed by the Supplier in the community of the applicable Facility”. Section

4.08 provided:

Calling Rates

Subject to this Section 4.08 and to Section 3.05(a), the Supplier shall establish the calling rates for local and long distance calls from all telephones. The Supplier shall ensure that the local and long distance rates and connection fees for all telephones are **no higher than the published residential rates** established by the Incumbent Local Exchange Carrier (ILEC) **applicable to a comparable call connected and billed by the Supplier placed outside the Facility within the local community of the applicable Facility**. In accordance with Section 3.02(a)(5) and upon the Ministry's request during the Term of the Contract, the Supplier shall provide written documentation satisfactory to the Ministry, in its sole discretion, to demonstrate compliance with this Section 4.08. [emphasis added]

28. In public statements, Bell stated repeatedly that rates for Prisoners are the same as for the general public. Again, these statements were false and misleading, and obscured the Defendants' maximization of their profits and Commissions.

29. The Crown had extensive discretion and powers under the Contract. For example:

- (a) Bell could not subcontract or assign any part of the Contract without the consent of the Crown (section 2.05);
- (b) The Crown could require that Bell provide information "demonstrating that all calling charges are no higher than the published residential rates established by the Incumbent Local Exchange Carrier (ILEC) that would apply to comparable calls connected and billed by the Supplier in the community of the applicable Facility" (section 3.02);
- (c) The Crown had discretion to approve or not the policies established by Bell (section 3.03);

- (d) Bell could not update or vary “the Supplier’s calling rates, without the Ministry’s prior written consent, which consent may be arbitrarily withheld” (section 3.05);
- (e) The Crown could conduct acceptance testing and verification of the telephone deliverables installed by Bell at the Facilities and express any concerns or dissatisfaction in its “sole and absolute discretion”, and in response, Bell was required to make necessary adjustments within a specified number of days (sections 3.07 and 3.08);
- (f) The Crown could request any reasonable changes to the OTMS, and Bell “shall comply with all reasonable Ministry change requests” (section 3.13);
- (g) The Ministry had extensive powers to demand information and assess Bell’s performance of the Contract (sections 3.19 and 3.20);
- (h) The Crown could request, and Bell “shall provide written documentation satisfactory to the Ministry, in its sole discretion, to demonstrate compliance” with the Contract’s provision that Bell “shall establish the calling rates for local and long distance calls ... **no higher than the published residential rates established by the Incumbent Local Exchange Carrier (ILEC) applicable to a comparable call connected and billed by [Bell] placed outside the Facility within the local community of the applicable Facility** [emphasis added]” (section 4.08); and
- (i) The Crown could immediately terminate the Contract if Bell “makes a material misrepresentation or omission or provides materially inaccurate information to the Ministry”, if Bell’s “acts or omissions constitute a substantial failure of

performance”, or if the Ministry issued Bell a “rectification notice ... to comply with any of its obligations under the Contract” and Bell failed to comply (sections 8.01 and 8.02).

30. Instead of implementing a telephone system that enhanced Prisoner rehabilitation and was comparable to residential phone services, the Defendants’ OTMS maximized Bell’s profits and the Crown’s Commissions, contrary to the interests of the Class Members.

H. BELL BREACHED CONSUMER PROTECTION LEGISLATION

31. Bell is located in the province of residence of each of the members of the ~~Consumer~~ Payor Class who meets the definition of “consumer” under the *Consumer Protection Act* and analogous definitions of the Equivalent Consumer Protection Legislation.

32. Bell is a “supplier” under s. 1 of the *Consumer Protection Act* and analogous provisions of the Equivalent Consumer Protection Legislation.

33. The members of the Class who made or received calls through the OTMS for personal, family or household purposes on terms imposed by Bell are “consumers” as defined in s. 1 of the *Consumer Protection Act* and analogous provisions of the Equivalent Consumer Protection Legislation.

34. Every instance of an Ontario Prisoner making a phone call from a Facility to another Class Member for personal, family or household purposes constitutes a “consumer agreement”, “consumer transaction” or as otherwise defined in the Equivalent Consumer Protection Legislation where Bell agreed to supply its telephone services to those Class Members for payment.

35. As detailed herein, Bell represented that the rates for calls at the Facilities were the same as its residential rates for the general public. In the Proposal, which was part of the Contract under which Bell exercised its monopoly, Bell represented that its telephone services for Ontario Prisoners would be at an “identical call rate and connection fees including all time of day and mileage discounts as are experienced by Bell residential customer”.

36. This Representation was false and/or used exaggeration, innuendo or ambiguity contrary to s. 14(2)14 of the Consumer Protection Act and analogous provisions of the Equivalent Consumer Protection Legislation. In reality, Bell charged the Class astronomical prices that no one else pays outside the Class—including Bell’s residential customers. It may be open to Bell’s residential customers outside of prison to make a Collect Call at the rates charged to the Class. However, no residential customer of rational mind would choose a Collect Call at the rates imposed on the Class instead of paying a fraction of a single Collect Call for unlimited long distance calling or using a competitive calling card to reduce the overall charge for a Collect Call. The OTMS call system is unique to Prisoners in the Ontario correctional Facilities insofar as rates are concerned. Reasonably comparable telephone services in Ontario since 2013 for residential and other public customers have been cellphones, calling cards and, to a lesser extent, residential landlines, all both of which cost a fraction of the exorbitant amounts that Bell charged the Class Members. When a Prisoner made a local call, Bell imposed more than a \$1 charge for each local call. Whenever the Crown transported a Prisoner to a Facility in a neighbouring area, Class Members were forced to pay in excess of \$30 for a long-distance phone call. These calls were capped at 20 minutes.

37. No other reasonably comparable telephone service in Ontario costs anywhere near these amounts. Depending on how many calls a Prisoner made in a month, the amounts of money that

Bell extracted from the Class Members could be tens of times higher than those paid by consumers outside the OTMS, including Bell's own residential customers.

38. There is no operational or security reason why telephone services have to be provided on a Collect Call basis. The Defendants in fact changed the OTMS to allow non-Collect Calls in or about May of 2020.

39. Bell's representations about the amounts it would charge the Class for Collect Calls on the OTMS constituted unfair, unconscionable and/or otherwise prohibited practices under the Consumer Protection Act and the Equivalent Consumer Protection Legislation, because, among other things, Bell knew, or ought to have known, that:

- (a) the Representations were false, misleading, and deceptive;
- (b) the fees imposed by Bell were not comparable to its residential and other customers outside the OTMS;
- (c) the Defendants exercised exclusive control over the provision of telephone services to the Class, and the Class was not reasonably able to protect its interests because of the Prisoners Class's vulnerable circumstances as Prisoners of the state, their lack of freedom and choice, and other challenges, including a significant number of Prisoner Class members with mental illnesses;
- (d) the consumer agreements and transactions between Bell and the Class were excessively one-sided in favour of Bell;

- (e) the consumer agreements and transactions made between Bell and the Class Members were so adverse to the Class Members as to be inequitable; and/or
- (f) because of such further conduct concealed by the Defendants and unknown to the Plaintiffs.

40. The Representations were made on or before the Plaintiffs and other Class Members entered into the consumer agreements and transactions to make phone calls on Bell's OTMS telephones. The actual charges to be imposed by the OTMS were never disclosed to the Class Members, either orally or visually, prior to using the OTMS. The Class Members only discovered the price of phone calls when they received a bill, often weeks after a call. The Commissions paid to the Crown were never disclosed by Bell to Class Members.

41. The Plaintiffs and other Class Members who meet the definition of "consumer" under the *Consumer Protection Act* and analogous definitions of the Equivalent Consumer Protection Legislation are entitled to rescission of the consumer agreements and transactions as well as damages pursuant to section 18 of the *Consumer Protection Act* and analogous provisions of the Equivalent Consumer Protection Legislation.

42. The Plaintiffs and other Class Members are entitled, to the extent necessary, to a waiver of any notice requirements under the *Consumer Protection Act* and the Equivalent Consumer Protection Legislation, particularly given the opaque nature of the Defendants' practices impugned herein and the Plaintiffs' and other Class Members' circumstances as Prisoners with little possibility of meaningful communication with individuals outside of Ontario correctional Facilities.

I. DEFENDANTS IMPOSED UNCONSCIONABLE RATES ON THE CLASS

43. Every time a member of the Prisoner Class made a Collect Call through the OTMS to a member of the ~~Consumer~~ Payor Class or anyone else and that person accepted the call by pressing the indicated button, ~~both~~ the parties were required to agree to terms imposed by the Defendants. In making the call, these parties entered into agreements with Bell whereby Bell provided the telephone service and the Class Members paid for that service (“**Agreements**”).

44. Given the terms imposed and the circumstances in which these Agreements were formed, such Agreements were unconscionable and therefore invalid. The Agreements were one-sided contracts of adhesion created under unfair circumstances that imposed improvident terms on the Class.

45. The terms that Bell imposed on the Plaintiffs and Class Members were grossly unfair and improvident.

46. Class Members were afforded no independent legal advice or any other suitable advice before entering into the Agreements.

47. There was an overwhelming imbalance in bargaining power caused by the Prisoners’ vulnerability and lack of any choice except the onerous terms offered by the Defendants, and the information asymmetry between the parties.

48. Without any other way to maintain phone contact with the Prisoner Class, the ~~Consumer~~ Payor Class ~~of~~ including family members and loved ones were captive to the terms of the OTMS and its unconscionable calling rates.

49. The Defendants knew the Class Members’ vulnerability as Prisoners of the state, and the

vulnerability of their families, loved ones and support network. The Defendants knowingly took advantage of those vulnerabilities to maximize their mutual financial gain.

J. DEFENDANTS BREACHED THE *TELECOMMUNICATIONS ACT*

50. The federal *Telecommunications Act* and the CRTC established thereunder govern the provision of telephone services in Canada, including those in Ontario Facilities.

51. Since before the commencement of the Class Period and throughout the Class Period, the CRTC has issued decisions that direct service providers, including Bell, to make detailed rate information available to consumers and callers. For example, the CRTC has directed Bell and other telephone service providers that, as a condition of providing the services, they must make detailed information available to consumers and callers regarding the amounts charged by or on behalf of Bell with respect to payphone calls. The CRTC has stated that detailed information includes connection fees, per-minute rates, and any other fees that would be charged to the consumer.

52. The CRTC has made these orders under section 24 of the *Telecommunications Act*, which states that the “offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the [CRTC]”.

53. The Defendants failed to provide information regarding the rates and other amounts charged to Class Members as directed by the CRTC. The Defendants’ failure to do so constitutes a breach of section 24 of the *Telecommunications Act* and a CRTC decision made under that statute. Under section 3.01 of the Contract, Bell was required to comply with the “Requirements of Law”, and the Crown had the contractual right and discretion to require that Bell comply with

the law. The law required that Bell provide the specified information to Class Members when they were making Collect Calls on the OTMS. In failing to require that Bell comply with the *Telecommunications Act*, the Crown authorized, consented to or participated in Bell's omission contrary to that statute.

54. The Defendants' violations and omissions meant the Class Members could not make a meaningful choice regarding using the OTMS and incurred higher charges. The Class Members suffered loss and damage as a result of the Defendants' conduct contrary to the *Telecommunications Act*.

K. THE COMMISSIONS WERE AN UNLAWFUL TAX

55. The Contract required Bell to pay to the Crown Commissions based on a percentage of the gross revenue from the OTMS.

56. These Commissions constituted an unlawful indirect tax *ultra vires* the Province of Ontario. Alternatively and if the Commissions are found to be a direct tax, they were *ultra vires* the Minister and could not be levied by way of the Contract in the absence of clear and unequivocal legislation from the Ontario Legislature.

57. The Commissions constituted a tax, not a fee, for the following reasons. The Commissions were enforceable by law under statutory authority granted to the Minister. Unless the Class Members agreed to the Collect Call rates unilaterally imposed by the Defendants, inclusive of the Commissions, the Prisoner Class members could not make a call and the ~~Consumer~~ Payor Class members could not receive a call from a Prisoner in an Ontario Facility.

58. Bell imposed the telephone fees on the Plaintiffs and the Class on authority given to it by

the Minister through the Contract. The Minister administered the OTMS, including the Contract, under the general authority given to it by the legislature through the *MCS Act* to operate Ontario Facilities.

59. Therefore, the Crown, as represented by the Minister, was a public body levying the Commissions in a public authority, and intended the Commissions to be collected for a public purpose. The revenue obtained from the Commissions was used for the public purpose of defraying the costs of ~~prison or~~ government administration in general, and not simply to offset the costs of the OTMS. The Crown's Request for Proposals numbered COS-0009 made clear that the "Commission' means the payment payable by the Successful Proponent to the Government of Ontario under the Agreement", stating further:

The Commission Percentage Rate proposed must be no less than 25% of the Gross Revenue generated by both the OTMS and conventional public pay telephones.

Payment of the Commission to the Government of Ontario will be paid on a monthly basis, no later than thirty (30) calendar days following the last day of the month in which the applicable revenues were generated. Payment will be made payable to the Minister of Finance and sent to the Ministry Contract Compliance Manager for processing. Accompanying the Commission payment will be a Commission statement, which will include the Gross Revenue and Commission amount for each Facility and a total for all OTMS and conventional public pay telephones for all Facilities .

60. There was no reasonable connection or nexus between the cost of the OTMS service provided and the Commissions charged. The Commissions varied for each call made by a Class Member depending on whether it was a local or long distance call and/or on how many minutes the call lasted, amongst other things. None of these variables would have a bearing on a fee relating to the Crown. All of them would have a bearing on a tax, which is fixed at a certain percentage as was the case with the Commissions.

61. The Commissions were an indirect tax. None of the Class Members ever paid the Crown any Commissions directly. Rather, the Crown demanded the Commissions from Bell in the expectation and intention that Bell should pass the Commissions on to the Class. Section 4.02 of the Contract required that Bell pay the Commissions to the Ministry through a cheque payable to the Minister of Finance (Ontario). Pursuant to section 4.01 of the Contract, Bell was required to pay the Commissions to the Crown regardless of whether Class Members had actually paid Bell for the calls.

62. As a result, the Commissions were an indirect tax outside the constitutional jurisdiction of the provincial Crown as listed in section 92 of the *Constitution Act, 1867*. Nor were the Commissions ancillary to a valid regulatory scheme. No regulatory scheme existed that included the Commissions. The Minister levied the Commissions through its commercial Contract with a private party, Bell.

63. In the alternative, if the Court finds that the Commissions were a direct tax, they were *ultra vires* the Minister. The Commissions did not originate in the Ontario Legislature. Neither the *MCS Act* nor any other act of the Ontario Legislature specifically or unequivocally authorized the imposition of this tax on the Class. The Commissions embody taxation without representation.

64. In the circumstances of this case, particularly given the vulnerability of the Class Members, the imposition of this unconstitutional and unlawful tax on the Class was unjust and oppressive. The Crown should not be allowed to retain the Commissions.

L. THE CROWN BREACHED ITS FIDUCIARY DUTY

65. The Crown has exclusive control over the Prisoner Class at the Facilities, and has been entrusted under the *MCS Act* to “provide programs and facilities designed to assist in the rehabilitation of inmates”. Throughout the Class Period, the Crown knew or should have known that—as the Crown has acknowledged in its OTMS Manual—“communication between the inmates and members of the community is important for rehabilitation and successful reintegration into society. The telephone is the primary method by which inmates maintain contact with others.”

66. The Crown has assumed and maintains an extensive degree of discretionary control over the Prisoner Class members’ lives, and the care and welfare of the Prisoner Class members in particular. A Prisoner at a Facility completely depends on the Crown for all the necessities of life. The Crown is required by law, and expressly and impliedly undertook to protect Prisoners, who are peculiarly vulnerable to and at the mercy of the Crown for their basic life, survival, and rehabilitation needs.

67. The level of custodial discretion that the Crown exercises over the day-to-day life of Prisoners in the Facilities is akin to that of a parental relationship, and therefore cloaks the Crown with fiduciary obligations in respect of the Prisoners.

68. These undertakings and circumstances placed a duty on the Crown to act loyally and in the best interests of the Prisoner Class.

69. The Crown breached that duty by: (a) failing to ascertain that Bell complied with the Contract and does not extract unconscionable telephone rates from the Class Members; (b) profiting from the unlawful Commissions; (c) the Crown’s self-created conflict of interest in

ensuring that the ~~higher the telephone rates charged by Bell, the more the~~ Crown benefitted from the highest Commissions, which led to the Crown putting its own interests ahead of those of the Prisoner Class—in selecting a proponent for the OTMS, the Crown allocated maximum importance to the Commissions, with the Request for Proposals numbered COS-0009 stating: “only Proponents whose proposed Commission Percentage Rate meets or exceeds the minimum 25% of the Gross Revenue generated from the OTMS and conventional public pay telephones in the Facilities will be considered for evaluation. The Proponent’s Commission will be calculated and will be scored based on a relative formula as set out below. Points in respect of a Proponent’s Commission will be allotted based on 100 available points. Commission points will be worth 60% of the Proponent’s overall score”; and (d) having an interest of the Prisoner Class adversely affected by the exercise of the Crown’s discretion and control on the Commissions and by failing to provide the Prisoner Class members with a meaningful and affordable means of communication with the outside world, their families, support network, legal defence, etc.

70. The Crown’s breach of its fiduciary duty to the Prisoner Class caused the Class loss and damage including, but not limited to, the unlawful Commissions and fees paid for the telephone calls through the OTMS.

M. DAMAGES AND UNJUST ENRICHMENT AND DISGORGEMENT

71. The conduct of the Defendants caused the Plaintiffs and Class Members loss and damage contrary to the *Constitution Act, 1867*, provincial and federal legislation, and the common law particularized herein.

72. As a result of this conduct, the Defendants have been enriched by the payment or overpayment made by the Plaintiffs and the Class.

73. The Plaintiffs and Class Members suffered a financial deprivation corresponding to the Defendants' enrichment.

74. There is no juristic reason for the Defendants' enrichment and the Plaintiffs' and Class Members' corresponding deprivation. It would be contrary to the interests of justice to allow the Defendants to retain the fruits of their unlawful and unconscionable conduct. The Plaintiffs and Class Members are entitled to restitution and/or a disgorgement of all profits, fees and Commissions as a result of said unjust enrichment.

75. In the alternative to damages, the Plaintiffs and the other Class Members claim the remedy of disgorgement of the profits generated by the Defendants as a result of the wrongful conduct particularized herein. Disgorgement is appropriate for the following reasons, among others:

- (a) the Defendants made profits as a result of breaches of statute and fiduciary duties, and through unconscionable telephone rates;
- (b) the Defendants made profits in such a manner that the Defendants cannot in good conscience retain it;
- (c) Absent the wrongful conduct, Class Members would not have suffered harm, and the Defendants would never have received profits arising from the OTMS; and
- (d) Disgorgement of profits retained by the Defendants would serve a compensatory purpose.

N. PUNITIVE, EXEMPLARY, AND AGGRAVATED DAMAGES

76. Telephone communication with individuals outside of Ontario correctional Facilities is crucial to Prisoners' rehabilitation, reintegration, and mental health. It is the principal way for

incarcerated persons to maintain regular contact with their families and loved ones, coordinate and arrange re-entry plans, and access important services in the community such as legal counsel, healthcare, and mental health support.

77. The Defendants saw an opportunity to exploit Prisoners, their families, and loved ones under their exclusive control. The Defendants chose excessive profits even if that meant isolating Prisoners in Ontario Facilities by preventing, or imposing insurmountable financial burdens on, contact with loved ones. The Defendants deliberately chose to profit by increasing the hardships and injustices on Prisoners resulting from isolation and a lack of access to necessary communication with vital post-release services, and their loved ones who were deprived of meaningful contact.

78. Due to the egregious nature of the Defendants' conduct particularized herein, the Plaintiffs and Class Members are entitled to recover punitive, exemplary, and aggravated damages. The Defendants' conduct offends the moral standards of the community and warrants the condemnation of this Court.

O. SERVICE

79. On February 19, 2020, the plaintiffs served notice on the Crown of this claim pursuant to section 18 of the *Crown Liability and Proceedings Act, 2019*, SO 2019, c 7, Sched 17.

80. This originating process may be served without court order outside Ontario in that the claim is:

- (a) in respect of real or personal property in Ontario (Rule 17.02(a) of the *Rules of Civil Procedure*);

- (b) brought against a person ordinarily resident or carrying on business in Ontario
(Rule 17.02 (p) of the *Rules of Civil Procedure*).

August ____, 2021

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-and-

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Court File No. CV-20-00635778-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

Proceeding under the *Class Proceedings Act, 1992*

AMENDED FRESH AS AMENDED STATEMENT OF CLAIM

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