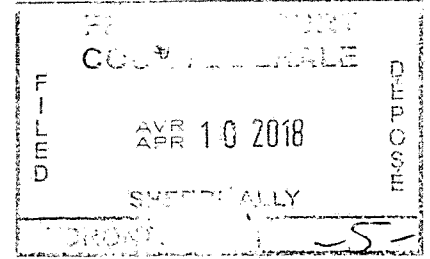


Seal

Court File No.: T-382-18

FEDERAL COURT

PROPOSED CLASS PROCEEDING



BETWEEN:

KALEVI HAIKOLA

Plaintiff

-and-

**THE PERSONAL INSURANCE COMPANY and
DESJARDINS GENERAL INSURANCE GROUP INC.**

Defendants

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 a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served 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 for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

February 27, 2018

Issued by: Michelle Gauvin
(Registry Officer)

Address of local office: 180 Queen Street West, Suite 200
Toronto, Ontario
M5V 3L6

TO: THE PERSONAL INSURANCE COMPANY
PO Box 7065, Station A
Mississauga, Ontario L5A 4K7

AND TO: DESJARDINS GENERAL INSURANCE GROUP INC.
PO Box 7065, Station A
Mississauga, Ontario L5A 4K7

CLAIM

RELIEF SOUGHT

1. The Plaintiff claims on his own behalf and on behalf of the proposed Class Members (as defined below):

- (a) An Order, pursuant to Rules 334.16(1) and 334.17 of the *Federal Court Rules*, SOR/98-106 (the “*Rules*”), certifying this action as a class proceeding;
- (b) An Order, pursuant to Rules 334.12(3), 334.16(1), and 334.17(1) of the *Rules*, appointing the Plaintiff as the representative plaintiff for the proposed Class, as defined herein;
- (c) A Declaration that the Defendants contravened Section 5(3) of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 (“*PIPEDA*”);
- (d) An Order requiring the Defendants permanently to remove all personal credit score information of the Class Members from their records, including any records stored in an electronic form;
- (e) An Injunction prohibiting the Defendants from further using or accessing the personal credit score information, personal financial information from financial advisors or financial institutions, information from personal information agents, or any information from risk or claim information agencies, of the Class Members for the purposes of adjusting accident benefits claims;
- (f) A declaration that all information referred to in (e) was obtained without reasonable informed consent of the Plaintiff and the Class Members in breach of Section 6.1

of PIPEDA, in breach of the Defendants' fiduciary obligations to the Class Members, and for no reasonable or proper purpose;

- (g) A declaration that the Defendants collected the information referred to in (e) above in bad faith and for no reasonable or proper purpose;
- (h) Damages at large in the aggregate amount of \$50,000,000, or as otherwise fixed by the Court, pursuant to Section 16(c) of PIPEDA for breach of the Class Members' privacy rights;
- (i) Aggravated, punitive, or exemplary damages in the amount of \$10,000,000 arising from the Defendants' breach of fiduciary duty, bad faith, breach of contract, and misleading of the Plaintiff, the Class and the Office of the Privacy Commissioner;
- (j) An Order, pursuant to Rule 334.28 of the *Rules*, for the aggregate assessment and distribution of monetary relief to the Plaintiff and other Class Members;
- (k) Costs of this action and the certification motion, if warranted, pursuant to Rule 400 and Rule 334.39(1) of the Rules, respectively; and
- (l) Such further or other relief as this Honourable Court deems just.

THE PARTIES

2. The Plaintiff, Kalevi Haikola, resides in the Province of Ontario. At all material times, the Plaintiff was insured by the Defendant, The Personal Insurance Company ("The Personal"), with a policy of automobile insurance under The Personal's policy number K4432514 (the "Policy").

3. The Defendant, The Personal, is a corporation incorporated pursuant to the laws of Canada with a registered business address in Mississauga, Ontario. The Personal provides insurance products, including automobile insurance, in Canada. The Personal issued Haikola's Policy. The

Personal is a wholly owned subsidiary of the Defendant, Desjardins General Insurance Group Inc. (“Desjardins”).

4. The Defendant, Desjardins, is a corporation incorporated pursuant to the laws of Canada, with a registered business address in Mississauga, Ontario. Desjardins provides insurance products, including automobile insurance, in Canada. Desjardins is the parent company of The Personal and provides directions to, and controls, The Personal with respect to the manner in which The Personal adjusts claims made against its automobile insurance policies. The Defendants operate as a single, combined corporate enterprise.

THE ACCIDENT AND INSURANCE CLAIM

5. The Plaintiff was involved in a motor vehicle accident in Ontario on November 24, 2012 (the “Accident”) and, that same day, reported the Accident to The Personal.

6. A claim was opened for the Plaintiff by The Personal as claim number P4270678 on November 24, 2012.

7. The Plaintiff advised the agent of The Personal that he spoke with on November 24, 2012 that he potentially suffered serious injuries in the Accident – including injuries to his head, neck, and jaw. The agent confirmed during this conversation that the Plaintiff’s claim would be handled speedily and fairly by The Personal.

8. As requested by The Personal’s agent, the Plaintiff completed a standard Ontario Claims Form (an OCF-1 form) shortly after reporting the Accident and forwarded this form to The Personal.

THE INTERVIEW

9. On November 27, 2012, a claims adjuster with The Personal contacted the Plaintiff by telephone in order to seek information about the Plaintiff's claim for accident benefits under the Policy (the "Interview"). During the course of the Interview, the claims adjuster aggressively pushed for information from the Plaintiff about his injuries, insurance history, and financial background.

10. While the Plaintiff was concerned that much of the information requested during the Interview was improper and intrusive, the Plaintiff was concerned that if he objected to providing his personal information, The Personal may delay his claim or deny it.

11. The Plaintiff was previously involved in a motor vehicle accident on January 18, 2012 and had claimed for accident benefits through The Personal pursuant to the Policy.

12. The Plaintiff's claim for accident benefits in this earlier accident was investigated aggressively and The Personal had denied significant aspects of the Plaintiff's claim.

13. The Plaintiff, consequently, did not want to risk The Personal once again denying his claim for accident benefits and believed that he needed fully to cooperate with all requests made by The Personal to receive full compensation under the Policy for his injuries. The Plaintiff believed that a refusal to provide any information requested during the Interview would lead to a delay processing his claim - or a denial of it.

14. Most significantly, during the Interview, the claims adjuster aggressively pushed the Plaintiff to provide consent for The Personal to obtain a "FICO score" (a credit score typically

used to assess credit risk for lending transactions). The Plaintiff was hesitant to provide this information because it was not relevant to his insurance claim.

15. The claims adjuster did not provide any explanation during the Interview as to why credit information was needed or relevant and made it sound as though the request was a routine matter. Further, the claims adjuster provided no information as to how the information may be used.

16. Despite his misgivings about providing credit information, the Plaintiff answered “ok” to the claims adjuster’s request for a FICO score. The Plaintiff did not think that he had a choice, if he wanted his claim adjusted fairly and resolved quickly.

FOLLOW UP WITH THE PERSONAL

17. The Plaintiff subsequently advised the claims adjuster of his concerns about the appropriateness of the credit score request, together with his concerns about the aggressive tone taken by the claims adjuster during the Interview.

18. On May 27, 2013, the claims adjuster provided a letter apologizing to the Plaintiff for the tone taken during the Interview and advising the Plaintiff that the question to obtain a credit bureau report was “one in a series of standard questions”. The letter, however, still provided the Plaintiff with no explanation for *why* The Personal needed his credit score information in the first place.

19. In September 2013, the Plaintiff requested access to all personal information in The Personal’s possession about him – including his credit information. While some information was disclosed to the Plaintiff by The Personal in November 2013, The Personal initially refused to provide the Plaintiff with the information it obtained about his credit score.

20. After continued demands for his credit score information were ignored, the Plaintiff followed up directly with the third-party provider used by The Personal to obtain his credit score information, Equifax, which, several months later, confirmed that the Plaintiff's credit file was accessed.

21. Significantly, the records provided to the Plaintiff by Equifax in January 2014 suggested that more than simply a credit score was obtained from it by The Personal and that the Plaintiff's full credit file stored with Equifax may have been accessed by The Personal on November 27, 2012.

22. Finally, The Personal agreed to release the Plaintiff's own credit score information to him in January 2014, even though this information was stored in The Personal's records since November 27, 2012. The Personal did not provide the Plaintiff with an explanation for why his credit score information was withheld from him.

THE PERSONAL'S POLICY OF ACCESSING CREDIT SCORES

23. In follow-up correspondence with The Personal, the Plaintiff asked for an explanation for why his credit score information was not requested after his previous accident on January 18, 2012. The Plaintiff was advised that, at the time of the earlier accident, The Personal did not have a "policy" in place to request credit score information - suggesting that a policy requiring its claims adjusters to seek credit score information was instituted by The Personal sometime between January 18, 2012 and November 27, 2012.

24. The Personal, somewhere within this time period, instituted a policy instructing its accidents benefits claims adjusters to obtain access to and to collect credit score information from The Personal's client insureds. Individual claims adjusters were required, by this policy, actively

to seek consent to obtain an client insured's credit score information for every accident benefits claim that was opened with The Personal.

25. A "standard script" was, apparently, instituted for this purpose, which provided as follows:

As a standard practice for our Accident Benefits claims, we would like your consent to obtain your current credit score. Collected information will remain confidential and will be used to facilitate your claim and to prevent, detect and prosecute fraud. Do I have your consent to do this?

26. The standard script did not contain any language suggesting that consent to a credit score check was optional and the language suggested that each individual client insured's accident benefits claim was being investigated for fraud – despite the obligation of The Personal to act with utmost good faith.

27. Claims adjusters were not otherwise advised to relay to The Personal's clients insureds that providing consent to obtain a credit score was optional.

28. In the event that an client insured refused to give consent, the claims adjuster was to inform the client insured that "I respect your decision if you do not want to give us consent, and I will handle your claim the same way I do with other clients." This was not conveyed to the Plaintiff at the time that the request for his credit score was made.

29. Those clients insureds who did not provide their consent to The Personal to collect their credit score information risked delays in receiving claim settlements relative to other clients insureds and risked being subjected to a higher degree of scrutiny – including a presumption of fraudulent conduct.

30. The Personal expedited settlements for its clients insureds who consented to credit score checks and who had favourable credit score information, relative to those who refused to provide such consent, or who provided such consent but had unfavourable credit scores.

31. Consequently, The Personal failed to treat its clients insureds equally or fairly, subjecting them to an unwarranted invasion of their privacy.

PROCEEDINGS BEFORE THE PRIVACY COMMISSIONER

32. As a result of his concerns about The Personal's breaches of his privacy rights, and the privacy rights of other clients insureds of The Personal, the Plaintiff commenced a formal complaint against The Personal before the Office of the Privacy Commissioner of Canada ("OPCC") under the provisions of *PIPEDA* on July 9, 2014 under OPCC file number PIPEDA-032166.

33. In his complaint, the Plaintiff alleged, amongst other things, that The Personal collected personal information that was unreasonable and that he had not provided meaningful consent for The Personal to access his credit score.

34. On March 14, 2017, the OPCC, after reviewing submissions from both the Plaintiff and The Personal, made the following findings in a carefully reasoned written decision:

- (a) The Plaintiff's complaints against The Personal were well-founded;
- (b) The Personal's collection and use of credit scores during the auto insurance claim assessment process is not something that a reasonable person would consider to be appropriate;
- (c) The Personal did not obtain meaningful consent from the Plaintiff as it did not advise him that obtaining a credit score was optional; and

(d) The Personal was not being open about its policies and practices with respect to the collection and use of credit score information during the auto insurance claim assessment process.

35. The OPCC found that The Personal contravened Section 5(3) and Principle 4.3 of PIPEDA.

36. In response to the OPCC's findings, The Personal agreed to conduct a comprehensive review of its procedures and processes with respect to the collection and use of credit score information. The Personal committed to comply with the OPCC's findings and that it would cease the practice of collecting and using credit score information during the claim assessment process for auto insurance as of April 22, 2017.

37. On February 8, 2018, the Plaintiff received notification from the OPCC that The Personal finally confirmed implementation of the OPCC's privacy recommendations.

ONGOING BREACHES

38. Despite providing assurances to the OPCC that The Personal and Desjardins had ceased the practice of requesting, collecting, and using credit score information, The Personal's adjusters continue to seek consent to obtain credit score information from their insureds, as well as other personal financial and other information wholly irrelevant to the Defendants' claim adjustment requirements.

39. On February 28, 2018, the Plaintiff was involved in an automobile accident in Toronto. He sustained a number of injuries as a result of the accident.

40. The same day as the accident, the Plaintiff filed a claim with The Personal by telephone. A few days after this, the Plaintiff was advised that his claim had been opened and that an automobile accident benefits adjuster was assigned.

41. On March 28, 2018, the Plaintiff received a package of documents from The Personal in connection with his accident benefits claim. Included in this package was an authorization form from The Personal requesting that the Plaintiff consent as follows:

I, hereby give my consent to **THE PERSONAL INSURANCE COMPANY** and its agents and employees to obtain from and to exchange with the following persons and organizations, any information and documentation with respect to the above-mentioned claim:

other insurers, insurance adjusters, agents and brokers, accountants, financial advisors, financial institutions, personal information agents, credit reporting agencies, risk and claim information agencies, police service agencies, organizations for the prevention, detection or suppression of crime and criminal offences and fire departments.

Information may solely be obtained from the following persons and organizations:

my former or current employers, as well as any other person, company or public or private organization which can provide the insurer with information and documentation related to my claim.

I declare that I have been notified:

- that the information obtained in accordance with this consent will be recorded in an insurance file and only the Insurer's employees, its agents and those authorized by law will be able to access this file when required in order to perform their duties or for purposes that I have authorized.
- that the file created will be kept at the address mentioned below.
- that I have the right to access the personal information contained in my file by sending a written request to this effect to the Insurer.

A copy of this signed authorization is as valid as the original signed copy thereof.

This consent is granted solely for the purposes of analyzing, assessing, investigating and processing the claim noted above and is only valid for the length of time necessary to carry out these activities.

42. The authorization form sent to the Plaintiff following the February 28, 2018 accident does not provide any proper explanation of why credit, financial, or other personal information is requested or required for the purpose of completing an accident benefits claim, nor is such

information required for that purpose. It is patently in breach of the OPCC findings and The Personal's commitment to the OPCC that it had fulfilled the OPCC's privacy recommendations.

43. The Personal had committed to the OPCC that it would not collect credit score information during the claim assessment process for auto insurance by April 22, 2017 and that it would implement any required information technology systems changes on or before that date. The Personal further committed to conduct a review of its current procedures and processes for the collection and use of credit score information for other types of insurance by June 30, 2017 and to implement major system changes, if necessary, by December 31, 2017. The Personal provided written confirmation to the OPCC that it had complied with all of its commitments to the OPCC in February 2018. On the basis of The Personal's written confirmation that these steps were taken, the OPCC found that privacy breaches identified in its March 14, 2017 were resolved.

44. In fact, as evidenced by the authorization sent to the Plaintiff, The Personal's representation to the OPCC was false, and it continues to seek authorizations to obtain credit score information, as well as other wholly irrelevant personal and financial information, from its insureds during the claims assessment process for auto insurance. The Personal has not effected changes to its systems to end its improper invasion of the privacy of its insureds, and the Plaintiff and class members' privacy continues to be breached.

PROPOSED CLASS DEFINITION

45. The Plaintiff brings this proposed class action on his own behalf, and on behalf of a proposed class of similarly situated persons (the "Class Members"), defined as:

All persons resident in Canada who: (a) were insured by a valid policy of automobile insurance by The Personal; (b) made insurance claims under their policies with The Personal between January 18, 2012 and ~~February 8, 2018~~ the date

of certification of this action as a class proceeding; and (c) had their credit score information, or other personal financial information, accessed by The Personal or its agents.

BREACH OF *PIPEDA*

46. The Personal violated the provisions of *PIPEDA* by collecting information from Class Members that a reasonable person would not have found to be appropriate in the circumstances.

47. The Personal did not, and does not, have a direct business need for credit score information as the collection and use of credit scores, or other personal financial information, is neither necessary nor effective in preventing and detecting fraud.

48. The Personal further violated the provisions of *PIPEDA* by failing to obtain meaningful consent to the collection, use, or disclosure of credit score information.

49. While the “standard script” to be read to Class Members by agents of The Personal, if read in its entirety, informed Class Members that their credit score information was to be used for the purposes of fighting fraud, it did not explain to Class Members, prior to providing consent, that obtaining their credit score information was optional.

50. Agents of The Personal were not provided with clear instructions as to whether obtaining a credit score was optional and certain claims adjusters were under the impression that obtaining consent to access and collect a credit score, rather than simply requesting such consent, was mandatory.

51. The Personal’s agents were required, in all cases, to seek credit score information from clients insureds as part of a policy instituted by The Personal in ~~2012~~ 2008. The policy was

improper and in breach of the Class Members' privacy rights and a breach of the fiduciary duty owed by The Personal to the Class Members.

52. Amongst other things, The Personal did not adequately disclose to the Class Members:
- (a) The manner by which their credit and other personal financial information would be preserved or recorded by the Defendants;
 - (b) Who would have access to their credit personal financial information;
 - (c) If any entities other than The Personal would have access to their credit scores and other personal financial information;
 - (d) When and under what conditions their credit scores and other personal financial information would be accessed;
 - (e) The specific purposes for which their credit scores and other personal financial information would be accessed;
 - (f) Whether negative credit scores or negative personal financial circumstances may delay the speed with which their claims are resolved;
 - (g) Whether their credit information and other personal financial information would be used for purposes other than resolving their claims; and
 - (h) How long their credit and other personal financial information would be stored.
53. The authorization form sent to the Plaintiff in March 2018 provides no explanation of the purpose for which the requested credit, financial, and other personal information is sought. There is no reason any financial information regarding any insured is required to process their claim for accident benefits.

INTRUSION UPON SECLUSION

54. The Plaintiff pleads and relies upon the common law tort of intrusion upon seclusion and pleads that The Personal's intentional or reckless acts intruded upon the reasonable privacy

expectations of the Class Members in such a manner that would be highly offensive to a reasonable person.

55. The Class Members' ~~credit~~ personal financial information, including credit scores, is private and sensitive information. The Personal knew or ought to have known that compelling the disclosure of this information was likely to cause distress, humiliation, and anguish to the Class Members.

56. There was no lawful justification for The Personal's invasion of the reasonable privacy expectations of the Class Members.

57. Desjardins knew of, and mandated, The Personal's intrusion upon the seclusion of the Class Members.

MISLEADING THE PLAINTIFF AND THE OPCC

58. The Personal and Desjardins knowingly misled the Plaintiff and the OPCC by advising the OPCC that, as of April 22, 2017, credit score information would no longer be requested of The Personal's insureds during the claims assessment process for auto insurance. As of March 2018, The Personal's agents continue to request consent to obtain credit score and other personal information from their insureds.

59. In either case, The Personal and Desjardins knew, or ought to have known, that the OPCC relied upon them to implement proper internal procedures to ensure that privacy breaches did not continue. The Personal and Desjardins were responsible for implementing any information technology and systemic changes that were necessary to ensure that privacy breaches did not continue. They failed to do so.

60. The Personal accessed the credit information of the Class Members for The Personal's benefit and not for the benefit of the Class Members. The Personal's motivation to secure its client insureds' credit and personal financial information was increased profit by delaying, denying, or reducing claims paid to the Class Members. This is an improper motive.

BREACH OF FIDUCIARY AND UTMOST GOOD FAITH

61. In handling the Class Members' insurance claims, The Personal was required to act with utmost good faith, and owed the Plaintiff and the Class a fiduciary duty to adjust their claims fairly, without regard to irrelevant factors such as the insured's financial condition, and without preferring its own interests over those of the Class.

62. The Personal breached its fiduciary duty and its obligation to act with utmost good faith by allowing irrelevant considerations, such as a Class Members' credit or personal financial history, to impact the handling of a Class Members' insurance claim, including by delaying the time to adjust claims, making assumptions of possible fraudulent conduct, or making settlement offers for less than the full value of a claim, all to the detriment of the Class and for the benefit of The Personal.

63. Desjardins, as the parent company of The Personal, also owed an obligation of utmost good faith to the Class Members as their insurer. Desjardins breached this duty by continuing The Personal's policy of obtaining credit score information after it became the parent company of The Personal.

64. The Defendants continue to breach their fiduciary duty and duty of utmost good faith. Despite an explicit finding by the OPCC that requesting credit score information is a breach of the privacy of its insureds, and despite the Defendants' commitment to the Plaintiff and the OPCC that

they had ceased this practice, consent to obtain credit score and other personal financial information continues to be requested from The Personal's insureds. The Personal and Desjardins continue to flout, or act with callous indifference towards, the privacy rights of The Personal's insureds.

65. The Defendants have acted in bad faith, with a view to improperly increasing their profits, under-compensating their insureds, and for other reasons unrelated to fairly and fully compensating their insureds at a time when their insureds are most vulnerable. The Defendants' conduct has exacerbated the harms suffered by the Class Members. The Defendants' conduct is egregious and warrants the sanction of the Court with an award of aggravated, punitive, or exemplary damages.

DAMAGES

66. The Plaintiff and the Class Members have all suffered the following damages as a result of the Defendants' conduct:

- (a) Humiliation and mental distress arising from the dissemination of their private credit scores and knowledge that their claim would be judged based on that score;
- (b) Inconvenience;
- (c) Increased costs of borrowing due to diminished credit ratings; and
- (d) Delay in receipt of insurance coverage or reduced benefits.

67. The Defendants' wrongful conduct entailed that the Plaintiff and the Class Members would experience delays in the processing of their insurance claims. The Defendants' conduct was

motivated by an improper purpose and breached the duty of utmost good faith. As a result, the Plaintiff and Class Members are entitled to aggravated damages.

68. The Defendants' wrongful conduct, as further particularized above, was deliberate, high-handed, and in complete disregard of the privacy and other rights of the Plaintiff and the Class Members. Further, the Defendants misled the OPCC and the Plaintiff by claiming that they would cease asking for the credit score information of the Class Members. Nevertheless, they continue to do so in flagrant disregard of the findings of the OPCC and their own written commitments. Such conduct necessitates an award of punitive or exemplary damages for the purposes of denunciation and deterrence.

69. The Plaintiff relies upon the provisions of Section 16 of *PIPEDA* and pleads that this Court may award damages for a breach of the Plaintiff's and the Class Members' privacy rights pursuant to that Act.

STATUTES

70. The Plaintiff pleads and relies upon the provisions of the following statutes, including any rules, regulations, or amendments thereto:

- (a) The *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5; and
- (b) The *Federal Courts Act*, RSC 1985, c F-7.

TRIAL

71. The Plaintiff proposes that this action be tried at Toronto.

Dated at the City of Toronto, in the Province of Ontario, this ~~27th day of February, 2018~~ 9th day of April, 2018



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