

C A N A D A

Class Action
SUPERIOR COURT

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
No.: 500-06-000636-130

INGA SIBIGA

Representative Plaintiff

v.

FIDO SOLUTIONS INC.

-and-

ROGERS COMMUNICATIONS INC.

-and-

BELL MOBILITY INC.

-and-

TELUS COMMUNICATIONS INC.

Defendants

DEFENCE OF BELL MOBILITY INC.

(Article 170 C.C.P.)

IN SUPPORT OF ITS DEFENCE TO THE ORIGINATING APPLICATION BELL MOBILITY INC.
STATES AS FOLLOWS:

1. With respect to the allegations contained at paragraphs 1 and 2 of the Originating Application dated February 17, 2017 (**Application**), the Defendant Bell Mobility Inc. (**Bell Mobility**) defers to the judgment of the Court of Appeal of Quebec dated August 10, 2016 (the **Authorization Judgment**), and denies everything inconsistent therewith.
2. Bell Mobility takes note of the allegations contained at paragraphs 3 and 4 of the Application and adds that the proceedings instituted against it by the Representative Plaintiff are unfounded in fact and in law.
3. Bell Mobility admits the allegations contained at paragraph 5 of the Application.
4. Bell Mobility takes note of the allegations contained at paragraphs 6 and 7 of the Application and adds that these allegations and the exhibits referred to do not concern the defendant Bell Mobility but rather the defendants Rogers Communications Inc. (**Rogers**) and Fido Solutions Inc. (**Fido**).
5. With respect to the allegations contained at paragraph 8 of the Application, Bell Mobility refers to Exhibits P-7, P-8, P-9 and P-10 and denies everything inconsistent therewith.

6. Bell Mobility takes note of the allegations contained at paragraph 9 of the Application and adds that these allegations and the exhibits referred to do not concern the defendant Bell Mobility but rather the defendant Telus Communications Company (**Telus**).
7. Bell Mobility admits the allegations contained at paragraphs 10 and 11 of the Application and adds that international data roaming is an optional and additional service as opposed to an essential element of the contractual relationship between Bell Mobility and its customers as is further explained at paragraphs 35 to 36 and 61 of Bell Mobility's defence.
8. With respect to the allegations contained at paragraph 12 of the Application, Bell Mobility refers to that portion of Exhibit P-14 that concerns Bell Mobility only and denies everything that is inconsistent therewith. Bell Mobility adds that throughout the Application the Representative Plaintiff incorrectly characterizes certain rates for international data roaming as "standard rates". These rates are not "standard", but rather the rates that apply when a Bell Mobility customer chooses, among various available options, to purchase international data roaming services on a pay-per-use basis.
9. As concerns Bell Mobility specifically, Bell Mobility denies as drafted the allegations contained at paragraph 13 of the Application and adds that roaming on a pay-per-use basis rather than roaming via "travel plans" has always been – and remains – a matter of informed customer choice as is further explained at paragraphs 85 to 100 of Bell Mobility's defence.
10. As concerns Bell Mobility specifically, Bell Mobility denies as drafted the allegations contained at paragraph 14 of the Application, adding that these contracts are confidential as they contain highly sensitive commercial information.
11. Bell Mobility denies the allegations contained at paragraph 15 of the Application and adds that the Representative Plaintiff's characterization of retail rates for international data roaming services is based entirely on suppositions and an erroneous premise, as is further detailed at paragraphs 107 to 123 of Bell Mobility's defence.
12. Bell Mobility has no knowledge of the allegations contained at paragraphs 16 and 17 and adds that it had no involvement whatsoever in the exchanges between counsel for the Representative Plaintiff and the Canadian Radio-television and Telecommunications Commission (**CRTC**). The CRTC's regulatory regime applicable to international data roaming is further explained at paragraphs 62 to 71 of Bell Mobility's defence.
13. With respect to the allegations contained at paragraphs 18 and 19 of the Application, Bell Mobility takes note of the Authorization Judgment (Exhibit P-1, referred to in footnotes 2 and 3 of the Application), denies any characterization of the Authorization Judgment that is inconsistent therewith and denies that the international data roaming rates charged by Bell Mobility are exploitative.
14. Bell Mobility has no knowledge of the allegations contained at paragraphs 20, 21, 22 and 23 of the Application and adds that any remarks or alleged "admissions" by Telus or Telus executives have no bearing whatsoever on the activities of Bell Mobility and cannot be relied upon by the Representative Plaintiff to argue that Bell Mobility's rates for international data roaming are exploitative or abusive.
15. Bell Mobility denies the allegations contained at paragraphs 24 and 25 of the Application and adds that any remarks or alleged "admissions" by Telus have no bearing whatsoever on the activities of Bell Mobility and cannot be relied upon by the Representative Plaintiff to argue that Bell Mobility's rates for international data roaming are exploitative or abusive.

16. Bell Mobility takes note of the allegations contained at paragraphs 26, 27, 28, 29, 30 and 31 of the Application and adds that the situation in the European Union (**EU**) is irrelevant to the analysis of Bell Mobility's rates for international data roaming, for the reasons further explained at paragraphs 117 to 120 of Bell Mobility's defence.
17. Bell Mobility denies the allegations contained at paragraph 32 of the Application and adds that the Representative Plaintiff wrongly seeks to draw an analogy between data roaming by EU customers within the EU and international data roaming by Bell Mobility customers, as is further explained at paragraphs 117 to 120 of Bell Mobility's defence.
18. Bell Mobility has no knowledge of the allegations contained at paragraph 33 of the Application and adds that this allegation makes no reference to Bell Mobility and that no inferences with respect to Bell Mobility can be drawn therefrom.
19. Bell Mobility denies the allegations contained at paragraph 34 of the Application and adds that the Representative Plaintiff again wrongly seeks to draw an analogy between data roaming by EU customers within the EU, and international data roaming by Quebec customers of wireless telecommunications services.
20. Bell Mobility denies the allegations contained at paragraph 35 of the Application and adds that throughout the class period, the rates charged by Bell Mobility for pay-per-use international data roaming were comparable to, and in some cases lower than, the rates charged by its competitors.
21. Bell Mobility takes note of the allegations contained at paragraph 36 of the Application and again adds that throughout the class period, the rates charged by Bell Mobility for pay-per-use international data roaming were comparable to, and in some cases lower than, the rates charged by its competitors.
22. Bell Mobility denies the allegations contained at paragraph 37 of the Application and adds that Bell Mobility's rates for international data roaming – when properly considered in the full context of the parties' respective contractual prestations – reflect fair market value for this service, as is further explained at paragraphs 101 to 116 of Bell Mobility's defence.
23. Bell Mobility takes note of the allegations contained at paragraphs 38 and 39 of the Application and adds that these allegations make no reference to Bell Mobility and that no inferences regarding Bell Mobility's pricing for pay-per-use international data roaming can be drawn therefrom.
24. Bell Mobility denies the allegations contained at paragraph 40 of the Application.
25. Bell Mobility takes note of the allegations contained at paragraph 41 of the Application and adds that these allegations make no reference to Bell Mobility, and that no inferences regarding Bell Mobility's pricing of pay-per-use international data roaming can be drawn therefrom.
26. Bell Mobility has no knowledge of the allegations contained at paragraph 42 of the Application, adding that these allegations do not concern and make no reference to defendant Bell Mobility.
27. Bell Mobility takes note of the allegations contained at paragraphs 43, 44 and 45 of the Application and adds that these allegations do not concern and make no reference to Bell Mobility and that no inferences regarding Bell Mobility can be drawn therefrom.
28. Bell Mobility has no knowledge of the allegations contained at paragraph 46 of the Application and adds that these allegations do not concern and make no reference to Bell Mobility and that no inferences regarding Bell Mobility can be drawn therefrom.

29. Bell Mobility denies the allegations contained at paragraphs 47, 48, 49 and 50 of the Application and adds that its international data roaming rates are neither exploitative nor abusive, and represent fair market value for the service offered.
30. With respect to the allegations contained at paragraph 51 of the Application, as concerns Bell Mobility only, Bell Mobility admits that it has entered into thousands of contracts with Quebec customers for wireless telecommunications services on its network.
31. Bell Mobility takes note of the allegations contained at paragraph 52 of the Application.
32. With respect to the allegations contained at paragraph 53 of the Application, Bell Mobility refers to the case of *Marcotte v. Fédération des caisses Desjardins du Québec*, 2014 SCC 57 cited by the Representative Plaintiff, denies everything that is inconsistent therewith and adds that collective recovery cannot be ordered in this case, for the reasons detailed in paragraphs 137 to 140 below.
33. Bell Mobility denies as drafted the allegations contained at paragraphs 54 and 55 of the Application.

AND, IN CLARIFICATION OF THE FACTS, BELL MOBILITY FURTHER STATES:

I. INTRODUCTION

34. The Representative Plaintiff's action is based on the erroneous premise that the notion of objective lesion under the *Consumer Protection Act (C.P.A.)* may be applied in respect of a single term of a multi-faceted service contract, without regard to all of the parties' prestations and the essential elements of the contract consented to by the parties.
35. Significantly, Quebec consumers cannot enter into a contract with Bell Mobility in order to receive international data roaming services only. The contracts entered into between Bell Mobility and Quebec consumers are for bundles of telecommunications services – for instance, voice calls, sending and receiving text messages (SMS), access to wireless data, etc. – on Bell Mobility's Canadian network. Such contracts may also provide for the acquisition of mobile devices by consumers, frequently at a significant discount.
36. International data roaming is an optional service that Bell Mobility customers may or may not purchase in the course of their contractual relationship with Bell Mobility. As stated below, those Bell Mobility customers who decide to purchase international data roaming services are offered a variety of pricing options to choose from.
37. Under the C.P.A., a contract can only be qualified as exploitive where a review of the parties' respective prestations reveals a serious imbalance between the consumer's obligations and all the benefits that he or she derives from the goods or services contracted for.
38. Furthermore, a clause in a consumer contract or contract of adhesion may be declared abusive under the *Civil Code of Québec (C.C.Q.)* only if it imposes on the consumer or the adhering party an obligation that is contrary to the requirements of good faith or that so departs from the usual practices in this type of contract that it changes the nature of the contract. This is a very exacting standard.
39. As will be demonstrated below, an overall assessment of the contractual relationship between Bell Mobility customers who are members of the class demonstrates that the contracts identified in the class description are not exploitative and that the contractual terms governing international data roaming are not abusive.

40. The class on behalf of whom the Representative Plaintiff is advancing claims against Bell Mobility consists of Quebec consumers who, for their own reasons and in furtherance of their own interests, have freely decided to purchase international data roaming services from Bell Mobility at competitive, market-based rates. They have done so, while fully informed by Bell Mobility of the price for that service. They have also done so while informed by Bell Mobility of the existence of other options available to them that, if chosen, would reduce the price paid for international data roaming on a per MB basis well below \$5.
41. In view of the parties' prestations as a whole, to suggest that such persons have been exploited or abused by Bell Mobility is to deprive these notions of their meaning.
42. That, however, is what the Representative Plaintiff wrongly proposes in the present proceedings.
43. Moreover and in any event, for the reasons outlined in paragraphs 131 to 136 below and expressed in the notice served by the Defendants pursuant to art. 76 of the *Code of Civil Procedure* on November 11, 2019, the provisions of the C.P.A and of the C.C.Q. upon which the Representative Plaintiff's action is based do not apply to and are constitutionally inoperative in respect of rates for wireless telecommunications services (including international data roaming), a matter that falls within Parliament's exclusive legislative competence over telecommunications.

II. THE DEFENDANT – BELL MOBILITY

44. Bell Mobility is a Canadian telecommunications undertaking governed by the *Telecommunications Act*, SC 1993, c. 38.
45. Bell Mobility is a wireless service provider (**WSP**) that provides its customers with wireless telecommunications services. Wireless telecommunications services consist of telecommunications services – including *inter alia* voice calls, text messages (SMS), emails and access to the Internet – delivered through mobile devices including smartphones and tablets.
46. Bell Mobility also offers wireless telecommunications services under the brand names Virgin Mobile Canada, Solo Mobile and Lucky Mobile. Lucky Mobile has not offered and currently does not offer international roaming services. Solo Mobile no longer accepts new customers, but offers certain international data roaming options to its existing customers. Virgin Mobile Canada offers international data roaming services, but not on a pay-per-use basis.

III. INTERNATIONAL DATA ROAMING

A. Wireless Telecommunications Services that Use “Data”

47. Certain wireless telecommunications services involve the use of “data”. In the wireless telecommunications context, “data” is what allows a customer to access the Internet using a mobile device. Wireless customers access the Internet and use data for various purposes, for instance, when sending or receiving emails, web browsing, streaming audio or video content from the web and using certain applications (**Apps**), including gaming and social media Apps.
48. The smallest measure of data is a “byte” (**B**). A byte consists of eight (8) bits. Each bit, which is the basic unit of information, represents a “0” or a “1”.
49. A kilobyte (**KB**) consists of 1024 bytes (i.e. 2^{10} B) and a megabyte (**MB**) consists of 1 048 576 bytes (i.e. 1024^2 B or 1024 KB).
50. During the period covered by these proceedings, the way in which customers use their mobile devices has changed fundamentally and the consumption of data has increased significantly as both technology and customer habits have evolved.

51. For instance, at the beginning of the class period, Blackberry devices were quite prevalent among Bell Mobility customers. Such devices were very useful for sending and receiving emails, but had quite limited functionality in terms of web browsing or Apps requiring the use of data. As a result, Blackberry users consumed little data when roaming internationally.
52. Traditional mobile phones with limited access to data – which are sometimes referred to as “flip phones” – were also widely used by Bell Mobility customers at the beginning of the class period. These devices were useful for voice-calls and limited text messaging (SMS). Bell Mobility customers using such devices consumed very little, if any, data when roaming internationally.
53. Today, Bell Mobility customers typically use smartphones – such as iPhones or Samsung Galaxy devices – with much greater functionality in terms of web browsing, media streaming and Apps. Such functionality comes with increased data use including, if a customer so chooses, increased use of data when roaming internationally.
54. Moreover, Bell Mobility customers now also frequently use data intensive social media Apps. Demand for and use of data when roaming internationally has thus increased significantly during the class period.
55. As the consumption of data has increased with changes in technology and habits, the available options to consume data have also increased.

B. International Roaming

56. Bell Mobility’s wireless telecommunications network serves customers throughout Canada.
57. Some Bell Mobility customers choose to use wireless telecommunications services provided by Bell Mobility when travelling outside Canada. When a Bell Mobility customer chooses to use wireless services outside of Canada, his or her mobile device must connect to the network of a foreign WSP.
58. Using the network of a foreign WSP to access wireless telecommunications services provided by Bell Mobility is known as “international roaming”. The wireless telecommunications services available to Bell Mobility customers when they “roam” outside of Canada include voice calls, text messaging (SMS) and data. Only international data roaming services are at issue in these proceedings.
59. Bell Mobility customers may roam in over 230 destinations around the world.
60. The destinations where Bell Mobility customers may roam are organized into five (5) zones (**Zones**) consisting of: (a) the United States of America, (b) Zone 1 (Europe, other major industrialized nations and certain popular southern destinations), (c) Zone 2 (destinations in Central and South America, certain Eastern European destinations and most Asian destinations), (d) Zone 3 (most African destinations), (e) Zone 4 (certain destinations in Africa and in the Pacific) and (f) Zone 5 (Cuba).
61. Roaming generally, and international data roaming in particular, are not essential elements of the contractual relationship between Bell Mobility and its customers. Rather, they are optional services made available to Bell Mobility’s customers. For various reasons, some Bell Mobility customers never use roaming services and/or choose not to use international data roaming services when travelling.

C. International Data Roaming and the CRTC

62. The *Telecommunications Act* confers on the CRTC, a single national regulatory authority, vast regulatory powers and exclusive regulatory jurisdiction over telecommunications in Canada.
63. Significantly, the *Telecommunications Act* requires the CRTC to forbear from regulating rates for telecommunications services where it concludes – as a question of fact – that a telecommunications service is or will be subject to competition sufficient to protect the interests of users.
64. Since the mid-1990s, the CRTC has progressively forborne, pursuant to section 34 of the *Telecommunications Act*, from regulating the rates for wireless telecommunications services, including international data roaming on the basis, *inter alia*, that these services are subject to sufficient competition to protect the interests of users, the whole as more fully appears from the CRTC's Telecom Decision CRTC 94-15, Telecom Decision CRTC 96-14, Telecom Decision CRTC 98-19, Telecom Order 99-991, Order CRTC 2001-501, Telecom Decision CRTC 2004-84, Telecom Decision CRTC 2010-445 and Telecom Decision CRTC 2012-556 (collectively the **CRTC Decisions**), copies of which are communicated *en liasse* in support hereof as **Exhibit DBM-1**.
65. The CRTC Decisions to forbear from regulating rates for wireless telecommunications services, including international data roaming, are based on and implement the policy objectives enacted in section 7 of the *Telecommunications Act* and the *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355.
66. The Representative Plaintiff's action constitutes a colourable attempt to reverse the CRTC Decisions and effectively have this Honourable Court regulate – in place of the CRTC – the rates for a particular telecommunications service, to wit international data roaming, through an application of provincial law rather than the provisions and policy objectives of the *Telecommunications Act*.
67. Moreover, as may be observed from Exhibit DBM-1, the CRTC has retained its regulatory power under section 24 of the *Telecommunications Act* to impose conditions on the offering and provision of any telecommunications service, including international data roaming.
68. In 2013, pursuant to section 24 of the *Telecommunications Act* and following a full regulatory proceeding in which it heard *inter alia* from industry players, consumer advocacy groups and provincial governments, the CRTC adopted a "Wireless Code". The CRTC's Wireless Code was later amended in 2017, the whole as more fully appears from the CRTC's Telecom Regulatory Policy CRTC 2013-271 and Telecom Regulatory Policy CRTC 2017-200, copies of which are communicated *en liasse* in support hereof as **Exhibit DBM-2**.
69. In adopting the Wireless Code, the CRTC determined that the best way to protect the interests of Canadian consumers in respect of international data roaming services is to allow rates to be set by market forces while imposing certain conditions on the provision of such services.
70. Pursuant to the Wireless Code, WSPs, including Bell Mobility, must:
- (a) Notify customers, without charge, when they enter an international roaming area and provide information on the rates that will be charged for voice, text and data services; and
 - (b) Suspend international data roaming charges once a cap of \$100 within a single billing cycle is reached, unless the customer explicitly and knowingly consents to pay additional charges.

71. The existence of the Wireless Code, and Bell Mobility's compliance therewith, forms part of the broader contractual context within which the parties' respective prestations must be considered.

D. Bell Mobility provides its Customers with Various Roaming Options

72. Depending on the Zone in which their destination is located, Bell Mobility customers who choose to use Bell Mobility's international data roaming services have various and differently priced options at their disposal.

73. To begin with, Bell Mobility customers may purchase "Travel Passes". A Travel Pass is valid for a 30 day period and is generally purchased by Bell Mobility customers to cover individual trips. Depending on the type of Travel Pass purchased, the Travel Pass will provide Bell Mobility customers with access to a given amount of text messaging (SMS), voice, and data usage over the 30 day period.

74. Bell Mobility currently offers its customers the following travel passes for the United States and for destinations located in Zones 1, 2, 3 and 5, the whole as appears more fully from the travel coverage section of Bell Mobility's website (https://www.bell.ca/Mobility/Coverage_map), extracts of which are communicated *en liasse* in support hereof as **Exhibit DBM-3**:

United States	\$40 – Voice, Text and Data Travel Pass (30 days): 200 minutes of voice calling, unlimited text messages (SMS) and 200 MB of data
	\$80 – Voice, Text and Data Travel Pass (30 days): 1000 minutes of voice calling, unlimited text messages (SMS) and 1 GB of data
	\$20 – Data Travel Pass – 200 MB (30 days)
	\$50 – Data Travel Pass – 1 GB (30 days)
Zone 1	\$60 – Voice, Text and Data Travel Pass (30 days): 100 minutes of voice calling, 200 sent and unlimited incoming text messages (SMS) and 250 MB of data
	\$100 – Voice, Text and Data Travel Pass (30 days): 100 minutes of voice calling, 200 sent and unlimited incoming text messages (SMS) and 1 GB of data
	\$30 – Data Travel Pass – 250 MB (30 days)
	\$75 – Data Travel Pass – 1 GB (30 days)
Zone 2	\$60 – Voice, Text and Data Travel Pass (30 days): 75 minutes of voice calling, 200 sent and unlimited incoming text messages (SMS) and 200 MB of data
	\$100 – Voice, Text and Data Travel Pass (30 days): 75 minutes of voice calling, 200 sent and unlimited incoming text messages (SMS) and 500 MB of data
	\$30 – Data Travel Pass – 200 MB (30 days)
	\$75 – Data Travel Pass – 500 MB (30 days)

Zone 3	\$75 – Voice, Text and Data Travel Pass (30 days): 25 minutes of voice calling, 50 sent and unlimited incoming text messages (SMS) and 100 MB of data
	\$100 – Voice, Text and Data Travel Pass (30 days): 25 minutes of voice calling, 50 sent and unlimited incoming text messages (SMS) and 250 MB of data
	\$40 – Data Travel Pass – 100 MB (30 days)
	\$75 – Data Travel Pass – 250 MB (30 days)
Zone 5	\$60 – Voice, Text and Data Travel Pass (30 days): 50 minutes of voice calling, 200 sent and unlimited incoming text messages (SMS) and 300 MB of data
	\$100 – Voice, Text and Data Travel Pass (30 days): 50 minutes of voice calling, 200 sent and unlimited incoming text messages (SMS) and 1GB of data
	\$30 – Data Travel Pass – 300 MB (30 days)
	\$75 – Data Travel Pass – 1 GB (30 days)

75. Thirty day data travel passes are also available to Bell Mobility customers travelling in Zone 4, who can opt for one of the following travel passes: (i) \$80 for 5 MB of data, and (ii) \$160 for 10 MB of data.
76. Virgin Mobile customers roaming in the U.S. may also purchase a 72 hour data pass at \$10 for 50 MB of data.
77. Since 2015, Bell Mobility customers may add daily “Roam Better” features when travelling. Bell Mobility’s Roam Better feature is currently available in the United States and over 190 international destinations.
78. Roam Better comes in two options: (1) Roam Better – with home data, and (2) Roam Better – with 100 MB. Both options allow the Bell Mobility customer to make unlimited voice calls and to send and receive unlimited text messages (SMS). Roam Better – with home data allows the Bell Mobility customer to use the data from his or her Canadian plan. Roam Better – with 100 MB provides the Bell Mobility customer with 100 MB of data that does not come out of the customer’s Canadian plan.
79. The current rates for Bell Mobility’s Roam Better features are as follows, the whole as appears more fully from the “Roam Better” page of Bell Mobility’s website (<https://www.bell.ca/Mobility/Roam-Better>), extracts of which are communicated *en liasse* in support hereof as **Exhibit DBM-4**:

	Roam Better – with home data	Roam Better – with 100 MB
United States	\$8 per day	\$7 per day
Other International Destinations	\$12 per day	\$11 per day

80. The same “Roam Better” features are available to Virgin Mobile customers and is referred to as “Roam Sweet Roam”, the whole as appears more fully from the “Roaming & Travel Add-ons” page on Virgin Mobile’s website (https://www.virginmobile.ca/en/features/features-summary.html?itcid=&dType=deviceType_ROAM), copy of which is communicated in support hereof as **Exhibit DBM-5**.
81. For those Bell Mobility customers who travel to the U.S. on a frequent basis, Bell Mobility offers specific monthly Canada and U.S. rate plans. These plans include data roaming within the U.S., the whole as appears more fully from the details of Bell Mobility’s Unlimited Canada & U.S. Plan available on Bell Mobility’s website (https://www.bell.ca/Mobility/Cell_phone_plans/Share_plans), copy of which is communicated in support hereof as **Exhibit DBM-6**.
82. Finally, Bell Mobility customers who do not wish to purchase a Roam Better feature or a Travel Pass, or who do not subscribe to the Canada and U.S. rate plans, may choose to purchase international data roaming services from Bell Mobility on a pay-per-use basis. Since the institution of these proceedings, the rates charged by Bell Mobility for international data roaming on a pay-per-use basis are as follows, the whole as appears more fully from the travel coverage section of Bell Mobility’s website for the United States and for destinations located in Zones 1, 2, 3 and 5 (Exhibit DBM-3), and the travel coverage section of Bell Mobility’s website for destinations located in Zone 4, an extract of which is communicated *en liasse* in support hereof as **Exhibit DBM-7**:

United States	\$6 per MB
Zone 1	\$8 per MB
Zone 2	\$12 per MB
Zone 3	\$16 per MB
Zone 4	\$16 per MB
Zone 5	\$8 per MB

83. Bell Mobility customers who are class members essentially consist of customers who have purchased international data roaming services on a pay-per-use basis.
84. As explained below, Bell Mobility actively informs its customers of the various options available to them in respect of international data roaming.

IV. NO MEMBER HAS A CAUSE OF ACTION TO ASSERT

A. Roaming on a Pay-Per-Use Basis is a Matter of Informed Customer Choice

85. Not only do Bell Mobility’s customers have various options available to them in terms of the international data roaming service that best meets their respective needs, they are informed of these options in various ways.

86. Bell Mobility customers may obtain information on the international data roaming options available in each destination where Bell Mobility offers international data roaming simply by consulting Bell Mobility's website (https://www.bell.ca/Mobility/Coverage_map), by using the MyBell App installed on their mobile device or by accessing their account options on the www.mybell.ca secure website, as appears notably from Exhibit DBM-3, Exhibit DBM-4 and Exhibit DBM-7, and from an extract of the www.mybell.ca secure website displaying the data roaming options available to Bell Mobility customers intending to roam in the U.S., copy of which is communicated in support hereof as **Exhibit DBM-8**.
87. Moreover, Bell Mobility customers may obtain information on the international data roaming options available to them by speaking with a customer service representative over the telephone or via e-chat, or by visiting a Bell Mobility retail outlet – either a branded store or one of the National Retailers (ex. the Source, Best Buy). Information on international data roaming may also be found in Bell Mobility's Terms of Service (see, for instance, Exhibits P-8, P-9 and P-10).
88. Most significantly, however, every Bell Mobility customer whose mobile device connects to the network of a foreign WSP immediately receives a text message (SMS) from Bell Mobility. During the entire period covered by these proceedings, and as now required by the Wireless Code, that message informs the customer that he or she is roaming on another network and informs the customer of the rates for roaming services.
89. Moreover, in the event that the Bell Mobility customer has not already added the Roam Better feature or purchased a Travel Pass, the text message (SMS) further informs the customer of the applicable pay-per-use rate for international data roaming and provides a link to Bell Mobility's web page where the customer can, without incurring any data charges, immediately add one of these options. The message also informs the customer that he or she can make a no-charge call to Bell Mobility Customer service for information regarding international data roaming options available for the relevant destination.
90. Should the Bell Mobility customer wish to add the Roam Better feature or purchase a Travel Pass, he or she may do so in a number of ways, notably, by selecting the desired option on the MyBell.ca website, through the MyBell App installed on the customer's phone or by speaking directly to a customer service representative. When doing so, Bell Mobility customers do not incur any charges.
91. Some Bell Mobility customers do not wish to purchase any international data roaming services when travelling in a foreign destination. Various strategies can be adopted by these customers to avoid international data roaming altogether. Such strategies include turning off the mobile device's data roaming function. Rather than consuming data on a foreign WSP's network, such customers can instead choose to only use WiFi to access email, to browse the web or to use various Apps.
92. In this respect, Bell Mobility's website offers customers tips on reducing or avoiding data usage while roaming (https://support.bell.ca/mobility/rate_plans_features/how_to_reduce_data_charges_on_my_smart_phone_when_travelling_out_of_the_country?step=2), the whole as appears more fully from a page from Bell Mobility's website titled "How to reduce data charges on my smartphone when travelling out of the country", a copy of which is communicated in support hereof as **Exhibit DBM-9**.
93. Moreover, Bell Mobility customers can, without incurring any data roaming charges, monitor their data usage – in particular, data usage during international roaming – by using the MyBell App installed on their mobile device.
94. Also, prior to the entry into force of the \$100 international data roaming cap provided for by the CRTC's Wireless Code, Bell Mobility customers whose international data roaming usage reached

\$25 would receive a text message (SMS) informing them that this level of data usage had been reached and of the possibility of purchasing a Travel Pass.

95. The degree to which Bell Mobility customers are informed of the cost of international data roaming on a pay-per-use basis and of the various alternatives is well illustrated by the situation of the Representative Plaintiff herself who, while not a Bell Mobility customer, admits to having been informed of various options available to her, some of which she had in fact used on previous trips. She was also aware of strategies for avoiding incurring data roaming charges, the whole as appears from pages 21-26, 29-32, 46-50 and 61 of the transcript of the Representative Plaintiff's pre-authorization examination by Fido and Rogers' attorneys and pages 12-19 of the transcript of the Representative Plaintiff's pre-authorization examination by Bell Mobility's attorneys, extracts of which are filed in support herewith *en liasse* as **Exhibit DBM-10**.
96. The choices made by class members who are Bell Mobility customers are also well illustrated by the situation of the Representative Plaintiff. While she estimated that she would incur perhaps \$100 in international data roaming charges, she nonetheless freely decided not to purchase a much less expensive plan, as appears from pages 23-24, 47-50 and 59-64 of the transcript of the Representative Plaintiff's pre-authorization examination by Fido and Rogers' attorneys and pages 17-19 and 32 of the transcript of the Representative Plaintiff's pre-authorization examination by Bell Mobility's attorneys (Exhibit DBM-10).
97. In the circumstances, it is evident that any Bell Mobility customer who purchased international data roaming services on a pay-per-use basis freely chose to do so, having been informed of both the relevant rates and the existence and availability of other options. Although the Representative Plaintiff is not a Bell Mobility customer, this is notably apparent from the excerpts of her pre-authorization examination that have been identified above (Exhibit DBM-10).
98. Under the Representative Plaintiff's theory of the case, it is effectively the customer's choice under a single term of a multi-faceted service contract that would render the contract exploitative or the term abusive. On its face, a contract or a contractual term providing for such a choice cannot be exploitative or abusive in the first instance. The exercise of choice by the customer cannot transform a reasonable bargain into exploitation or abuse.
99. Indeed, one of the reasons some Bell Mobility customers choose to roam on a pay-per-use basis, is to reduce their overall spending on international data roaming – by using strategies to avoid any roaming charges from being incurred – while maintaining the ability and flexibility to use international data roaming services sparingly should that prove necessary.
100. Significantly, Bell Mobility customers who choose to purchase international data roaming services on a pay-per-use basis spend on average less on international data roaming than customers who choose to add a Roam Better feature or to purchase a Travel Pass.

B. The Price Paid for International Data Roaming is Neither Abusive nor Exploitative When the Contractual Relationship is Considered as a Whole

101. Any analysis of whether the price paid for a service is exploitative or abusive must take into account the parties' respective prestations as a whole.
102. When Bell Mobility customers enter into a contractual relationship with Bell Mobility, they contract for and receive wireless telecommunications services provided on Bell Mobility's domestic Canadian network in order to use their mobile devices within Canada.
103. Depending on the specific plan chosen by the Bell Mobility customer, the wireless telecommunications services provided by Bell Mobility pursuant to this contractual relationship allow the customer to make and receive voice calls, to send and receive text messages (SMS)

and to use various functions of the customer's mobile devices that require data, including *inter alia* email, web browsing, video streaming, music streaming, gaming and social media Apps.

104. When contracting with Bell Mobility, customers receive reasonably and competitively priced high quality and reliable wireless communications services provided through Bell Mobility's extensive, fast and cutting-edge wireless network. Moreover, Bell Mobility customers are frequently given discounts on mobile devices, rebates and other benefits when selecting Bell Mobility as their WSP.
105. This constitutes the global context of the contractual relationship between Bell Mobility and its customers within which the allegations of exploitation and abuse advanced by the Representative Plaintiff on behalf of the class members who are Bell Mobility customers must be assessed.
106. When considered within the context of the parties' respective prestations as a whole and the significant benefits received by class members who are Bell Mobility customers, the average amount spent on international data roaming by class members who are Bell Mobility customers, simply cannot be described as so excessively disproportionate as to constitute exploitation or abuse.

C. Bell Mobility's Rates for International Data Roaming Represent Fair Market Value

107. The Representative Plaintiff's claim against Bell Mobility is based on the simple, but erroneous, premise that the "fair market value" of international data roaming can be determined on the basis of Bell's Mobility marginal cost of providing a single MB of data to a customer roaming on a foreign WSP's network. In other words, the Representative Plaintiff seeks to compare the price paid by Bell Mobility to a foreign WSP for a MB of data to the price charged by Bell Mobility for providing that MB of data to its customers.
108. This approach is fundamentally flawed for high fixed-cost industries such as the wireless telecommunications industry where providers, like Bell Mobility, have invested billions of dollars in creating, maintaining, upgrading and expanding their wireless telecommunications networks.
109. For high fixed-cost industries, the marginal costs of providing a single service, like a telephone call or a single MB of international data roaming, do not reflect the true cost of providing that service. As with all of the wireless telecommunications services it provides, Bell Mobility's price for international data roaming must allow it to recover, not only its marginal costs, but also its total costs including, *inter alia*, the costs of acquiring spectrum, creating, maintaining, operating and expanding its Canadian wireless telecommunications network and all other costs that Bell Mobility incurs in order to offer wireless telecommunications services (including international data roaming) to its customers (ex. marketing, customer service, general overhead, etc.).
110. Without incurring such costs Bell Mobility would not have a domestic network nor customers for its wireless telecommunications services including international data roaming services. In short, without incurring such costs, Bell Mobility would not earn revenues from international data roaming.
111. When Bell Mobility's total costs are taken into consideration any profits earned in relation to international data roaming are reasonable and cannot be said to be either excessive or exorbitant.
112. Moreover and in any event, the cost plus mark-up approach proposed by the Representative Plaintiff is commonly used by regulators to set rates for regulated industries, where there is little or no competition. Properly applied, this model ensures that regulated firms earn a reasonable, but largely risk-free, return on capital.

113. However, the costs plus mark-up regulatory model cannot be applied for determining fair market value in the competitive market for wireless telecommunications services where firms do not have substantial market power. Where firms compete against each other in a free market, an appropriate measure of fair market value must take into account that prices are set through the operation of market forces, notably supply and demand.
114. The wireless telecommunications market in Quebec is fiercely competitive given the presence of the large national telecommunications undertakings, a strong regional competitor and smaller WSPs. The competitive nature of pricing for wireless telecommunications in Quebec extends to the pricing of international data roaming.
115. Moreover, the wireless telecommunications services offered by Bell Mobility and the costs incurred by Bell Mobility for providing such services may differ significantly from those offered by its competitors. Nonetheless, throughout the class period the rates charged by Bell Mobility for international data roaming are comparable to, and in some instances lower than, the rates charged by such competitors.
116. It is thus evident that Bell Mobility's rates reflect, in a free and competitive market governed by supply and demand, fair market value for international data roaming. These rates do not represent a departure from the usual practices for a wireless telecommunications service contract. They are also consistent with the requirements of contractual good faith.
117. The Representative Plaintiff erroneously seeks to compare Bell Mobility's rates for international data roaming to the retail and wholesale rate caps imposed by *Regulation (EU) No 531/2012 on Roaming on Public Mobile Communications Networks within the Union* (the "**EU Regulations**"). This comparison is of no utility whatsoever in determining whether Bell Mobility's pay-per-use rates for international data roaming are exploitative or abusive.
118. The EU Regulations cap wholesale and retail roaming rates payable by EU WSPs and by their customers for data roaming within the EU. For a number of reasons, no analogy can be drawn between data roaming by customers of EU WSPs within the EU and international data roaming by Bell Mobility customers in foreign destinations.
119. To begin with, one of the very purposes of the EU Regulations is to create a common market within the EU for wireless telecommunications. Data roaming by customers of EU WSPs within the EU is thus not at all analogous to international data roaming by Bell Mobility customers.
120. Moreover, Canadian wireless communications networks must serve a vast, but sparsely populated country. The differences in population, geography and density between the EU and Canada are so significant as to render meaningless any comparison of the costs of and prices paid for data roaming by customers of EU WSPs within the EU and international data roaming by Bell Mobility customers.
121. The Representative Plaintiff also wrongly seeks to rely on prices charged by the defendants for "Travel Plans" to suggest that Bell Mobility's pay-per-use international roaming rates are excessive.
122. Bell Mobility's pricing for the Roam Better feature and Travel Passes is, among other factors, based on the settled principle that a customer who purchases a large quantity of a given product or service will pay a lower unit price.
123. Bell Mobility's Roam Better feature and Travel Pass provide valuable revenue stability for Bell Mobility in respect of the international roaming services it makes available to customers, while providing customers who choose these options with extensive and inexpensive access to telecommunications services on networks outside of Canada.

D. The Representative Plaintiff would Have this Court Act as a Regulator of Rates for Wireless Telecommunications Services

124. The relief sought by the Representative Plaintiff effectively asks that this Honourable Court set the rate for pay-per-use international data roaming for all defendants, in respect of all destinations that they serve and for an indefinite period of time. With respect, such a monumental task, when appropriate and required (and it is neither appropriate nor required here), is the role of a regulator – to wit the CRTC – and not that of the Court.
125. As noted, the claims advanced by the Representative Plaintiff against Bell Mobility are premised on this Honourable Court determining the fair market value of Bell Mobility's international data roaming services by identifying the costs of providing that service and adding some unidentified mark-up thereto.
126. To the extent that the Representative Plaintiff's proposed costs plus mark-up approach can be used in determining fair market value in a competitive market (such as the Quebec market for wireless telecommunications services), which is expressly denied, Bell Mobility's total costs, including its fixed costs, and not simply the marginal costs of international data roaming must be taken into account.
127. Accurately identifying and assessing the total costs of a telecommunications network is an exceedingly complex endeavour as may be readily observed from the costing exercises performed by the CRTC when it approves just and reasonable rates for telecommunications services pursuant to its powers under the *Telecommunications Act*.
128. The Representative Plaintiff's claim against Bell Mobility thus seeks to have this Honourable Court, applying provincial law, act as a provincially-based regulator of the wireless telecommunications industry and engage in a vast regulatory inquiry into international data roaming rates in order to set Bell Mobility's pay-per-use rates for this telecommunications service.
129. The Representative Plaintiff would have this Court engage in this exercise for each of the over 230 destinations where Bell Mobility offers international data roaming, for an indefinite period of time and notwithstanding the very significant distinctions between these numerous destinations. With respect, this Court has neither the resources, the expertise nor, most importantly, the authority to act as a regulator of rates for telecommunications services, including international data roaming.

V. NO PUNITIVE DAMAGES MAY BE GRANTED

130. In any event, the Court cannot award the punitive damages claimed by the Representative Plaintiff given that neither the cause of action based on the C.P.A. nor the one based on the C.C.Q. gives rise to a right to claim punitive damages and that the relevant criteria are in no way satisfied.

VI. SECTION 8 C.P.A. AND ARTICLE 1437 C.C.Q. ARE CONSTITUTIONALLY INAPPLICABLE OR, ALTERNATELY, INOPERATIVE AS REGARDS THE RATES CHARGED BY BELL MOBILITY FOR INTERNATIONAL DATA ROAMING

131. For the reasons expressed in the notice served by the Defendants pursuant to article 76 of the *Code of Civil Procedure* on November 11, 2019, and which are incorporated by reference herein, Bell Mobility submits that, with respect to the rates it charges for international data roaming, article 1437 C.C.Q. and section 8 C.P.A. are constitutionally inapplicable pursuant to the interjurisdictional immunity doctrine or, alternately, inoperative pursuant to the federal paramountcy doctrine.

132. Applying provincial law – such as article 1437 C.C.Q. and section 8 C.P.A. – to effectively regulate telecommunications rates (including rates for international data roaming) by having a court determine “fair market value” would impair core federal legislative competence over telecommunications. As a result, article 1437 C.C.Q. and section 8 C.P.A. are constitutionally inapplicable to the international data roaming rates charged by Bell Mobility.
133. Alternatively, article 1437 C.C.Q. and section 8 C.P.A. are constitutionally inoperable pursuant to the federal paramountcy doctrine.
134. Canadian telecommunications companies, including Bell Mobility, are subject to the *Telecommunications Act*, SC 1993, c 38 and the *Radiocommunication Act*, RSC 1985, c R-2.
135. Applying article 1437 C.C.Q. and section 8 C.P.A. so as to have this Court determine “fair market value” for international data roaming and effectively regulate the rates paid by Quebec consumers for this telecommunications service would frustrate federal legislative purposes expressed in both the *Telecommunications Act* and the *Radiocommunication Act*.
136. Notably, applying article 1437 C.C.Q. and section 8 C.P.A. in the manner proposed by the Representative Plaintiff would defeat Parliament’s purpose in: (i) creating a single, uniform and pan-Canadian regulatory regime governing telecommunications, (ii) conferring upon a single, national regulatory authority, the CRTC, the task of supervising Canada’s telecommunications, notably in determining whether rates are just and reasonable, and (iii) creating a forbearance regime, which is specifically intended to allow rates for telecommunications services (including rates for international data roaming) to be set by competition and market forces rather than by a regulatory authority or a court.

VII. ALTERNATELY, COLLECTIVE RECOVERY CANNOT BE ORDERED

137. Finally, should the Representative Plaintiff’s action be well-founded in fact and in law, which is expressly denied, any recovery must be individual rather than collective.
138. Indeed, the quantum of damages to which each class member is entitled will necessarily depend on the efforts made by that member to mitigate his or her damages, which will vary significantly based on each member’s circumstances and will require an inquiry into why such customer chose to incur pay-per-use international data roaming charges rather than purchase a Travel Pass or add a Roam Better feature.
139. For instance, those class members who were informed by Bell Mobility of its pay-per-use rates for international data roaming and were thus made aware of the existence of available options and/or strategies that allow one to avoid or substantially reduce international data roaming charges, yet willfully incurred such charges, have failed to mitigate their damages.
140. Even assuming that, within the broader context of the parties’ respective prestations considered as a whole, Bell Mobility’s rates for pay-per-use international data roaming are found to be disproportionate (any disproportion being expressly denied), such class members are the authors of their own misfortune and are not entitled to any recovery. As a result, it is impossible to calculate with accuracy the aggregate amount of the claims at issue in this action.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

DISMISS the Originating Application dated February 17, 2017.

DECLARE that section 8 of the *Consumer Protection Act* and article 1437 of the *Civil Code of Québec* are constitutionally inapplicable or, alternately, inoperative to the rates charged by Bell Mobility Inc. for international data roaming.

With legal costs, including expert fees.

Montreal, November 12, 2019

Norton Rose Fulbright Canada LLP

NORTON ROSE FULBRIGHT CANADA LLP

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C A N A D A

Class Action
SUPERIOR COURT

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
No.: 500-06-000636-130

INGA SIBIGA

Representative Plaintiff

v.

FIDO SOLUTIONS INC.

-and-

ROGERS COMMUNICATIONS INC.

-and-

BELL MOBILITY INC.

-and-

TELUS COMMUNICATIONS INC.

Defendants

LIST OF EXHIBITS IN SUPPORT OF THE DEFENCE OF BELL MOBILITY INC.

- Exhibit DBM-1** *En liasse*, copy of Telecom Decision CRTC 94-15; Telecom Decision CRTC 96-14; Telecom Decision CRTC 98-19; Telecom Order 99-991; Order CRTC 2001-501; Telecom Decision CRTC 2004-84; Telecom Decision CRTC 2010-445 and Telecom Decision CRTC 2012-556
- Exhibit DBM-2** *En liasse*, copy of the CRTC's Telecom Regulatory Policy CRTC 2013-271 and Telecom Regulatory Policy CRTC 2017-200
- Exhibit DBM-3** *En liasse*, extracts from the travel coverage section of Bell Mobility's website for travel passes for the United States and for destinations located in Zones 1, 2, 3 and 5
- Exhibit DBM-4** *En liasse*, extracts of the Roam Better section of Bell Mobility's website
- Exhibit DBM-5** Copy of the "Roaming & Travel Add-ons" page on Virgin Mobile's website
- Exhibit DBM-6** Copy of the "Connect Everything plans" section of Bell Mobility's website providing details of Bell Mobility's Unlimited Canada & U.S. Plan
- Exhibit DBM-7** Extract from the travel coverage section of Bell Mobility's website for destinations located in Zone 4

- Exhibit DBM-8** Extract of the www.mybell.ca secure website displaying the data roaming options available to Bell Mobility customers for data roaming in the U.S
- Exhibit DBM-9** Page from Bell Mobility's website titled "How to reduce data charges on my smartphone when travelling out of the country"
- Exhibit DBM-10** *En liasse*, extracts of the transcript of the Representative Plaintiff's pre-authorization examination by the attorneys for Fido Solutions Inc. and Rogers Communications Inc. and extracts of the transcript of the Representative Plaintiff's pre-authorization examination by the attorneys for Bell Mobility Inc.

Montreal, November 12, 2019

Norton Rose Fulbright Canada LLP

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Our file: 1000310781

No.: 500-06-000636-130

Class Action
SUPERIOR COURT

DISTRICT OF MONTREAL

INGA SIBIGA

Representative Plaintiff

v.

FIDO SOLUTIONS INC.

- and -

ROGERS COMMUNICATIONS PARTNERSHIP

- and -

BELL MOBILITY INC.

- and -

TELUS COMMUNICATIONS INC.

Defendants

**DEFENCE OF BELL MOBILITY INC. AND LIST OF
EXHIBITS DBM-1 TO DBM-10**

(Article 170 C.C.P.)

ORIGINAL

BO-0232

N/R : 1000310781

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