

FEDERAL COURT

PROPOSED CLASS PROCEEDING

BETWEEN:

KALEVI HAIKOLA

Plaintiff

-and-

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

Defendants

REPLY

1. The Plaintiff admits the allegations contained in paragraphs 4, 5, 6, and 13 of the Statement of Defence.
2. The Plaintiff denies all other allegations in the Statement of Defence unless otherwise admitted herein.

THE ROLE OF DESJARDINS AS PARENT AND MANAGING COMPANY

3. The Defendant, Desjardins General Insurance Group Inc. (“Desjardins”) is the parent company of The Personal Insurance Company (“The Personal”) and also a direct insurer. It actively manages the business of The Personal and is not a mere holding company. Desjardins, and its subsidiary insurance companies that it actively manage are, in combination, Canada’s third largest property and casualty insurer group.

4. Senior management at Desjardins plan, conduct, and control the Desjardins group of insurance companies' business activities, including its control measures.

5. Desjardins' management developed, or approved of, a regime for the collection of credit scores and other financial information from The Personal's insureds. Desjardins was ultimately responsible for all aspects of this regime, including the use of information collected for its alleged analytics.

LACK OF CONSENT TO ACCESS CREDIT SCORES

6. The Plaintiff denies that an interactive voice response recording ("IVR") was played prior to the Plaintiff's November 24, 2012 telephone interview with an agent of the Defendants, Jan Boron. In the alternative, if an IVR was played, it did not provide sufficient details about what personal information would be demanded or collected in order to obtain informed consent from the Plaintiff or the Class.

7. At no material time did the Plaintiff give informed consent, whether verbal, in writing, or by his actions, for the Defendants to collect his credit score or other financial information, or to use such information as part of the Defendants' analytics regime.

8. At the time that the Plaintiff made his claim for Ontario Statutory Accident Benefits ("SABs") in November 2012, the Defendants had no reason to believe that the Plaintiff's claim was fraudulent. Presuming fraudulent conduct on the part of its insureds is not good faith performance of the insurance contract and is offensive to a reasonable person.

THE “RELEASE”

9. On May 11, 2015, the Plaintiff executed a release (the “Release”) and a related settlement disclosure notice (the “Settlement Notice”) in the context of a mediated settlement of his claim for the payment of insured medical benefits owed to him under the Ontario Statutory Accident Benefits Schedule. The Release did not provide a release of the Plaintiff’s claims concerning the Defendant’s breach of the Plaintiff’s privacy, the parties did not contemplate that the Release would include a release of any claims arising from the Defendants’ invasion of the Plaintiff’s privacy, and the release has no application to this action.

10. The Release language is limited in scope to a release of the Defendants from liability to make any further SABs payments to the Plaintiff with respect to his November 2012 motor vehicle accident.

11. In the event that the Court finds that the Release does cover the Plaintiff’s separate privacy breach claims, which is denied, the Defendant, Desjardins, was not a party to the Release and cannot claim the benefit of the Release as it was not an agent, servant, or employee of The Personal and is not a successor company of The Personal.

12. In the event that the Court finds that the Release does cover the Plaintiff’s privacy breach claims, which is denied, then the Release, in the context, was unconscionable and, as a matter of public policy, it should not be enforced

13. The Plaintiff pleads and relies upon the legal doctrine of *contra proferentum*. To the extent of any ambiguity in the Release or the Settlement Notice, such ambiguity should be interpreted in favour of the Plaintiff and contrary to the drafter of the documents, The Personal or Desjardins.

LIMITATIONS ALLEGATIONS

14. The Plaintiff could not proceed with a court action, pursuant to the terms of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 (“*PIPEDA*”), until the Office of the Privacy Commissioner of Canada (“OPCC”) completed its investigation of the Plaintiff’s privacy breach complaint against The Personal. The Plaintiff commenced this action within one year of receiving the OPCC’s Report of Findings on March 14, 2017.

15. The Plaintiff did not discover that a court proceeding would be an appropriate means to seek a remedy for breach of privacy, either at common law or under *PIPEDA*, until the OPCC delivered its report of findings to the Plaintiff. A reasonable person could not have reached this conclusion earlier.

16. The Defendants refused to provide the Plaintiff with appropriate access to information about how his credit score or other financial information was used during the claims handling process. As the Defendants would not disclose this information to the Plaintiff, he was unable to discover the nature of the wrongs committed by the Defendants until the OPCC released its Report of Findings on March 14, 2017.

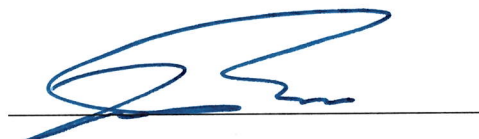
USE OF ANALYTICS

17. Insurance fraud cannot be identified from credit scores. The Plaintiff denies that the Defendants used credit scores for the purpose of preventing and detecting fraud. Credit score information, rather, was used for adjusting claims.

18. At no time were the Defendants’ insureds informed that their credit scores would be subjected to the Defendants’ analytics, nor were the Defendants’ insureds ever provided with

information about how the results of such analytics impacted the handling of claims. The use of analytics in adjusting SABs claims was a breach of the Defendants' duty of good faith in handling and fairly resolving the Class members' claims under their contracts of insurance.

Dated at the City of Toronto, in the Province of Ontario, this 21st day of August, 2018.



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