CITATION: Haikola v. The Personal Insurance Company, 2019 ONSC 5982
COURT FILE NO.: CV-19-622974CP
DATE: 20191017

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Kalevi Haikola	)	*Margaret Waddell and John-Otto Phillips*, for the Plaintiff
Plaintiff	)	
	)	
– and –	)	*Christine L. Lonsdale, Gillian Kerr, and Caroline H. Humphrey*, for the Defendants
The Personal Insurance Company and Desjardins General Insurance Group Inc.	)	
	)	
Defendants	)	

HEARD: October 7, 2019

GLUSTEIN J.

REASONS FOR DECISION

Nature of motions and overview

[1] The action involves a claim for damages by the plaintiff, Kalevi Haikola ("Haikola") for the Defendants' alleged breach of an implied term of their insurance contract requiring them to comply with the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA*").

[2] In the period between 2012 and 2017, the defendant, The Personal Insurance Company ("The Personal") systemically collected credit score information from its insureds during its automobile insurance claims adjusting process. The Privacy Commissioner of Canada concluded

that this was a *PIPEDA* breach after Haikola filed a complaint with it. This proposed class action was commenced after the Privacy Commissioner delivered its report.[1]

[3] Following a mediation held in December 2018 the parties executed a settlement agreement on June 28, 2019 (the "Settlement Agreement"). There are an estimated 8,525 class members (the "Class Members").

[4] There are two motions before me. On consent, Haikola asks the Court to certify the class, approve the Settlement Agreement, and dismiss the action. Haikola also seeks ancillary relief approving the claims administrator, the notice plan, and the payment of a $15,000 honorarium to him, all of which is unopposed by the Defendants.

[5] Class counsel Waddell Phillips Professional Corporation ("Class Counsel") brings a motion to (i) approve the contingency retainer agreement respecting fees and disbursements between Haikola and Class Counsel dated November 7, 2017 (the "Retainer Agreement") and (ii) approve payment of Class Counsel fees in the amount of $500,000, plus HST of $65,000, and disbursements totaling $20,000 inclusive of HST, to be paid from the settlement fund of $2,200,000 (the "Settlement Fund").[2] The Defendants do not oppose this relief.

[6] At the hearing, I considered the submissions of counsel and granted the relief sought in both motions (with reasons to follow). I signed the draft order provided at court. I now set out my reasons below.

Facts

(a) Credit score collection by The Personal

[7] After suffering personal injuries in a car accident on November 24, 2012, Haikola opened a claim for accident benefits under his insurance policy with The Personal.

[8] On November 27, 2012 an adjuster from The Personal contacted Haikola and requested that he consent to The Personal accessing his credit score. Haikola agreed since he felt pressured, and was concerned that his claim would be impacted if he did not agree. Haikola was not provided with a proper explanation for why The Personal wanted his credit score.

[9] Throughout 2013 Haikola repeatedly sought answers from The Personal about why his credit score was relevant to review his accident benefits claim. The Personal advised Haikola that

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[1] There is no impugned conduct by the defendant Desjardins General Insurance Group Inc. ("Desjardins"), who is named as the parent corporation of The Personal.

[2] The Settlement Fund is $50,000 less than the settlement funds of $2,250,000 paid by the Defendants. As I set out in more detail below, the amount of $50,000 is to be paid for Haikola's costs thrown away in related Federal Court proceedings.

the request for access to credit score information was "one in a series of standard questions" it asked when opening an accident benefits claim.

[10] This practice was standard from September 2012 until April 22, 2017, when it was discontinued following receipt of the Privacy Commissioner's Report. The Personal asserts that the practice was implemented to assist it in preventing and detecting fraud.

[11] While claims adjusters did not see the credit scores, the results of the credit inquiry could impact the scrutiny to which a claim was subjected and change the "management" of claims.

(b) Findings of the Privacy Commissioner

[12] Haikola had preliminary communications with the Privacy Commissioner in November 2013 advising of his difficulties obtaining records from The Personal and his concerns about the collection of his credit score information. The Privacy Commissioner required that Haikola first try to resolve the matter directly with The Personal, who did not satisfy Haikola's concerns.

[13] On July 10, 2014 Haikola filed a formal complaint with the Privacy Commissioner, resulting in a lengthy investigation which culminated in a Preliminary Report of Investigation on January 26, 2017 and a final Report of Findings on March 14, 2017. The Privacy Commissioner found that:

(i) Haikola's complaint against The Personal was well-founded;

(ii) 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;

(iii) The Personal did not obtain meaningful consent from Haikola as it did not advise Haikola that obtaining a credit score was optional;

(iv) 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;

(v) The Personal contravened section 5(3) and Principle 4.3 of *PIPEDA*; and

(vi) The matter was conditionally resolved as The Personal agreed to (a) refrain from collecting and using credit score information during the claim assessment process for auto insurance, (b) cease the practice as of April 22, 2017, and (c) complete a comprehensive review of its procedures and practices regarding the collection and use of credit score information for all of its insurance products and purposes.

[14] On February 8, 2018 the Privacy Commissioner confirmed to Haikola that The Personal had ceased collecting credit score information from its insureds as of April 22, 2017.

(c) The Federal Court class action

[15] Under section 14 of *PIPEDA*, a complainant may commence a Federal Court action for privacy breaches, but only after receiving a report from the Privacy Commissioner. Consequently, Haikola could not commence a statutory cause of action under *PIPEDA* until after the Privacy Commissioner's Report was delivered to him.

[16] After receiving the Privacy Commissioner's Report, Haikola retained Class Counsel to commence a class action. A Federal Court action was issued on February 27, 2018 claiming damages on behalf of Haikola and the Class Members for the Defendants' breaches of *PIPEDA*, together with breaches of the Class Members' common law privacy rights and breach of the insurer's duty of utmost good faith.

[17] The Defendants defended the action and took the position that (i) the Federal Court did not have jurisdiction to certify a class proceeding under section 14 of *PIPEDA* and (ii) the statute only allowed for individual actions. The jurisdiction issue would have been a matter of first instance if this proceeding had not settled.

(d) Haikola's access to information request and judicial review

[18] In its Report of Findings, the Privacy Commissioner referenced representations made by The Personal and its own investigations. Haikola's complaint was under investigation for almost three years.

[19] Haikola was not satisfied with the responses that he had received from the Defendants about The Personal's credit score access policy and how it affected insureds making accident benefit claims. Consequently, he made an access to information request to the Privacy Commissioner in December 2017 seeking access to all records available from it.

[20] The Privacy Commissioner responded to Haikola's request and, as of May 30, 2018, was prepared to release a number of records to him. The Defendants challenged the release of the records and sought a judicial review of the Privacy Commissioner's decision to provide them to Haikola.

[21] Haikola instructed Class Counsel to contest The Personal's judicial review application, and Haikola filed a Notice of Appearance entitling him to participate in the proceedings. A significant point of disagreement was the right of Haikola and his lawyers to have at least limited access to the records in dispute to ensure a fair hearing. This culminated in a motion and an Order from Prothonotary Tabib that Haikola should have access to a partially redacted Certified Tribunal Record for the judicial review proceeding.

[22] As part of the settlement, the Defendants insisted that Haikola withdraw his access to information request from the Privacy Commissioner. If the Settlement Agreement is approved, (i) Haikola will withdraw his access to information request and the Federal Court judicial review

application will then be discontinued; and, (ii) the Defendants will pay Haikola his costs thrown away in the Federal Court judicial review proceeding in the amount of $50,000 (reducing the available settlement funds for the class members from $2,250,000 to $2,200,000).

(e) Mediation

[23] In the course of the negotiations with the Defendants from May to December 2018, Class Counsel requested, and were provided with, a substantial amount of information relevant to the merits of Haikola's claim and damage quantification, including details of the total class size.

[24] In the fall of 2018, following the filing of Haikola's certification record in the Federal Court, the parties began to discuss in earnest the possibility of an early resolution of Haikola's claim. The parties recognized that they were unlikely to come to an agreement through direct negotiations and agreed to mediation to determine if resolution was possible.

[25] On December 14, 2018 the parties attended a full day mediation with mediator Joel Wiesenfeld, at which the parties reached an agreement in principle for the settlement of the action.

[26] Minutes of settlement were executed, contingent upon the parties finalizing a settlement agreement on terms acceptable to all parties.

(f) The settlement

[27] Over the next six months, the parties engaged in lengthy, arm's length, and often contentious negotiations before ultimately agreeing upon the Settlement Agreement.

[28] As a key part of the settlement process, the parties sought instructions from the Federal Court case management judge (Boswell J.) as to whether the Federal Court could make an enforceable order in a *PIPEDA* class action against a non-government entity. Following recommendations from Boswell J., the parties agreed, as a term of the Settlement Agreement, that Haikola would commence an action in the Ontario Superior Court for settlement purposes and discontinue his Federal Court action if the settlement was approved.

[29] The key terms of the Settlement Agreement are:

(i) The Defendants will pay $2,250,000 inclusive of interest, administration expenses, and legal costs (the "Settlement Amount");

(ii) $50,000 of the Settlement Amount will be paid to Haikola's counsel for his costs thrown away in respect of the judicial review application, and Haikola will withdraw his access to information request made to the Privacy Commissioner. The Settlement Amount less the $50,000 is the "Settlement Fund";

(iii) Class Counsel's fees and disbursements for the class proceeding, in an amount to be approved by the court, will be paid out of the Settlement Fund;

(iv) The fees and expenses of the Claims Administrator will be paid out of the Settlement Fund;

(v) The balance of the Settlement Fund will be distributed *pro rata* to the Class by the Claims Administrator;

(vi) Any amounts not distributed to Class Members (due to stale dated cheques or unspent holdbacks for claims administration) will be paid to the Public Interest Advocacy Centre ("PAIC") for *cy-près* distribution to advance consumer privacy interests;

(vii) The Federal Court action and the Superior Court action will be dismissed with prejudice on a without-costs basis;

(viii) Nothing in the Settlement Agreement shall be "deemed, construed, or interpreted to be an admission of any violation of any statute or law, or of any wrongdoing or liability by any of the [Defendants]" and the defendants "deny any liability and deny the truth of the allegations made against them"; and

(ix) The Defendants will receive a comprehensive release from the Class Members.

[30] The Defendants have identified 8,525 persons in the Class and provided their names and contact information to the Claims Administrator.

[31] The distribution protocol provides for a *pro rata* direct payment to all Class Members who remain insureds with The Personal without the need for them to make a claim. The Defendants advise that approximately 73% of the Class Members remain The Personal's insureds.

[32] The other 27% of the Class will be given notice of the settlement to their last known address and by email to their last known email address if the Class Member's last known address is not available or where mail is returned as undeliverable. These Class Members must complete a simple claim form.

[33] Class Counsel will also provide indirect notice to Class Members by (i) posting an update to their firm website advising of the settlement approval with sufficient detail and links to the key documents, and (ii) issuing a press release with a summary of the core terms and links to key documents.

[34] If every Class Member directly receives payment or files a valid claim, Class Counsel anticipates that each Class Member will receive approximately $150.[3] Assuming a take-up rate of

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[3] This amount is based on an anticipated $250,000 for claims administration fees.

about 55% for the 27% of the Class Members no longer insured by The Personal, the anticipated value of each claim would be $180.

(g) Notice to Class Members of this hearing

[35] On July 10, 2019 I ordered that notice of this hearing be provided to the Class Members in accordance with the Notice Protocol set out in the Settlement Agreement and I appointed CA2 Class Action Claims Administration ("CA2") as the Claims Administrator. The Defendants provided CA2 and Class Counsel with a list of the last known mailing addresses and email addresses for all identified Class Members.

[36] The Defendants directly mailed a short form Notice of Hearing to all Class Members identified from their records.

[37] Class Counsel also provided notice of this hearing and of the Settlement Agreement to the Class Members by (i) publishing a press release in English and in French, (ii) updating their website with information about the hearing and posting a copy of the Long Form and Short Form Notices of Hearing, together with a copy of the Settlement Agreement, and (iii) providing notice of the hearing through social media (such as Twitter).

(h) Plaintiff's honorarium

[38] The relevant evidence as to the efforts undertaken by Haikola can be summarized as follows:

(i) For more than four years before retaining counsel, Haikola personally fought to determine why The Personal had accessed his credit score. He ultimately obtained a finding from the Privacy Commissioner that his privacy rights had been breached by The Personal, giving him the right to bring a civil action against The Personal under *PIPEDA*;

(ii) Haikola determined on his own that he wished to start a class proceeding. He was not recruited by Class Counsel;

(iii) No other Class Member has a finding from the Privacy Commissioner that their privacy was breached and there is no evidence that any other Class Member complained to the Privacy Commissioner about the matters in dispute in this action. Without Haikola's efforts, the Defendants' alleged breach of their insureds' privacy would not have been known and publicized, the Privacy Commissioner would not have made its finding, and the alleged breach of privacy by the Defendants would likely be ongoing;

(iv) Without Haikola, this action would not have been brought. Haikola was in a unique position relative to all other Class Members as the Privacy Commissioner's

completed investigation and report gave him the right to start an action in Federal Court. Instead of using this right to commence an individual action, Haikola commenced a class action which led to the settlement; and

(v) Haikola rendered active and necessary assistance, including gathering evidence, swearing affidavits, meeting with Class Counsel on multiple occasions, asking probing questions, reviewing court documents, and participating in settlement discussions.

(i) Class Counsel's fees

[39] On November 7, 2017, Haikola entered into a Class Action Contingency Fee Retainer Agreement (previously defined as the "Retainer Agreement") with Class Counsel. Under the terms of the Retainer Agreement, Haikola agreed that Class Counsel's legal fees for this action would be 25% of any settlement, plus applicable taxes and disbursements.

[40] Class Counsel anticipates that (i) their docketed time for this action will be approximately $370,000 up to the date of the hearing of the present motions, and (ii) they will incur about another $60,000 in time value to complete the settlement and assist with settlement administration. Disbursements, to the completion of settlement, are anticipated to total approximately $20,000.

[41] Class Counsel asks this Court to approve legal fees of $500,000, HST of $65,000, and $20,000 for disbursements. $500,000 for legal fees constitutes a contingency fee of about 22.7% on the $2,200,000 Settlement Fund. This is an estimated multiplier on Class Counsel's docketed hours of approximately 1.16.

[42] Haikola retained Class Counsel in November 2017. Class Counsel subsequently moved the Federal Court action and the present action forward expeditiously, including taking the following procedural steps:

(i) receiving and reviewing Haikola's documents, including the decisions of the Privacy Commissioner and the long history of communications between Haikola and the Defendants,

(ii) analyzing and determining the merits of the potential causes of action that could be pursued against the Defendants, and the potential range of the quantum of damages,

(iii) drafting and amending the Statement of Claim in the Federal Court Action,

(iv) obtaining an order for case management of the class proceeding in the Federal Court on May 1, 2018,

(v) negotiating a consent timetable with counsel for the Defendants for the orderly prosecution of the action through to the certification motion,

(vi) forcing delivery of a Statement of Defence pre-certification for the Federal Court action,

(vii) requesting inspection of documents referred to in the Defendants' Statement of Defence,

(viii) completing a Reply to the Defendants' Defence,

(ix) preparing a 500+ page certification motion record,

(x) collecting substantial information from the Defendants going to the merits of the claim and engaging in protracted and contentious discussions as to whether pre-certification settlement was possible,

(xi) preparing a comprehensive mediation brief and attending a full day mediation with Joel Wiesenfeld, on December 14, 2018,

(xii) reviewing the proposed Settlement Agreement with Haikola, providing advice on it, and obtaining Haikola's instructions,

(xiii) drafting the Settlement Agreement (inclusive of all schedules) and negotiating the Settlement Agreement with defence counsel,

(xiv) providing written submissions and attending case management conferences with Boswell J. for directions on jurisdictional issues related to the Federal Court action,

(xv) drafting a new Statement of Claim and commencing this action in Ontario Superior Court for settlement approval purposes,

(xvi) preparing a motion record and factum for the notice approval order granted by the court on July 10, 2019,

(xvii) preparing the motion record and factum for certification and this Court's approval of the Settlement Agreement,

(xviii) publishing news releases, updates to Class Counsel's website, and social media updates from February 2018 to the present, and

(xix) answering inquiries from hundreds of Class Members, the media, and the public from February 2018 to the present.

[43] If the Settlement Agreement is approved, Class Counsel will have the following work to perform:

(i) supervising the work of CA2, including working with CA2 to finalize the forms of the notices of settlement approval and the claim form, and providing directions with respect to any questions that CA2 may have,

(ii) publishing another news release, updates to counsel's website, and otherwise publicizing the settlement's approval through social media,

(iii) answering further inquiries from Class Members about the settlement, opting out, and completing claim forms, which, based upon the experience of Class Counsel, will number in the hundreds, given the size of the Class,

(iv) reporting to the Defendants and to the court regarding any opt outs,

(v) obtaining a dismissal of the Federal Court action and withdrawing the access to information request,

(vi) if there is any need to obtain directions from the court on any matter regarding the settlement administration, bringing a motion for directions, and

(vii) when the settlement administration process is completed, arranging for a final report from the Claims Administrator to be filed with the court.

Analysis

[44] The following issues arise on these motions:

(i) Should this action be certified, on consent, for settlement purposes?

(ii) Is the Settlement Agreement fair, reasonable and in the best interests of the Class as a whole?

(iii) Should the opt out period be limited to 60 days?

(iv) Should PAIC be approved as the *cy-près* recipient of any undistributed portion of the Settlement Fund?

(v) Should CA2 be appointed as the Claims Administrator?

(vi) Should the notice plan be approved?

(vii) Should Haikola receive an honorarium?

(viii) Should Class Counsel's retainer agreement be approved? If so, are the fees and disbursements sought by Class Counsel fair and reasonable?

[45] I address each issue below.

Issue 1: Should this action be certified, on consent, for settlement purposes?

i) The applicable law

[46] I first review the general principles and then consider the requirements under s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*").

a. General principles

[47] The court is required to certify the action as a class proceeding where the following five-part test in s. 5(1) of the *CPA* is met:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;

(c) the claims of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for resolution of the common issues; and,

(e) there is a representative plaintiff who,

(i) would fairly and adequately represent the interest of the class;

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interest of other class members.

[48] The fact that the parties seek certification on consent for settlement purposes does not dispense with the need to meet the certification criteria (*Osmun v. Cadbury Adams Canada Inc.*, [2009] O.J. No. 5566 (S.C.) ("*Osmun*"), at para. 20). While the basic requirements for certification are the same as in a contested context, the requirements need not be as rigorously applied in the settlement context because the court has less reason to be concerned about the manageability of the proceeding (*Osmun*, at para. 21).

b. Cause of action

[49] In determining whether a pleading discloses a cause of action: (i) no evidence is admissible to assess the cause of action; (ii) all pleaded allegations of fact are accepted as proven, unless they are patently ridiculous or incapable of proof; (iii) the novelty of the cause of action will not militate against sustaining the plaintiff's claim; (iv) matters of law which are not fully settled by the jurisprudence must be permitted to proceed; and (v) the court's power to refuse to certify on this ground is exercised "only in the clearest of cases" (*Perrenoud v. eHealth Ontario*, 2012 ONSC 6704, 33 C.P.C. (7th) 60, at paras. 54-59).

[50] A court may consider documents referred to in the pleading, such as a contract, to determine if the pleading discloses a cause of action (*Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (C.A.), at para. 58).

c. Class definition

[51] The class definition must identify all those who may have a claim, who will be bound by the result of the litigation, and who are entitled to notice. The class must be defined by objective criteria without reference to the merits of the action. It cannot be unlimited (*Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 ("*Hollick*"), at para. 17; *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.), at para. 10).

d. Common issue

[52] The proposed common issues must be "necessary to the resolution of each class member's claim" and a "substantial ingredient" of those claims (*Hollick*, at para. 18). The plaintiff must provide "some basis of fact" (*Hollick*, at para. 25) for these proposed common issues in the certification motion record.

e. Preferable procedure

[53] A class proceeding is the preferable procedure for the resolution of the common issues in an action when it is (i) a fair, efficient and manageable method for advancing the class members' claims, and (ii) preferable to other means of resolving the class members' claims (*Hollick*, at paras. 27-31).

[54] In considering preferability, a court is "to adopt a practical cost-benefit approach ... to consider the impact of a class proceeding on class members, the defendants, and the court" (*AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 21).

[55] Further, "where there is a cause of action, an identifiable class, common issues, and a settlement, there is a strong basis for concluding that a class proceeding is the preferable procedure because certification would serve the primary purposes of the *Class Proceedings Act, 1992*;

namely, access to justice, behavioural modification, and judicial economy" (*Krajewski v. TNOW Entertainment Group, Inc.*, 2012 ONSC 3908, at para. 32).

f. Representative plaintiff

[56] In determining whether a representative plaintiff is appropriate, the court considers "whether there was a common interest with other class members and whether the representatives would 'vigorously prosecute' the claim" (*Campbell v. Flexwatt Corp*, [1997] B.C.L.R. (3d) 343 (C.A.), at paras. 75-76).

ii) Application of the law to the present case

[57] I find that all of the requirements for certification have been met in the present case.

a. Cause of action

[58] The claim of breach of contract is the only cause of action asserted in the Statement of Claim. Paragraph 34 sets out the standard form privacy section of the insurance policy, which states that The Personal will "act as required or authorized by law" in the collection, use, and disclosure of the Class Members' personal information – including information from credit reporting agencies.

[59] Paragraph 35 of the Claim pleads that the standard form privacy language is an implied term that the Defendants would comply with *PIPEDA*. Haikola then pleads at paragraphs 36 to 40 that The Personal's process constituted a breach of *PIPEDA* and, as such, a breach of contract, resulting in damages to Haikola and the Class Members.

[60] Consequently, s. 5(1)(a) of the *CPA* is satisfied.

b. Class definition

[61] The Class Members are defined by objective criteria and the class definition is not tied to the outcome of the action. The proposed class definition (the "Class") is:

> All persons who: (1) were insured by The Personal under a valid automobile insurance policy between January 2012 and May 2019; (2) made an automobile insurance claim under that policy with The Personal during that time; and (3) consented to the collection and/or use of their credit score by The Personal or its agents as part of the fraud prevention and detection needs of The Personal's claims management process.

[62] The Class Members are readily identifiable from the Defendants' records and these records have been provided to Class Counsel and to CA2.

[63] Consequently, s. 5(1)(b) of the *CPA* is satisfied.

c. Common issue

[64] The proposed common issues for settlement purposes are:

(i) Did the Defendants breach their contracts with the class members by failing to comply with an implied term to comply with the *Personal Information Protection and Electronic Documents Act*?

(ii) If so, are the Defendants, or either of them, liable in damages to the Class?

[65] These issues are common to the class and arise from the cause of action asserted in the Statement of Claim. They are "necessary" and "substantial" elements of the Class Members' cause of action.

[66] Consequently, s. 5(1)(c) of the *CPA* is satisfied.

d. Preferable procedure

[67] With respect to the preferable procedure requirement, the present claim seeks a remedy for common law privacy breaches through an alleged breach of contract. Given the modest value of any such claim, a class action would be the preferable procedure.

[68] This is particularly so if the Defendants are correct that a claim for a privacy breach under *PIPEDA* requires individual complaints to the Privacy Commissioner and then, once each individual complaint is resolved, a separate Federal Court action to pursue the statutory cause of action under that Act. On this view, each individual would not have the benefit of the decision of the Privacy Commissioner arising from Haikola's complaint. The need to obtain a ruling from the Privacy Commissioner prior to commencing an action in Federal Court, if the Defendants are correct, would raise a barrier to access to justice for most people, the vast majority of whom have claims that are of only a very modest value.

[69] The common law claim proposed is preferable to each Class Member making a privacy complaint, waiting for the resolution of the complaint from the Privacy Commissioner with a formal report, and then commencing a Federal Court action.

[70] Consequently, s. 5(1)(d) of the *CPA* is satisfied.

e. Representative plaintiff

[71] Based on the above evidence as to Haikola's involvement in this litigation, I agree with Class Counsel's description of him in the plaintiff's factum as an "exceptional" representative plaintiff who can, and has, fairly and adequately represented the interests of the proposed class members. He has no conflicts of interest with other class members.

[72] The Settlement Agreement provides a workable and highly effective plan for providing notice to the class of certification and settlement approval, including a comprehensive (direct mailing) notice protocol, and simplified settlement administration plan.

[73] Consequently, s. 5(1)(e) of the *CPA* is satisfied.

[74] For the above reasons, I certify this action as a class proceeding.

Issue 2: Is the Settlement Agreement fair, reasonable and in the best interests of the Class as a whole?

[75] I again address the applicable law and then apply it to the present case.

i) The applicable law

[76] In my prior decision in *Cass v. Westernone*, 2018 ONSC 4794 ("*Cass*"), I addressed the law relevant to both settlement and fee approval. I rely on those reasons where applicable below.

[77] In *Cass*, I set out the applicable law on the test for approval of a settlement agreement in a class action, at paras. 85-90:

> In *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) ("*Parsons I*"), Winkler J. (as he then was) set out the applicable legal principles relevant to the court's assessment of the reasonableness of a settlement agreement (at paras. 69-80):
>
> (i) The test for approving a settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interests of the class as a whole, not whether the settlement meets the demands of a particular class member;
>
> (ii) The court should not engage in a "dissection of the settlement with an eye to perfection in every aspect". The settlement need only fall "within a zone or range of reasonableness", which is an "objective standard which allows for variation depending on the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation";
>
> (iii) In determining whether to approve a settlement, the court may take into account the following factors:
>
> (a) the likelihood of recovery or success,
>
> (b) the proposed settlement terms and conditions,

(c) the amount and nature of discovery, evidence or investigation,

(d) the future expense and likely duration of litigation,

(e) the recommendation of neutral parties, if any,

(f) the number of objectors and nature of objections,

(g) the presence of good faith, arm's-length bargaining and the absence of collusion,

(h) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation and information conveying to the court the dynamics of, and the position taken by the parties during, their negotiation, and

(i) the recommendation and experience of counsel;

(iv) These factors "are, and should be, a guide in the process and no more. Indeed, in a particular case, it is likely that one or more of the factors will have greater significance than others and should accordingly be attributed greater weight in the overall approval process"; and

(v) Class action settlements must be "seriously scrutinized by judges".

The function of the court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of improving the terms of the settlement. It is within the power of the court to indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement. However, the court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement (*Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.) ("*Dabbs*"), at para. 10).

"Evidence sufficient to decide the merits of the issue is not required because compromise is necessary to achieve any settlement. However, the court must possess adequate information to elevate its decision above mere conjecture" (*Ontario New Home Warranty Program v. Chevron Chemical Co.*, [1999] O.J. No. 2245 (S.C.J.), at para. 92). The parties proposing the settlement have an obligation to provide sufficient information to permit the court to exercise an objective, impartial and independent assessment of the fairness of the settlement in all the circumstances (*Dabbs*, at para. 15).

It is not necessary that examination for discovery have occurred at the time of settlement. Settlements reached at an early stage of proceedings are appropriate (*Dabbs*, at para. 24).

There is a "strong initial presumption of fairness" when the settlement is negotiated at arm's length and recommended by class counsel (*Serhan (Trustee of) v. Johnson & Johnson*, 2011 ONSC 128 ("*Serhan*"), at paras. 55-56).

Similarly, Sharpe J. (as he then was) held in *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 (S.C.J.), at para. 32:

> The fact that this settlement is strongly recommended by experienced class counsel is certainly a factor in its favour. The recommendation of class counsel is clearly not dispositive as it is obvious that class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line. [...] [Footnotes omitted.]

[78] I now review the above factors based on the evidence on this motion.

ii) Application of the law to the evidence

1. The likelihood of recovery, or the likelihood of success

[79] In the present case, there are risks which affect the likelihood of success. I summarize the basis of that concern as follows:

(i) There is uncertainty as to whether a class action can be brought in Federal Court. Section 14 of *PIPEDA* requires that a complainant alleging a privacy breach must obtain a report from the Privacy Commissioner prior to commencing an action for damages in Federal Court. *PIPEDA* does not specifically address whether a complainant may avail himself or herself of the class procedure in the *Federal Courts Rules* if he or she has obtained a report from the Privacy Commissioner demonstrating a systemic privacy breach. The Defendants vehemently disputed (and continue to dispute) the Federal Court's ability to certify Haikola's claim as a class proceeding under section 14 of *PIPEDA*;

(ii) The issue set out in subparagraph (a) above would have resulted in a preliminary battle over whether the Federal Court had jurisdiction to certify the proposed class proceeding. As a matter of first instance, on statutory interpretation and as a matter

of national importance, this could have led to several appeals, with the attendant additional risks, costs, and delay;

(iii) Even under Class Counsel's interpretation that a class action can be brought for a *PIPEDA* breach under the *Federal Court Rules*, Haikola would be the only person with standing to bring the class action since he was the only one to obtain a Privacy Commissioner's report. However, the Defendants argued that all of Haikola's claims were barred because he executed a full and final release in favour of The Personal following the settlement of his accident benefits file;

(iv) Further, any issues of consent may be individual in nature and, consequently, not certifiable;

(v) The Defendants also raised a limitations issue for the common law claims of Haikola, alleging that the two-year period ran from the date of discovery of the alleged *PIPEDA* breach. Many of the other class members had their credit scores accessed more than two years before Haikola filed his proposed class proceeding and would have faced similar limitation arguments;

(vi) If the issue of whether the limitation period ran from the report of the Privacy Commissioner was not resolved in Haikola's favour, then certification could be opposed on the argument that individual discovery (or discoverability) would have to be considered for each Class Member;

(vii) The findings of the Privacy Commissioner which support the claim would not bind the Federal Court since a hearing in Federal Court is a full *de novo* review (*Randall v. Nubodys Fitness Centres,* 2010 FC 681, at para. 32). The court could have accepted the Defendants' arguments that credit score collection was a reasonable business requirement, or that consent of the Class Members was informed and voluntary;

(viii) Damages under section 16(c) of *PIPEDA* have been limited to "the most egregious situations" "where the breach has been one of a very serious and violating nature" (*Randall*, at paras. 55-56). Haikola faced the risk that the court could find that credit score collection did not reach such a high threshold;

(ix) Furthermore, the question of whether any particular Class Member experienced humiliation, or some other compensable damage under section 16(c), is potentially an individual issue that differs between Class Members, and might impact on the certifiability of the action as a class proceeding; and

(x) The court would also be required to consider the Defendants' position that there were no damages suffered by the Class Members, even if there was a privacy breach, because a reasonable person would not suffer humiliation from credit score

disclosure or because there is no expectation of privacy for such information. The Defendants would have submitted that credit score information is routinely accessed by insurers for underwriting purposes and is permitted by statute in Ontario for this purpose and credit scores are routinely accessed for other commercial transactions.

[80] Consequently, the risks of litigation were significant. The settlement terms and conditions fairly and reasonably reflect the risks that this claim might not be certified, particularly with respect to the common law claims and, that even if certified, there may have been no liability or damages awarded.

2. The proposed settlement terms and conditions

[81] The evidence is that the proposed settlement amount is within the range of other privacy class action settlements. By way of example:

(i) In *Condon v. Canada*, 2018 FC 522, 2018 CF 522, a class of 583,000 individuals settled a Federal Court privacy class action for approximately $60 per person when financial and other information from student loan applications contained on an external hard drive was lost;

(ii) In *Speevak v. Canadian Imperial Bank of Commerce*, 2010 ONSC 1128, [2010] O.J. No. 770, no set amount of damages were awarded to the 38 class members for the bank having inadvertently sent customers' names, social insurance numbers, account number, amounts, addresses, telephone numbers, and signatures by faxes to an unrelated American company and a Quebec company, allowing only for a claims process, efforts at settlement, and arbitration process for any class member who might make a claim; and

(iii) In *Lozanski v. The Home Depot, Inc.*, 2016 ONSC 5447, the settlement was for $400,000 for a potential class of over 43,000 members, with no direct compensation to class members. Instead, up to 2,500 class members could sign up for free credit monitoring services. In addition, class members who were required to take steps to remedy a consequence of the data breach would receive $15 per hour compensation for up to five hours of their time and up to $5,000 if there was documented financial losses resulting from the data breach.

3. The number of objectors and nature of objections

[82] No class member has objected to the settlement.

4. The presence of good faith, arm's length bargaining and the absence of collusion, the dynamics of the negotiations and the recommendation of neutral parties

[83] Negotiations leading to settlement were adversarial, difficult, hard-fought, protracted and at arm's length. They were also facilitated by an experienced and neutral mediator.

5. Recommendation and experience of class counsel

[84] Class Counsel are very experienced in class actions. They believe that the proposed settlement is fair, reasonable and in the best interests of the Class Members, affords significant judicial efficiency and economy, promotes access to justice and fosters behaviour modification.

[85] As I held in *Cass* (at para. 108):

> Those terms are supported by Class Counsel who are very experienced in securities cases and in class actions generally. They have put their reputation "on the line" in supporting such a settlement as being fair, reasonable and in the best interests of the Class members. In these circumstances, the "strong initial presumption of fairness" in *Serhan*, which arises when the settlement is negotiated at arm's length and recommended by class counsel, is justified.

6. Support of the plaintiff

[86] Haikola supports and recommends approval of the settlement.

[87] Haikola was involved in this case and communicated with counsel throughout. He met with their lawyers on numerous occasions, at various times, and was kept informed of the progress of the case, as well as the settlement discussions.

7. Other relevant factors

[88] The basic goals of a class proceeding (access to justice, judicial economy, and behavioural modification) are all served by the Settlement Agreement. No Class Members, other than Haikola, were either willing or able to assert a breach of their privacy rights against the Defendants in a proceeding before the Privacy Commissioner. The hurdles associated with obtaining a report, including submitting a full privacy complaint to the Privacy Commissioner, do not justify the likely modest amounts that Class Members would have obtained in compensation after a Federal Court action (assuming that after receiving a report, an individual complainant would choose to incur the time and legal fees associated with a Federal Court proceeding).

[89] Judicial economy is served by the settlement. Even if individual Class Members were inclined to commence privacy complaints with the Privacy Commissioner, the courts will not be required to hear hundreds or thousands of similar complaints related to the same basic systemic

wrong (the Defendants' credit score access policy). The proposed settlement spares both the courts and the Privacy Commissioner the unnecessary time and expense of handling a potentially enormous volume of complaints and actions.

[90] Behavioural modification is a key objective of the Settlement Agreement. If systemic *PIPEDA* privacy breaches are not rectified by a class procedure, it is not clear what incentive large insurers and others will have to avoid collection of such information. While the Privacy Commissioner may encourage or require changes to future practices, it has very limited powers to enforce compliance through strong regulatory penalties (see s. 28 of *PIPEDA*).

[91] The Settlement Agreement ensures that there is a meaningful business cost to the Defendants for collecting credit score information and violating privacy rights.[4] The publicity that this action has generated will discourage such action in the future by the Defendants or other insurers.

8. Conclusion

[92] Based on the above evidence, I approve the Settlement Agreement. I find that it is fair, reasonable, and in the best interests of the Class Members as a whole.

[93] All Class Members will share in the Settlement Fund regardless of limitations issues they may face, their individual ability to prove privacy breaches of a serious or egregious nature, and concerns about informed consent.

[94] The Settlement Agreement ensures that all Class Members receive some compensation for having their credit scores accessed and that the Defendants' breach of their privacy rights has consequences. The estimated $150 - $180 award for each Class Member is a reasonable amount in the circumstances, particularly given the modest sums awarded for successful litigants asserting claims under *PIPEDA* and whose privacy rights were found to have been breached in a "serious" or "egregious" manner.

[95] The settlement obtained in this action, in contrast to *Speevak* and *Lozanski*, provides direct compensation to the Class Members without need for further steps other than, for approximately 27% of the Class, completion of simplified claim forms.

[96] The quantum of settlement is reasonable, given the significant risks of the action not being certified, the potential reversal of the Privacy Commissioner's findings by the Court on a *de novo* common issues trial, and the risk that damages, even if a privacy breach is found, may not be awarded if the "egregious violation" threshold is not met. The settlement obtained is higher, per class member, than that obtained in *Condon* and is proportionate to the privacy breach.

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[4] (without any finding of liability in these Reasons or under the Settlement Agreement)

Issue 3: Should the opt out period be limited to 60 days?

[97] I agree with Haikola's submissions that the opt out period should be 60 days, since (i) there will be direct notice to the vast majority of the Class; (ii) most Class Members have received direct notice of the proposed settlement from the Defendants since the notice of this hearing was delivered in late July 2019; and (iii) to date, no one has objected to the proposed settlement.

[98] Consequently, I approve a 60-day opt out period.

Issue 4: Should PIAC be approved as the *cy-près* recipient of any undistributed portion of the Settlement Fund?

i) The applicable law

[99] In *Ali Holdco Inc. v. Archer Daniels Midland Company*, 2019 ONSC 131, I summarized the applicable principles for *cy-près* settlements as follows (also referring to my decision in *Cass*) (at paras. 46-47):

> In *Cass* (at para. 91), I set out the following principles relevant to court approval of *cy-près* settlements:
>
> *Cy-près* settlements have been ordered by the court where [citing (*Serhan (Trustee of) v. Johnson & Johnson*, 2011 ONSC 128, at paras. 58-59]:
>
> (i) "it is not practical to distribute the benefits in any other manner";
>
> (ii) "A direct distribution to the Settlement Class would be uneconomic considering the modest damages and the fact that there is no cost effective way of locating the Settlement Class Members, determining if they suffered damage and, if so, establishing their loss; and
>
> (iii) "[T]he *cy-près* distribution is directly related to the issues in the lawsuit" and will "directly benefit" people in similar circumstances to the class members"
>
> I also rely on the following principles relevant to *cy-près* distribution, as set out by Perell J. in *Slark v. Ontario*, 2017 ONSC 4178 ("*Slark*"):
>
> (i) A *cy-près* distribution must be fair, reasonable and in the best interests of the class (*Slark*, at para. 36);
>
> (ii) A reasonable number of class members who would not otherwise receive monetary relief must benefit from the order (*Slark*, para. 36);

(iii) *Cy-près* distributions are generally intended to meet at least two of the principal objectives of class actions. They are meant to enhance access to justice by directly or indirectly benefiting class members, and they may provide behaviour modification by ensuring that the unclaimed portion of an award or settlement is not reverted to the defendant (*Slark*, at para. 38);

(iv) A *cy-près* distribution should be justified within the context of the particular class action for which settlement approval is being sought, and there should be some rational connection between the subject matter of a particular case, the interests of class members, and the recipient or recipients of the *cy-près* distribution (*Slark*, at para. 39); and

(v) A *cy-près* distribution should not be used by class counsel, defence counsel, the defendant, or a judge as an opportunity to benefit charities with which they may be associated or which they may favour. To maintain the integrity of the class action regime, the indirect benefits of the class action should be exclusively for the class members (*Slark*, at para. 40).

ii) Application of the law to the case

[100] The intent behind the distribution protocol is to distribute as much of the Settlement Fund as possible to the Class Members. There will, however, be a small residue from any stale dated cheques and the holdback for the Claims Administrator's fees. It would be uneconomical to effect a further distribution of these residual funds to the Class. Consequently, a *cy-près* distribution is appropriate so that these funds can be applied to benefit the Class as a whole.

[101] PIAC is the proposed *cy-près* recipient. PIAC is a non-profit charitable organization that has national reach and provides advocacy services protecting consumer interests, including privacy rights. PIAC's work will advance the privacy rights of the Class Members. PIAC has confirmed with Class Counsel that it will accept such a *cy-près* award and use it for its privacy advocacy.

[102] Consequently, I approve the *cy-près* distribution of residual funds.

Issue 5: Should CA2 be appointed as the Claims Administrator?

[103] This issue is straight-forward. Based on the uncontested evidence before the court, CA2 is an experienced and reputable claims administrator. It has been actively engaged with the Class Members already, including in responding to their inquiries following the dissemination of the Notice of Hearing for Certification and Settlement Approval. Since being appointed as the Claims Administrator for the purposes of providing notice of this hearing, CA2 has been actively involved in informing Class Members of this action and responding to their inquiries.

[104] Consequently, CA2 is an appropriate administrator for this settlement.

Issue 6: Should the notice plan be approved?

i) The applicable law

[105] I summarize the principles governing the approval of a notice plan as follows:

(i) The requirement to provide notice is not a mere technicality or a formality and the notice must be meaningful and effective (*Fantl v. ivari*, 2018 ONSC 4443, 23 C.P.C. (8th) 9 ("*Fantl*"), at para 10);

(ii) The wording of the notice must consider the context and situation of the class members and be informative, accurate, balanced, and independent, allowing the class members to fully understand how the action affects their rights (*Fantl*, at paras. 11-12); and

(iii) The notice must maximize the likelihood that class members will receive the notice, and a direct mailing to each class member is preferable to advertising or other forms of indirect notice. Nevertheless, the *CPA* provides the court wide discretion to approve a notice plan and what constitutes appropriate notice to the class is dependent upon the circumstances of the case and the purpose of the notice (*Fantl*, at para. 13).

ii) Application of the law to the case

[106] Approximately 73% of the Class Members are getting direct notice by means of their current mailing address with The Personal, if they remain its insureds.

[107] The notice will go to their last known mailing address for Class Members who are no longer its insureds, and by email to their last known email address if the Defendants do not have a last known address or where mail is returned undeliverable.

[108] Reasonable and proportionate measures are being taken to provide notice to the comparatively few Class Members whose mail or email addresses are invalid - including by means of press releases, publication in national English and French newspapers, social media, and updates to Class Counsel and claims administration websites.

[109] Given the value of the settlement (approximately $150 - $180 per Class Member), the direct notice program, and the expenditures that would be required from the Settlement Fund to provide additional notice, the proposed notice program is proportionate and will be effective.

[110] The Notices use plain language and fully explain the rights and entitlements arising from certification and the approval of the Settlement Agreement.

[111] For the above reasons, I approve the notice plan.

Issue 7: Should Haikola receive an honorarium?

i) The applicable law

[112] Perell J. reviewed the relevant principles governing the award of an honorarium to a representative plaintiff in *Hodge v. Neinstein*, 2019 ONSC 439, at paras 48-50:

(i) A representative plaintiff may receive an honorarium, on a *quantum meruit* basis, where he or she "rendered active and necessary assistance in the preparation or presentation of the case and … such assistance resulted in monetary success for the class";

(ii) Such an award of compensation is "rare", upon evidence of an "exceptional contribution that has resulted in success for the class"; and

(iii) When determining whether to award an honorarium and the amount of such an honorarium, the court may consider, amongst other factors: (a) active involvement in the initiation of the litigation and retainer of counsel, (b) exposure to a real risk of costs, (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation, (d) time spent and activities undertaken in advancing the litigation, (e) communication and interaction with other class members, and (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.

ii) Application of the law to the case

[113] The present case establishes an evidentiary basis for the "rare" and "exceptional" order of an honorarium for the representative plaintiff, which I fix at the requested amount of $15,000.

[114] Without Haikola's unique efforts, there would be no class action and the Class Members would be receiving no compensation. The Defendants likely would be continuing their credit score access policy. The uncontested evidence is that:

(i) Prior to retaining Class Counsel, Haikola diligently fought the Defendants for more than four years, to determine why his insurer, The Personal, had accessed his credit score. Haikola ultimately obtained a finding from the Privacy Commissioner that his privacy rights had been breached;

(ii) Haikola determined on his own that he wished to start a class proceeding. He was not recruited by Class Counsel;

(iii) No other Class Member has a finding from the Privacy Commissioner that his or her privacy rights were breached, and to Class Counsel's knowledge, no other Class

Member (or any other individual) made a complaint to the Privacy Commissioner about the matters in dispute in this action;

(iv) Haikola's complaint to the Privacy Commissioner, and the related investigation and findings, led to real and significant changes in the way that the Defendants conduct business. After the Privacy Commissioner made findings that Haikola's complaint was well-founded, the Defendants changed their credit score collection policies and no longer ask for this information from insureds during the automobile insurance claims adjusting process;

(v) Haikola was in a unique position relative to all other Class Members as the Privacy Commissioner's completed investigation and report gave him the right to start an action in Federal Court. Instead of using this right to commence an individual action, the Plaintiff commenced a class action which led to the settlement;

(vi) Haikola rendered active and necessary assistance in the prosecution of this action, including gathering extensive records from multiple sources, swearing affidavits, and meeting with Class Counsel on multiple occasions. He reviewed and approved all documents filed with the court and reviewed any documents and/or responses from the Defendants. He asked probing questions, and was fully informed and understood each step taken in the proceeding. He participated in the settlement negotiations by instructing counsel to make formal offers to settle and by actively advocating for the maximum recovery that could be achieved for the Class Members;

(vii) Haikola participated in reviewing and approving all evidence filed in support of these motions. He was fully advised of the terms of the Settlement Agreement and ensured that the Settlement Agreement was in the best interests of the Class; and

(viii) Haikola waived his personal rights both to pursue his own litigation in Federal Court (which may have led to higher recovery for him) and to obtain further answers from the Privacy Commissioner through his freedom of information request (discontinuance of which was a term of the Settlement Agreement).

[115] Based on the above evidence, I find that Haikola made an "exceptional contribution that has resulted in success for the class" and I order the honorarium requested.

Issue 8: Should Class Counsel's retainer agreement be approved? If so, are the fees and disbursements sought by Class Counsel fair and reasonable?

i) The applicable law

[116] I reviewed the applicable law for approval of class counsel fees and disbursements in *Cass*, at paras. 117-26:

Class counsel fees are to be approved on the basis of whether they are "fair and reasonable" in all of the circumstances (*Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.) ("*Parsons 2*"), at para. 13-14 and 56; *Lefrancois v. Guidant*, 2014 ONSC 1956 ("*Lefrancois*"), at para. 52).

The courts in *Lefrancois* (at para. 52) and in *Silver* (at para. 41) set out the following factors which may be considered by the court when determining whether class counsel's fees are fair and reasonable:

(i) the factual and legal complexities of the matters,

(ii) the risks assumed in pursuing the litigation, including the risk that the matter might not be certified, and the risk of loss at trial,

(iii) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement,

(iv) the amount in issue,

(v) the result achieved,

(vi) the importance of the matter to the class members and to the public,

(vii) the degree of responsibility assumed and the skill and competence demonstrated by class counsel,

(viii) the ability of the class to pay, and

(ix) the expectations of the representative plaintiffs, the class and class counsel as to the basis for calculating fees and the amount of fees.

An agreement to make a contingent payment, on the basis of a percentage of a settlement or recovery, is contemplated by the word "otherwise" in s. 32(1)(c) of the *CPA*, and has often been awarded (*Nantais v. Telectronics Proprietary (Canada) Ltd.* (1996), 28 O.R. (3d) 523 (Gen. Div.) at pp. 528-29; *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 (Gen. Div.) ("*Crown Bay*"), at 86).

Contingency fee arrangements are an "important means" to provide "enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient". Similar to a multiplier, a contingency fee retainer "gives the lawyer the necessary economic incentive to take the case in the first place and to do it well" and, as such, "that opportunity must not be a false hope" (*Gagne v. Silcorp Limited* (1998), 41 O.R. (3rd) 417 (C.A.), at 422-23).

The policy of the *CPA* is to provide an incentive to class counsel to pursue class actions in order to increase access to justice. Class counsel fees have been awarded and are intended to compensate law firms for the risk that they may never be paid for their time or reimbursed for their disbursements. In *Parsons 2*, Justice Winkler (as he was then) stated (at para. 56; see also para. 14):

> [...] The legislature has not seen fit to limit the amount of fees awarded in a class proceeding by incorporating a restrictive provision in the *CPA*. On the contrary, the policy of the *CPA*, as stated in *Gagne*, is to provide an incentive to counsel to pursue class proceedings where absent such incentive the rights of victims would not be pursued. It has long been recognized that substantial counsel fees may accompany a class proceeding. [...]

In *Crown Bay*, Winkler J. commented on the benefits of a contingency fee in class actions to encourage settlement (at 88):

> [...] On the other hand, where a percentage fee, or some other arrangement such as that in *Nantais*, is in place, such a fee arrangement encourages rather than discourages settlement [...] Fee arrangements which reward efficiency and results should not be discouraged.

Similarly, in *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752, Strathy J. (as he then was) endorsed contingency fee arrangements in class actions. He held (at paras. 21 and 22):

> There is much to be said in favour of contingent fee arrangements. Litigants like them. They provide access to justice by permitting the lawyer, not the client, to finance the litigation. They encourage efficiency. They reward success. They fairly reflect the considerable risks and costs undertaken by class counsel, including the risk that they will never be paid for their work, the risk that their compensation may come only after years of unpaid work and expense, and the risk that they will be exposed to substantial cost awards if the action fails. Effective class actions simply would not be possible without contingent fees. Contingent fee awards serve as an incentive to counsel to take on difficult but important class action litigation.
>
> [...] in my respectful view, courts should not be too quick to disallow a fee based on a percentage simply because it is a multiple – sometimes even a large multiple – of the mathematical calculation of hours docketed times the hourly rate.

In *Abdulrahim v. Air France*, 2011 ONSC 512, Strathy J. (as he then was) approved a "one-third" contingency fee, referring to it as "standard in class action litigation". He held (at para. 13):

> A contingency fee of one-third is standard in class action litigation and has been common place in personal injury litigation in this province for many years. It has come to be regarded by lawyers, clients and the courts as a fair arrangement between lawyers and their clients, taking into account the risks and rewards of such litigation. Fees have been awarded based on such a percentage in a number of class action cases.

In *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 ("*Cannon*"), Justice Belobaba also approved a one-third contingency fee and held that there was a presumption that such arrangements are valid and enforceable provided that they are "fully understood and accepted by the representative plaintiffs". He held (*Cannon*, at para. 8):

> What I suggest is this: contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable, whatever the amounts involved. Judicial approval will, of course, be required but the presumption of validity should only be rebutted in clear cases based on principled reasons.

In *Cannon*, Justice Belobaba provided "examples of clear cases where the presumption of validity could be rebutted" which included (*Cannon*, at para. 9):

(i) "Where there is a lack of full understanding or true acceptance on the part of the representative",

(ii) "Where the agreed-to contingency amount is excessive", and

(iii) "Where the application of the presumptively valid one-third contingency fee results in a legal fees award that is so large as to be unseemly or otherwise unreasonable".

ii) Application of the law to the present case

[117] Class Counsel ask this Court to approve the Retainer Agreement and legal fees in the amount of $500,000, HST in the amount of $65,000, and its disbursements in the amount of $20,000 pursuant to section 32 of the *CPA*.

[118] $500,000 is a contingency fee of 22.7% of the total value of the settlement and represents a multiplier of approximately 1.16 on Class Counsel's docketed time.

[119] I apply the above principles to the present case.

[120] I find that there is no basis to rebut the "strong presumption of validity" of the contingency fee arrangement (*Cannon*, at para. 9).

[121] I rely on the following factors:

(i) Class Counsel has been acting under the terms of the Retainer Agreement, executed on November 7, 2019 by Haikola, which set Class Counsel's legal fees as 25% of the value of any settlement, plus applicable taxes and disbursements;

(ii) Haikola is sophisticated, fully understood the terms of the Retainer Agreement, and was not acting under any undue pressure at the time;

(iii) A contingency fee of 22.7% is less than Haikola, or the Class, would have anticipated paying to Class Counsel for fees following a successful settlement of the action;

(iv) Class Counsel funded disbursements and provided Haikola with an undertaking to pay any adverse costs awarded against him;

(v) Haikola is retired and was not in a financial position to fund disbursements or to pay an adverse costs award;

(vi) No other Class Members have offered to fund or otherwise assist in the prosecution of this action. All financial risks were borne by Class Counsel;

(vii) Class Counsel took a novel approach to privacy breach litigation by commencing a proposed class proceeding in Federal Court for a systemic breach of *PIPEDA*. Class Counsel is unaware of any other cases where this approach was attempted. The interrelationship between section 14 of *PIPEDA* and the class procedure in the *Federal Courts Rules* was legally complex and led to a (still unresolved) disagreement between Class Counsel and counsel for the Defendants as to how to interpret these legislative instruments;

(viii) There was significant risk that this action might not be certified on a contested certification motion in Federal Court as the Defendants raised a number of challenges both to the jurisdiction of the Federal Court and to whether key common issues (such as informed consent) were certifiable questions;

(ix) In addition, even if these hurdles could be overcome, there was a serious risk that the Court might conclude that the Class Members did not suffer any compensable

damages, given the high thresholds established for section 16 damages awards under *PIPEDA*. It was possible that the Federal Court would find that while there was a systemic breach of the Class Members' privacy rights by the Defendants, the breach did not reach the threshold necessary to trigger an award of damages under *PIPEDA*;

(x) This action settled in principle within a year of being commenced due to the diligent work of Class Counsel and the significant amount of resources put into the file. If the Settlement Agreement is approved, the Class Members will receive compensation from this action early in 2020 and, in any event, less than two years from when the claim was commenced. Obtaining a fair and reasonable settlement within such a short time period is in the interests of the Class and speaks to the skill and competence of Class Counsel;

(xi) The settlement achieved in this action helps ensure that the Defendants, and other insurers, do not gradually erode the privacy wall of insureds in the claims adjusting process. The privacy wall created by *PIPEDA* serves an important purpose in the insurance context as it helps protect particularly vulnerable persons, including those who were recently in potentially serious automobile accidents, from having to fully expose themselves to an insurer just to obtain their lawful entitlements under an insurance contract. The privacy rights involved are therefore matters of importance to the Class;

(xii) The ultimate result achieved for the Class, in the circumstances, is excellent. A settlement of $2,200,000 compensates the 8,525 Class Members with between $150 and $180 each. For the reasons described above, it is unclear whether any of the Class Members may have had individually viable claims for damages, given the high thresholds for recovery and the generally low (if any) damages awarded in privacy breach actions. The settlement achieved ensures that no Class Member will be forced to go through the same lengthy process undertaken by Haikola to obtain redress; and

(xiii) Class Counsel will have to devote significant time to the implementation of the settlement if it becomes final.

[122] For the above reasons, I approve the Fee Agreement and the fees, disbursements, and taxes sought by Class Counsel.

Order and costs

[123] For the above reasons, I grant the relief sought.

GLUSTEIN J.

Date: 20191017