CITATION: Redublo v. CarePartners, 2022 ONSC 1398
COURT FILE NO.: CV-20-647324-00CP
DATE: 20220302

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Arthur Redublo and Donna Moher

AND:

8262900 Canada Inc. o/a CarePartners

BEFORE: J.T. Akbarali J.

COUNSEL: *Margaret Waddell, Paul Miller and Christine Sesek,* for the plaintiffs

James Bunting, for the defendant

HEARD: February 9, 2022

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

Overview

[1] The plaintiffs seek an order certifying the class for the purposes of settlement, approving the settlement agreement reached between the parties, and approving class counsel fees and an honorarium for each representative plaintiff. The defendants support the motion, although they deny liability and do not agree with the facts relied upon by the plaintiffs.

Brief Background

[2] The defendant, CarePartners, provides personal support workers, rehabilitation services and nursing care for patients in homes, schools, retirement homes, clinics and workplaces. It is an official service provider partner of the Ontario Local Health Integration Networks ("LHINs")[1] and thus contracts with the LHINs to provide at-home and community clinic care around Ontario. CarePartners has over 4,500 staff, of which approximately 3,000 are unionized.

[3] In the course of its business, CarePartners collected personal information and personal health information of its patients, as well as personal information of its employees. Of note, CarePartners maintained a Privacy Pledge on its website, in which it pledged to protect patient

[1] LHINs now operate under the name Home and Community Care Support Services, but the change is irrelevant for the purposes of this motion. I will continue to refer to the LHINs in these reasons.

privacy in accordance with applicable legislation, and provided information about how it met those obligations, including minimizing access to patient information, and ensuring information was kept secure, among other things.

[4] This action arises out of a cyber breach of CarePartners' computer system which occurred around June 11, 2018. Unknown hackers, self-styled as "team_orangeworm", exfiltrated an unknown amount of unencrypted data from CarePartners' system. Thereafter, it sent a file with a sample of the stolen data to CarePartners in an attempt to collect a ransom for the return of the data. It threatened to disclose the stolen data on the internet if the ransom was not paid.

[5] CarePartners and the LHINs issued a joint press release on June 18, 2018 disclosing the breach, and indicating that CarePartners had retained a cyber security firm to contain and determine the extent of the breach.

[6] In the following weeks, CarePartners mailed direct notices of the breach to those individuals it had identified from the data sample team_orangeworm had sent it, other than those CarePartners knew to be deceased.

[7] When CarePartners did not pay the ransom, team_orangeworm made another attempt to obtain a ransom payment. It sent a data file to the Canadian Broadcasting Corporation ("CBC") which reportedly contained the personal information and personal health information of as many as 80,000 CarePartners' staff and patients going back to 2010. It appears that the patient data included phone numbers and addresses, dates of birth, health care numbers, medical histories, care plans and credit card numbers and expiry dates. The employee data appears to have included T4 tax slips, social insurance numbers, bank account details and plaintext passwords. Although CarePartners became aware that the data set was in the CBC's possession, the CBC has refused to produce the data (although it has agreed that it will do so if the proposed settlement, which includes a release in favour of the CBC, is approved by the court.)

[8] This second attempt to pressure CarePartners into paying the ransom also failed.

[9] The proposed representative plaintiff, Arthur Redublo, was a patient of CarePartners. He learned his health information had been exfiltrated from CarePartners' system when he received a telephone call from a CBC reporter who was working on a story about the hack in July 2018. Mr. Redublo's personal health information in the possession of CarePartners included his medical records and treatment plan. He deposed that he also provided CarePartners with personal information including his cellphone number, the alarm codes to his home, and information about his, his wife's, and his children's schedules.

[10] The proposed representative plaintiff, Donna Moher, was a CarePartners employee. She learned her personal information had been exfiltrated by team_orangeworm when CarePartners advised her that her data was included in the data file it received directly from the hackers. The hackers accessed Ms. Moher's personal information, including her contact information, social insurance number, 2013 T4 earnings, and bank account information.

[11] Both Ms. Moher and Mr. Redublo spent time taking steps to protect themselves and their families from potential fraud or identity theft. Although they report what appears to be an increase

in phishing attempts or scam calls since the data hack, neither of them, nor indeed any identified proposed class member, has suffered any out-of-pocket losses known to be related to the hack.

[12] On January 24, 2019, CarePartners received an email from an unknown sender advising that it was in possession of the stolen data. CarePartners also became aware that two data files purporting to contain CarePartners' data had been uploaded to a torrent caching site in early January 2019 and a fee was being charged to access the data. Both data files had been downloaded, one over 300 times, and the other, over 1000 times.

[13] In February 2019, a cyber security blog known as DataBreaches.net reported it had been contacted by individuals purporting to be the hackers responsible for the breach. They claimed that all of CarePartners' patient and company data had been stolen in the breach and, because CarePartners had not paid the ransom, they were releasing two data dumps. The first was purportedly a compressed archive with CarePartners' financial documents, including employee T4 statements. The second was described as an encrypted dump of patient data, including over 80,000 complete patient medical files, for which the hackers offered to sell the encryption key for 5 bitcoins.

[14] DataBreaches.net found that the first data dump contained a 2.2 GB archive of 12,971 files of CarePartners' financial data. DataBreaches.net was able to download the file with the patient data, but the hackers would not release the encryption key without receiving the payment of five bitcoins.

[15] In a subsequent report, DataBreaches.net stated that the hackers had threatened CarePartners that if it did not pay the ransom, they would give the data to the Information & Privacy Commissioner of Ontario ("IPC") and would contact CarePartners' patients. The hackers provided DataBreaches.net with access to the second data dump. DataBreaches.net reviewed the sample patient records and estimated that there were likely more than 5000 patients' detailed records contained in it.

[16] According to DataBreaches.net, the hackers had stated that CarePartners' security was non-existent, and nothing was encrypted. There is no evidence, and no reason to believe, that DataBreaches.net has shared the data it received.

[17] Despite CarePartners' continuing refusal to pay the requested ransom, there is no definitive evidence that the data was sold, disclosed, or otherwise made publicly available, beyond what I have described. Despite team_orangeworm's threat, it did not provide the data to the IPC. The plaintiffs' cyber security expert was unable to locate any information associated to the data hack on the deep or dark web during his investigation. He was able to find several torrent sites which offered data for download which was labelled as being associated with the hack, but which contained only malware, and no legitimate files.

Issues

[18] The motions before me require me to determine the following issues:

a. Should this action be certified for the purpose of settlement?

b. Should the settlement agreement, as amended, be approved? Related orders are sought with respect to the approval of the proposed distribution protocol and notice, and with respect to the appointment and powers of a claims administrator and an independent reviewer. In addition, the plaintiffs seek an order approving a *cy-près* distribution to the Public Interest Advocacy Centre of any unallocated or unclaimed amounts from the settlement fund six months after its distribution.

c. Should the contingency fee agreement and class counsel's fees and disbursements, be approved?

d. Should the proposed $5,000 honoraria to the proposed representative plaintiffs be approved?

Certification

[19] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, ("*CPA*") the court shall certify a class proceeding if: (a) the pleadings or the notice of application 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 or defences of the class members raise common issues; (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and (e) there is a representative plaintiff who would fairly and adequately represent the interests of the class, has produced a workable plan for the proceeding, and does not have an interest in conflict with the interests of other class members.

[20] Where certification is sought for the purposes of settlement, all the criteria for certification must still be met, although compliance with the certification criteria is not as strictly required, because the manageability of the proceeding is not an issue: *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.), at para. 30; *Speevak v. Canadian Imperial Bank of* Commerce, 2010 ONSC 1128, at para. 14; *Waheed v. Pfizer Canada Inc.*, 2011 ONSC 5057, at para. 26. The representative plaintiff must provide a certain minimum evidentiary basis for a certification order: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 24.

Section 5(1)(a): The pleadings disclose a cause of action.

[21] Certification will not be denied under s. 5(1)(a) unless it is plain and obvious that the pleadings disclose no cause of action: *Hollick*, at para. 25.

[22] The plaintiffs allege that the defendant is liable for negligence. They plead that the defendant owed the class a duty of care in its collection, use and storage of the class members' personal information, to keep it confidential and secure, and to ensure it would not be lost, disseminated or disclosed to unauthorized persons. They allege the defendant failed to establish, maintain, and enforce appropriate cyber security measures, programs and policies to keep the class members' personal information confidential, thus breaching the standard of care. They allege the class suffered damages as a result.

[23] The plaintiffs allege that the terms of the contracts between the class members and the defendant, and the defendant's privacy pledge, inform the duty of care, in addition to relevant statutory provisions.

[24] I note that negligence claims associated with breaches of privacy have been certified in other class actions, including as against health professionals in their capacity as health information custodians: see, for example, *Daniells v. McLellan*, 2017 ONSC 3466.

[25] There is no dispute, and I accept, that the pleadings disclose a cause of action in negligence for which the facts and elements are sufficiently pleaded.

Section 5(1)(b): There is an identifiable class of two or more persons that would be represented by the representative plaintiff.

[26] In determining whether there is an identifiable class, the court asks whether the plaintiff has defined the class by reference to objective criteria such that a person can be identified to be a class member without reference to the merits of the action. The class must be bounded, and not of unlimited membership or unnecessarily broad. It must also have some rational relationship with the common issues: *Hollick*, at para. 17: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 45. The class definition needs to identify all those who may have a claim, will be bound by the result of the litigation, and are entitled to notice: *Bywater Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.). Defining the class is a technical, rather than a substantive challenge: *Waldman v. Thomson Reuters Corp.*, 2012 ONSC 1138, at para. 122.

[27] For purposes of settlement, the plaintiffs seek to certify the following class:

> All persons who are or were patients, non-unionized employees or contractors of CarePartners from January 1, 2010 to June 11, 2018, excluding the defendant's senior executives, officers and directors, and unionized personnel.

[28] The proposed class is divided into two subclasses:

a. Members of the Class who are or were non-unionized employees or contractors of CarePartners (the Employee Subclass); and

b. Members of the Class who are or were patients of CarePartners (the Patient Subclass).

[29] There is a rational connection between the proposed class definition and the proposed common issue, which is whether was the defendant negligent in the manner in which it maintained and protected its electronic information? The class is limited to those individuals whose personal information may have been stolen or accessed in the breach. It also excludes those who have no tenable claim, such as unionized employees, who have no claim because they are governed by the labour arbitration scheme. Moreover, inclusion in the proposed class does not depend on the outcome of the litigation.

[30] The class period begins on January 1, 2010, consistent with the evidence in the record that personal information dating to 2010 was released to the CBC by team_orangeworm.

[31] The proposed definition of the class is suitable.

Section 5(1)(c): The claims raise a common issue.

[32] When considering whether a claim raises a common issue, the court asks whether it is necessary to resolve the issue in order to resolve each class member's claim, and whether the issue is a substantial ingredient of each of the class members' claims. The issue is a substantial ingredient of each claim if its resolution will advance the case or move the litigation forward, and if it is capable of extrapolation to all class members: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at para. 46.

[33] The plaintiffs' proposed common issue is: was the defendant negligent in the manner in which it maintained and protected its electronic information? This question encompasses whether the defendant owed the class members a duty of care, the scope of that duty, the identification of the standard of care, whether the standard of care was breached, and whether any breach of the standard of care caused the data hack.

[34] I agree with the plaintiffs that this proposed common issue meets the requirements of s. 5(1)(c) of the *CPA*. It focuses on the defendant's conduct, and does not relate to the individual circumstances of the class members, so it may properly be resolved on a common basis. The resolution of the issue advances each class member's claim.

Section 5(1)(d): A class proceeding is the preferable procedure

[35] This branch of the test requires that the court be satisfied that a class proceeding would be the preferable procedure for the resolution of the common issue. This inquiry is directed at two questions: first, whether the class proceeding would be a fair, efficient, and manageable way to advance the claim, and second, whether the class proceeding would be preferable to other procedures for resolving the common issues.

[36] Where certification is sought for the purposes of settlement, courts have recognized that a class proceeding is a fair, efficient, and manageable method for advancing the class members' claims and is preferable to other procedures. As Perell J. held in *Waheed v. Pfizer Canada Inc.*, 2011 ONSC 5057, at para. 27, where there is a cause of action, an identifiable class, a common issue, and a settlement, there is a strong basis to conclude that a class proceeding is the preferable procedure because certification would serve the primary purposes of the *CPA*: access to justice, behaviour modification, and judicial economy. Certifying this action would be a fair, efficient, and manageable way to advance the claim — in this case, by considering the appropriateness of the settlement.

[37] The class proceeding is also preferable to other procedures for resolving the common issues. The evidence suggests that no individual actions have been filed in relation to the data hack, over three years after it occurred. The IPC has declined to take further action against CarePartners with regard to the data hack. Without this class proceedindg, the class members' claims would not be advanced at all.

[38] In my view, the criteria under s. 5(1)(d) have been satisfied.

Section 5(1)(e): There are two adequate representative plaintiffs.

[39] To be an adequate representative plaintiff, a proposed plaintiff must be able to fairly and adequately represent the class, have developed a plan for proceeding, and not have a conflict with the class. She must be prepared and able to vigorously represent the interests of the class: *Rosen v. BMO Nesbitt Burns Inc.,* 2013 ONSC 2144, at para. 73.

[40] The evidence reveals that the two proposed representative plaintiffs have been involved in this proceeding and have understood and executed their responsibilities, including participating actively in the litigation, instructing counsel, and understanding the role of a representative plaintiff. They have prepared a litigation plan, but in any event, in this case certification would be for settlement purposes, and the settlement agreement is, in effect, the litigation plan. If the action is certified, I will consider whether to approve the settlement.

[41] There is no conflict of interest between the representative plaintiffs and the class members on the common issue.

[42] I conclude that the proposed representative plaintiffs can fairly and adequately represent the interests of the class.

Conclusion on Certification

[43] For purposes of settlement, the criteria set out in s. 5(1) of the *CPA* are met. I thus grant the plaintiffs' motion and certify this action as a class proceeding pursuant to the *CPA* for settlement purposes. I also approve the plaintiffs' notice plan, which is appropriate.

Settlement Approval

[44] Notice of the settlement approval hearing was provided to the class in accordance with my order dated November 16, 2021. No class member attended the hearing. Counsel and the representative plaintiffs are unaware of any objectors to the settlement.

[45] The settlement agreement entered into between the parties, as amended, provides for a payment of $3,440,000, subject to a holdback of $1,000,000. The agreement contemplates that the holdback will be repaid to CarePartners if it turns out that there are fewer than 45,000 Affected Class Members, defined as:

> those Class Members (i) whose personal health information, or personal information was extracted from the Defendant's computer system as part of the Cyber Attack and was produced to the [CBC], or (ii) who CarePartners contacted directly after determining that their data was attached to the "Team OrangeWorm" email of June 11, 2018.

[46] The Affected Class Members are thus limited to those who the plaintiffs have been able to confirm had their personal information exposed publicly by the hackers, except those whose information was included in the original email to CarePartners but whom CarePartners did not contact because it knew them to be deceased.

[47] All legal fees, noticing costs, and claims administration costs are to be paid from the settlement fund. Each Affected Class Member will qualify for an equal payment from the net settlement fund if they make a claim within a proposed three-month period.

[48] The settlement agreement contemplates that Affected Class Members will be identified through a process that involves an independent reviewer, Innov-8, undertaking a review of the CBC records pursuant to a review protocol attached to the settlement agreement and, at the conclusion, producing to the parties a list of identified names and a list of other identifying information. CarePartners will then use the information provided by the independent review to prepare a list of last known addresses, including email addresses if known, for the Affected Class Members based on the information available to it in its records.

[49] The settlement agreement contemplates that a claims administrator will use the list prepared by CarePartners to provide notice of the anticipated court order to the Affected Class Members for settlement distribution purposes only.

[50] Affected Class Members will have 90 days within which to make a claim, and each will be entitled to an equal share of the net settlement fund.

[51] In practical terms, if the proposed legal fees are approved, and the CBC is correct that there are as many as 80,000 class members, 100% take-up of the settlement would result in each class member receiving $25-$30. At a more realistic 30-40% take-up, each class member would receive somewhere between $70-$100. If there are fewer than 45,000 class members, each class member stands to receive a greater recovery than if there are over 45,000 class members.

[52] If any funds remain in the settlement fund six months after the last cheque has been delivered to those class members who are entitled to a share of the settlement fund (for example, due to cheques that are not cashed and become stale-dated), the settlement agreement contemplates that the funds leftover shall be paid, *cy-près*, to the Public Interest Advocacy Centre ("PIAC") to be allocated towards its work in respect of consumer privacy issues. The PIAC has previously been the recipient of *cy-près* awards in class proceedings, and has consented to receiving the funds in this case, which are not expected to be significant in any event.

Legal Principles Applicable to Motions to Approve a Settlement in a Class Proceeding

[53] Under s. 27.1(1) of the *CPA*, a proceeding brought under the *CPA* may only be settled with court approval. The court shall not approve a settlement unless it determines that the settlement is fair, reasonable, and in the best interests of the class: s. 27.1(5) of the *CPA*; *Sheridan Chevrolet Cadillac v. T. Rad Co.,* 2018 ONSC 3786, at para. 6. The key question is whether the settlement falls within a zone of reasonableness: *Sheridan*, at para. 6. The burden lies on the party seeking approval: *Nunes v. Air Transat A.T. Inc.,* [2005] O.J. No. 2527 (S.C.) at para. 7.

[54] Settlements need not be perfect; they are compromises: *Bancroft-Snell v. Visa Canada Corporation*, 2015 ONSC 7275, at para. 48; *Lozanski v. The Home Depot, Inc.*, 2016 ONSC 5447, at para. 71. To find that a settlement is not fair and reasonable, it must fall outside a range of reasonable outcomes: *Nunes*, at para. 7; *Haney Iron Works v. Manufacturers Life Insurance*, (1998), 169 D.L.R. (4th) 565 (Ont. S.C.), at para. 44. An objective and rational assessment of the pros and cons of a settlement is required: *2038724 Ontario Ltd. v. Quizno's Canada Restaurant*

Corporation, 2014 ONSC 5812, at para. 33. There is a strong presumption of fairness when a proposed class settlement, which was negotiated at arms-length by counsel for the class, is presented for court approval: *Nunes*, at para. 7.

[55] A court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of its litigation rights against the defendants: *Nunes*, at para. 7. However, it is not the court's function to substitute its judgment for that of the parties or attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action, or, on the other hand, to rubber-stamp a settlement: *Nunes*, at para. 7.

[56] When considering whether to approve a negotiated settlement, the court may consider, among other things: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of litigation; (f) the number of objectors and nature of objections, if any; (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 parties with class members during the litigation; and (i) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Hodge v. Neinstein*, 2019 ONSC 439, at para. 38; *Lozanski*, at para. 73; *Nunes*, at para. 7.

[57] These factors are a guide, and no more. In any given case, one or more of the factors will have greater significance or should be afforded greater weight than the others: *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151, at para. 73.

[58] When analyzing the reasonableness of a settlement, the court engages in two analytical exercises. First, the court compares and contrasts the settlement with what would likely be achieved at trial, without making findings about the actual merits of the claims. In other words, the court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination on the merits. Second, the court undertakes a structural analysis to examine the fairness and reasonableness of the terms of the settlement and the scheme of distribution: *Hodge*, at para. 42.

Is the proposed settlement fair, reasonable, and in the best interests of the class?

[59] Applying the legal framework above, I note the following.

[60] This is high-risk litigation. The plaintiffs correctly observe that privacy breach class actions are in a state of flux in Canada. Many have been certified, but none have been tried on their merits. This case was negatively impacted by recent jurisprudential developments. In particular, in *Owsianik v. Equifax Canada Co*., 2021 ONSC 4112, the Divisional Court found that gatherers and custodians of personal data cannot be liable for intrusion upon seclusion when third parties steal or access that data. The plaintiffs in this case had pleaded intrusion upon seclusion — a cause of action that became untenable after the *Equifax* decision. Yet it was the only cause of action pleaded where moral damages could be claimed in the aggregate; the causes of action pleaded in negligence and breach of contract require proof of individual damages. The upshot is that the claim for intrusion upon seclusion was unlikely to be certified and may have been subject to appeal; if

unsuccessful, no class member would have been able to receive compensation without undergoing an individual issues assessment. The certification of a workable action was far from a certainty.

[61] Even if certified, the risk to the class of losing at trial is a meaningful one. Another significant challenge the class faced — especially in view of the tenuous nature of the intrusion upon seclusion claim — is that neither representative plaintiff nor any known class member has suffered pecuniary damages as a result of the hack. The action was thus vulnerable to an argument that the class suffered no quantifiable harm.

[62] The defendant was expected to mount other defences including (i) that it did not breach the standard of care (a matter which would require costly expert evidence), (ii) that the defendant did not cause the class members' losses, and (iii) that much of the data obtained was not private information, such that the loss of the data to the hackers was inconsequential.

[63] Moreover, a trial would be several years away. Given the technical issues the claim raises, one can expect that the action would be costly to pursue. Class proceedings generally require significant time investment by counsel. This class proceeding would also require investment into expert evidence.

[64] The record establishes that the settlement was reached after a meaningful amount of investigation. In particular, the plaintiffs had the benefit of expert advice, a report of the IPC, and the exchange of pleadings and motion records on what was originally a contested certification motion. Plaintiffs' counsel has also conducted legal research on the issues raised in the claim. They have had ongoing discussions with the representative plaintiffs, and also with potential class members who reached out to them after learning of the class action from press releases or notices.

[65] The proposed settlement terms and conditions respond equally to every known Affected Class Member's loss. Moreover, the compensation each will receive, even at 100% take-up of a class of 80,000, is in line with the recovery of similarly situated plaintiffs or class members in data privacy breach class actions: see, for example, *Drew v. Walmart*, 2017 ONSC 3308; *Condon v. Canada*, 2018 FC 522; *McLean v. Cathay Pacific Airways Limited*, 2021 BCSC 1456.

[66] There is one discrepancy. The definition of Affected Class Member excludes anyone whose personal health information or personal information was provided to CarePartners by the hackers in the original email they sent, but who CarePartners knew to be deceased at that time. The logic in excluding the estates of these persons is that they did not suffer any compensable damages from the privacy breach since it took place after their death. The settlement provides the ability for the estate of a deceased person to make a claim on the settlement fund. The theory is that people may have suffered compensable damages by having their information exfiltrated in the hack, and have died since that time. The estate of any such person is captured in the definition of Affected Class Member.

[67] However, there may be people who were deceased at the time of the hack and whose personal information or personal health information was provided to the CBC. They are also included in the definition of Affected Class Member. Their estates are thus treated differently than the estate of any person who was deceased at the time their information was provided to CarePartners by the hackers. The latter are excluded from the definition of Affected Class Member.

[68] The reason for this distinction is a practical one. While, in theory, the estate of anyone who was deceased when their information was provided to the CBC could be excluded from the definition of Affected Class Member, the administrative process of determining who was known to be alive or deceased at the time of the hack and disclosure to CBC is not an undertaking that CarePartners has agreed to assume in the settlement agreement. The parties submit that it would be disproportionately burdensome and expensive to require this level of investigation to determine eligibility, or to impose on the claims administrator the additional step of filtering out estate claims given the modest quantum of the settlement.

[69] I accept that the over-inclusion in the definition of Affected Class Member of estates of people who were deceased at the time their information was provided to the CBC is a proportionate solution to the administrative problem that separating out those individuals would cause. In any event, it does not change the fact that the anticipated recovery of class members is in line with similar privacy breach cases.

[70] Given the nature of CarePartners' business, it is possible that a number of class members are elderly and/or suffering health complications that require the homecare that CarePartners provides. There is a benefit to them to receiving compensation at an early stage in the litigation.

[71] The settlement was reached through arms-length, hard-fought bargaining between experienced and competent counsel. The negotiation process unfolded over a period of about nine months. Plaintiffs' counsel, who hail from three different firms, have experience in class actions, mass torts, and privacy breach law. All recommend the settlement.

[72] Finally, as I have noted, no objector attended the hearing, and the evidence demonstrates that no objector is known to class counsel or the representative plaintiffs.

[73] In my view, these factors establish that the settlement is fair and reasonable, and in the best interests of the class.

[74] The settlement plan, including the appointment of the independent reviewer and the claims administrator, and the release of the CBC, are sensible steps to reach and identify the Affected Class Members, and to facilitate the delivery of their compensation. The proposed claims administrator is experienced, and was selected after class counsel obtained three quotes and judged the proposed claims administrator's proposed fees to represent the best value to the class.

[75] The distribution plan is fair and reasonable. It provides equal access to the settlement fund to the Affected Class Members who have a straightforward method to make their claim, and a reasonable length of time to do so.

[76] Moreover, the *cy-près* distribution is a reasonable way to address any funds that remain in the settlement fund after distribution of the net fund to the Affected Class Members. The amount of the *cy-près* distribution is not expected to be significant. It would not be practical, and would likely be uneconomic, to distribute any leftover funds in any other manner.

[77] The proposed recipient of the *cy-près* distribution, the PIAC, is a charity that engages in advocacy in support of privacy rights, among other work. It is an appropriate charity with a purpose aligned with the interests this class action seeks to protect and advance, and in that sense, the

proposed *cy-près* distribution can be said to benefit all members of the class. The PIAC has been approved as an appropriate *cy-près* recipient in other class proceedings: see, for example, *Haikola v. The Personal Insurance Company*, 2019 ONSC 5982; *Speevak v. Canadian Imperial Bank of Commerce*, 2010 ONSC 1128.

[78] For these reasons, I conclude that the proposed settlement is fair and reasonable, and in the best interests of the class.

Counsel Fee Approval

[79] Section 32 of the *CPA* provides that class counsel's fees must be approved by the court. Section 33 of the *CPA* allows class counsel to enter into a contingency fee arrangement for payment of its fees for a class proceeding.

[80] The basic test is whether class counsel's proposed fees are fair and reasonable in all of the circumstances. Fair and reasonable fees may include a premium for the risk undertaken and the result achieved, but the fees must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the class as a whole: *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 1222, at para. 32.

[81] As Morgan J. recently noted in *Austin v. Bell Canada*, 2021 ONSC 5068, at para. 10, generally speaking, when considering whether to approve class counsel fees, "the amount payable under the contract is the starting point for the application of the court's judgment." If approving a fee pursuant to a contingency agreement, the court must consider all the relevant factors and circumstances to determine whether the fee is reasonable and maintains the integrity of the profession: *Hodge*, at para. 46.

[82] A contingency fee of up to 33% is presumptively valid and enforceable provided that the arrangement is fully understood and accepted by the representative plaintiffs: *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, at paras. 8-9.

[83] The general principles to apply to the assessment of class counsel's fees were set out by Juriansz J.A. in *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, 106 O.R. (3d) 37 (C.A.), at para. 80:

a. the factual and legal complexities of the matters dealt with;

b. the risk undertaken, including the risk that the matter might not be certified;

c. the degree of responsibility assumed by class counsel;

d. the monetary value of the matters in issue;

e. the importance of the matter to the class;

f. the degree of skill and competence demonstrated by class counsel;

g. the results achieved;

h. the ability of the class to pay;

i. the expectations of the class as to the amount of the fees;

j. the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[84] In this case, under the retainer agreement, class counsel is entitled to a 20% contingency fee of the amount recovered, plus taxes and disbursements if the action is resolved prior to the commencement of the certification motion hearing. The agreement is thus presumptively valid in accordance with the decision in *Cannon*. A contingency fee of 20% is also in line with similar contingency fees approved in other, recent cases: see, for example, *Haikola*; *Drew*.

[85] The evidence from the representative plaintiffs indicates that they understood and accepted the contingency fee. The contingency fee is in line with standard contingency rates in other class proceedings and in individual litigation in Ontario.

[86] As I have already noted, this action raised some complexities as a result of the unsettled and evolving jurisprudential landscape, and due to the technical nature of the issues, including whether CarePartners' cyber security measures met the standard of care.

[87] Moreover, class counsel undertook to the plaintiffs that they would pay any adverse costs awards made against the plaintiffs by the court. They also bore the costs of the disbursements. Class counsel thus assumed the risk of the proceeding.

[88] The issues raised by the proceeding are important. Class members had their personal information compromised, including sensitive health and financial information. The representative plaintiffs each deposed to the stress and anxiety they felt upon learning their information had been stolen, and the continued possibility that, despite the steps they have taken to protect themselves, the compromised information may be used in nefarious ways in the future.

[89] The results achieved in this litigation were good, particularly given the lack of evidence of consequential damages as a result of the data hack. The Affected Class Members stand to receive direct compensation in line with similar cases, and to receive it early in the litigation process. Particularly given the likely precarious health of some of the class members, the early resolution of this claim benefits the class.

[90] Class counsel has, to date, devoted over $290,000 of time prosecuting this action and is expected to expend another $110,000 to $137,500 of time completing the settlement of this action. This represents a significant opportunity cost which class counsel risked not recouping given the challenges in the action. Moreover, depending on the end value of the settlement fund, the premium on counsel fees will be reasonable; if the settlement fund is $2,440,000, class counsel fees will be $488,000, which represents approximately a 1.14 multiplier. If the settlement fund is $3,440,000, class counsel fees will be $688,000, or approximately a 1.6 multiplier.

[91] Finally, I note no objections to legal fees have been made by any class member.

[92] These factors lead to the conclusion that the counsel fees sought are fair and reasonable.

[93] I also approve the disbursements requested, consisting of $33,491.72, inclusive of HST, for disbursements already incurred, and an additional $5,000 plus HST for disbursements anticipated in the implementation of the settlement.

Honoraria

[94] The plaintiffs seek a $5,000 honorarium to be paid to each representative plaintiff.

[95] The law around awarding honoraria to representative plaintiffs in Ontario was described by Perell J. in *Hodge*, at para. 50:

> Compensation to the representative plaintiff should not be routine, and an honorarium should be awarded only in exceptional cases. In determining whether the circumstances are exceptional, the court may consider among other things: (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.

[96] In *Miller v. FSD Pharma, Inc.*, 2021 ONSC 911, Morgan J. awarded a $5,000 honorarium to the representative plaintiff, taking into account that she initiated the investigation into the claim, conducted her own investigation prior to contacting class counsel and shared the results with the class, participated in the prosecution of the action, completed affidavits on various motions, was available for examination on her affidavits, and met and spoke with class counsel to advance the matter. Class counsel attributed much of the settlement to the representative plaintiff's efforts. Does this qualify as exceptional circumstances? Justice Morgan does not say, but he found the proposed honorarium to be modest, fair and reasonable in the circumstances.

[97] Similarly, in *Romita v. Intellipharmaceutics International Inc.*, 2021 ONSC 6760, at para. 7, Morgan J. held that, where a representative plaintiff can demonstrate that he or she has rendered active and necessary assistance in respect of the preparation of a case which aided in the ultimate outcome, it may be appropriate to award compensation to the representative plaintiff in his or her own right.

[98] In the very recent case of *Pabla v. Caterpillar of Canada Corporation et al.*, 2022 ONSC 732, at para. 30, MacLeod R.S.J. awarded a $10,000 honorarium, finding that "such fees have become more common than they once were", and "there is utility in encouraging the active involvement of representative plaintiffs in litigation of this type."

[99] If *Miller*, *Romita*, and *Pabla* might have been steps towards expanding the availability of honoraria to representative plaintiffs, *Doucet v. The Royal Winnipeg Ballet*, 2022 ONSC 976, has taken the law in another direction. *Doucet* was released while this decision was under reserve, and as a result, I sought additional submissions from counsel on the impact of the case on this motion.

[100] In *Doucet*, an institutional abuse case, Perell J. was faced with a request for $70,000 in honoraria, consisting of $30,000 to one representative plaintiff, $10,000 to the other, and $10,000

to each of three class member witnesses. He indicated that the request caused him to rethink the practice of awarding honoraria, and led him to conclude the practice should be stopped. He identified nine reasons for his conclusion, at para. 61:

a. Awarding a litigant on a *quantum meruit* basis for active and necessary assistance in the preparation or presentation of a case is contrary to the policy of the administration of justice that represented litigants are not paid for providing legal services. Lawyers not litigants are paid for providing legal services.

b. *A fortiori* awarding a represented litigant on a *quantum meruit* basis for active and necessary assistance in the preparation or presentation of a case is contrary to the policy of the administration of justice that self-represented litigants are not paid for providing legal services. Lawyers not litigants are paid for providing legal services.

c. Awarding a litigant for such matters as being a witness on examinations for discovery or for trial is for obvious reasons contrary to the administration of justice.

d. In a class action regime based on entrepreneurial Class Counsel, the major responsibility of a Representative Plaintiff is to oversee and instruct Class Counsel on such matters as settling the action. The court relies on the Representative Plaintiff to give instructions that are not tainted by the self-interest of the Representative Plaintiff receiving benefits not received by the Class Members he or she represents.

e. Awarding a Representative Plaintiff a portion of the funds that belong to the Class Members creates a conflict of interest. Class Members should have no reason to believe that their representative may be motivated by self-interest and personal gain in giving instructions to Class Counsel to negotiate and reach a settlement.

f. Practically speaking, there is no means to testing the genuineness and the value of the Representative Plaintiff's or Class Member's contribution. Class Counsel have no reason not to ask for the stipend for their client being paid by the class members. The affidavits in support of the request have become *pro forma*. There is no cross-examination. There is no one to test the truth of the praise of the Representative Plaintiff. Class Members may not wish to appear to be ungrateful and ungenerous and it is disturbing and sometimes a revictimization for the court to scrutinize and doubt the evidence of the apparently brave and resolute Representative Plaintiff.

g. The practice of awarding an honourarium for being a Representative Plaintiff in a class action is tawdry. Using the immediate case as an example, awarding Class Counsel $2.25 million of the class member's compensation for prosecuting the action, makes repugnant awarding Ms. Doucet $30,000 of the

class member's compensation for her contribution to prosecuting the action. The tawdriness of the practice of awarding a honourarium dishonours more than honours the bravery and contribution of the Representative Plaintiff.

h. As revealed by the unprecedented request made in the immediate case, the practice of awarding a honourarium to a Representative Plaintiff in one case is to create a repugnant competition and grading of the contribution of the Representative Plaintiff in other class actions.

i. The practice of awarding a honourarium in one case may be an insult to Representative Plaintiffs in other cases where lesser awards were made. For instance, in the immediate case, I cannot rationalize awarding Ms. Doucet $30,000 for her inestimably valuable contribution to this institutional abuse class action with the $10,000 that was awarded to the Representative Plaintiffs who brought access to justice to inmates in federal penitentiaries and who themselves experienced the torture of solitary confinement. I cannot rationalize awarding any honourarium at all when I recall that the Representative Plaintiff in the Indian Residential Schools institutional abuse class action did not ask for a honourarium and he did not even make a personal claim to the settlement fund. Having to put a price tag to be paid by class members on heroism is repugnant.

[101] Since Perell J.'s decision in *Doucet* was released, Belobaba J. has awarded an honorarium to a representative plaintiff, without reference to the *Doucet* decision. In *Kalra v. Mercedes Benz*, 2022 ONSC 941, at paras. 34-40, Belobaba J. held that representative plaintiffs do not receive additional compensation for simply doing their job as class representatives, but an honorarium is justified only where the representative plaintiff can demonstrate a level of involvement and effort that is truly extraordinary, or where he was financially harmed because of his role. Justice Belobaba found that Mr. Kalra had lost income opportunities as a result of dedicating more than 100 hours fulfilling his obligations as representative plaintiff. He also noted that about two months after filing the proposed class proceeding, Mr. Kalra traded in his vehicle for another, as a result of which he no longer expected to recover any compensation pursuant to any settlement or judgment that could be reached in the proceeding. Nevertheless, as a matter of duty, Mr. Kalra continued to devote significant time to meeting his obligations as representative plaintiff with no expectation of personal gain, and at a cost to his business. In the result, Belobaba J. approved payment of a $10,000 honorarium. Thus, Belobaba J.'s approach was in line with earlier law, such as that exemplified in *Hodge*.

[102] The practice of awarding honoraria received appellate treatment in Ontario in *Smith Estate v. National Money Mart Company*, 2011 ONCA 233, at paras. 133-136. After noting that judges of the Superior Court have different approaches with respect to payment of the representative plaintiff's fees (a state of affairs that obviously continues), Juriansz J.A., for the court, held that, as a general matter, the representative plaintiff's fee should be paid out of the settlement fund, and not out of class counsel fees, to avoid raising the spectre of fee splitting. In so doing, the Court of Appeal can be said to have at least implicitly approved of the practice of awarding honoraria to representative plaintiffs.

[103] The British Columbia Court of Appeal has written about honoraria for representative plaintiffs in *Parsons v. Coast Capital Savings Credit Union*, 2010 BCCA 311, at paras. 19-22. While acknowledging the concern that representative plaintiffs could be tempted to act in self-interest, contrary to the interests of the class, the court concluded that a court approving an honorarium must require a representative plaintiff to establish that the settlement presented is in the interests of the class as a whole, and that the representative plaintiff has fulfilled the duties she assumed by taking on the role as class representative. The court went on to conclude that "services of special significance beyond the usual responsibilities" of a representative plaintiff are not required to award an honorarium. Rather "[w]here the representative plaintiff has fulfilled his or her duties…and where a monetary settlement in favour of the class members is achieved, a modest award in recognition of the effort expended on behalf of the class members is consistent with restitutionary principles and recognition of the principle of *quantum meruit*." The court found that exceptional service was not required; competent service coupled with positive results is sufficient to recognize a representative plaintiff by way of an honorarium. The court cautioned that in no case should the award be so large as to create the impression that the representative plaintiff was put into a conflict of interest.

[104] I note that viewing the question through the lens of *quantum meruit* was also the approach adopted by Sharpe J. (as he then was) in *Windisman v. Toronto College Park Ltd*., [1996] O.J. 2897, (Gen. Div.) at para. 28. Justice Sharpe expressed concern that if a representative plaintiff is not compensated in some way for time and effort, the class would be enriched at the expense of the representative plaintiff.

[105] In "Additional Compensation to Representative Plaintiffs in Ontario: Conceptual, Empirical and Comparative Perspectives", (2014) 40:1 Queen's L.J. 341, Vince Morabito cites two statements made by Winkler J. (as he then was) which, juxtaposed, illustrate the inherent tension between honoraria and the obligations of a representative plaintiff to the class:

> The common issue trial will determine the litigation for all class members. Nonetheless, the plaintiffs will be the only class members exposed to costs in the litigation, up to the conclusion of that trial….[U]nder virtually any other procedure, they would be exposed to less costs individually. Notwithstanding this, they stand to gain no more from the class proceeding than any other class member on a proportionate basis or than they would in individual lawsuits. (*1176560 Ontario Limited v. Great Atlantic & Pacific Co of Canada Ltd.*, 62 O.R. (3d) 535, at para. 55.)
>
> Where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is an appearance of a conflict of interest between the representative plaintiff and the class members. A class proceeding cannot be seen to be a method by which persons can seek to receive personal gain over and above any damages or other remedy to which they would otherwise be entitled on the merits of their claims. (*Tesluk v. Boots Pharmaceutical PLC*, 21 C.P.C. (5th) 196, at para. 22.)

[106] Professor Morabito argues, at p. 344, that not awarding honoraria to representative plaintiffs is irreconcilable with basic notions of fairness, and contrary to the policy underlying class action regimes, as it may result in no one with similar legal grievances stepping forward to represent the relevant class of claimants.

[107] He also argues, at pp. 356-57, that because in many class actions, class counsel has the greatest financial stake in the outcome of the litigation, it is crucial to provide representative plaintiffs with incentives to act as a check and balance to the excesses of entrepreneurial law firms. He notes that this line of reasoning appears to have found favour with Rady J. in *Snelgrove v. Cathay Forest Products Corp.*, 2013 ONSC 7282, at para. 24, where she held that "a modest honorarium is entirely appropriate if for no other reason but to encourage plaintiffs to be involved in the litigation in a meaningful rather than notional way."

[108] Professor Morabito notes that Australia's approach to awarding honoraria is more generous than Ontario's, and is similar to the approach adopted in British Columbia, although an empirical evaluation indicates that Australian courts award compensation that is substantially greater than that awarded in British Columbia: at p. 354. The Australian approach compensates representative plaintiffs "for the time they have spent in performing that role to the benefit of others", not for the work they have done to pursue their individual claim: see, for example, the Federal Court of Australia case of *McKenzie v. Cash Converters International Ltd. (No. 4),* [2019] F.C.A. 166, at paras. 25-26, citing *Kadam v. MiiResorts Group 1 Pty Ltd. (No. 5)*, [2018] F.C.A. 1086.

[109] In '"The doors to justice are open, but how do I get in?"': Experiencing access to justice as a class action member", (2019) 8 Annual Rev. Interdisciplinary Justice Research 277, Catherine Piché, the Director of the University of Montreal Faculty of Law's Class Actions Lab, argues that the quality of the representation provided by the representative plaintiff influences access to justice in class actions, and notably the level of access and the fairness of outcomes. She notes, at p. 289, the palpable tension, particularly during settlement negotiations, between the entrepreneurial interests of class counsel and the best interests of class action representatives and class members, and argues that financial compensation may encourage the representative plaintiff to exercise their fiduciary duties. In Professor Piché's view, compensation "is not only ideal, but necessary" to ensure adequate participation by the representative plaintiff when there is otherwise little incentive to do so.

[110] Like every question that arises in class proceedings, the question of whether and when to award honoraria, and how much, must be viewed through the lens of the goals of the *CPA*: access to justice, behaviour modification, and judicial economy.

[111] From my review of the authorities and academic writings above, I conclude that the goals of the *CPA* are advanced through the award of honoraria to representative plaintiffs in class proceedings:

a. Without a representative plaintiff willing to advance the action, there is no action, and no access to justice. Honoraria provide an incentive to representative plaintiffs to take on the risks and duties of the role in order to access justice for the class.

b. Especially in cases where a representative plaintiff's damages and individual class members' damages are modest, such that no individual actions are likely, a representative plaintiff is required to advance a class action to meet the goal of behaviour modification. Without a representative plaintiff, there is no proceeding. Honoraria serve to encourage a representative plaintiff to take on obligations and risks out of proportion to her damages to ensure defendants are held to account.

c. As noted by the academics I have cited, honoraria incentivize representative plaintiffs to take an active role in the process, and in so doing, act as a check and balance on entrepreneurial class counsel, who often have the largest financial stake in class action litigation.

d. In certain cases, such as cases involving sexual, physical, and/or institutional abuse, honoraria help advance the cause of justice for all class members in a unique way. In such cases, a representative plaintiff is not only advancing the interests of the class, but protecting the class from being re-traumatized by the litigation process, at the risk of their own personal re-traumatization. Moreover, in such cases, representative plaintiffs enable a process whereby victims of abuse do not have to navigate their claims alone. Many victims of abuse are unable to expose themselves to the risk of an individual action, and would not be able to access any justice at all. Brave representative plaintiffs willing to risk public exposure of the details of their abuse and its aftermath, notwithstanding the potential negative impacts on them personally, to secure accountability and institutional change on behalf of a class of survivors, perform a difficult and vital service for the class. Honoraria provide some small measure of recognition and compensation for their important actions. In my view, recognizing the value of a representative plaintiff's contribution in such cases will help to bring a trauma-informed approach to judging, something that I consider to be desirable, and unfortunately, historically lacking in our courts due to a lack of awareness of its importance.

e. Honoraria can also cover or at least defray out of pocket costs or financial losses incurred by a representative plaintiff in the discharge of his duties. Why should a representative plaintiff have to pay out of pocket for expenses incurred or suffer financial losses to advance the interests of the class?

f. Without honoraria, the class benefits at the expense of the representative plaintiff. The representative plaintiff takes on work beyond that which he would do to advance his personal claim. No other actor in the class actions process is expected to sacrifice for nothing for the sake of the class.

g. Honoraria thus ensure that a representative plaintiff is not unduly prejudiced by taking on the responsibilities and obligations of the role.

[112] With the greatest of respect to Perell J., I do not agree with the concerns he raised in *Doucet*, or at least, I do not agree that they cannot be managed:

a. I do not agree that awarding an honorarium to a representative plaintiff amounts to paying for legal services. Nor do I agree that an honorarium compensates a representative plaintiff for participating in a discovery, cross-examination, or trial. Rather, like the Australian courts have recognized, it compensates a representative plaintiff for work done for the class, and not in pursuit of her own individual claim.

b. I share Perell J.'s concern that, in a system where the representative plaintiff must oversee entrepreneurial class counsel, the court must have confidence that the representative plaintiff's instructions are not tainted by self-interest. However, I do not agree that this is a reason not to award honoraria. Rather, it is a reason for the court to carefully scrutinize settlements, counsel fees, and honoraria when it is asked to approve them. It is a reason to require compelling evidence from class counsel and the representative plaintiff on these issues. It is a reason to require notice of honoraria to be given to the class, along with notice of the settlement and class counsel fees, to enable individual class members to object if they wish, so the court can consider any objections in its deliberations. And it is a reason to ensure that the honoraria awarded are not so large as to create a real or perceived conflict with the class in the context of a settlement.

c. Although Perell J. raises concerns about how the court can test the genuineness and value of the contribution of the representative plaintiff, doing so is little different than testing the reasonableness of class counsel fees, or of a settlement for that matter. The court can, and does, handle those requests even though they arise outside of an adversarial context. Insisting on an appropriate evidentiary foundation, reviewing other, similar decisions, considering the request within the context of the proposed settlement, and providing an opportunity for class members to object, are all tools at the court's disposal to ensure requests for honoraria are properly scrutinized.

d. The risk that testing the genuineness and value of a representative plaintiff's contribution could re-traumatize a representative plaintiff is not, in my respectful view, a reason not to award honoraria. Rather, it is a reason to consider the process the court employs to test the relevant evidence. Where the risk of re-traumatization exists, a trauma-informed approach to judging allows judges to design a process that respects and responds to the needs of an individual representative plaintiff while still maintaining the integrity of the court's fact-finding process. In such cases, a trauma-informed approach should apply throughout the proceeding, and not only at the stage of considering whether to award an honorarium. Counsel can assist by proposing measures that would minimize the potential for harm to parties and witnesses at risk of re-traumatization. Judges can also draft their reasons in a trauma-informed manner to avoid or minimize the potential for re-traumatization of a representative plaintiff or witness.

e. I do not agree that the practice of awarding an honorarium is tawdry, or that it dishonours more than honours the bravery and contribution of a representative plaintiff. First, I do not think it is up to the court to decide whether a representative plaintiff will feel honoured or dishonoured by an honorarium. Rather, one can

> presume that if a representative plaintiff is prepared to swear an affidavit in support of an honorarium, she does not feel that receiving it would dishonour her contribution to the class. Second, there are limits in the way the civil justice system can recognize the contributions of those who act within its confines. We have no plaques to bestow, no trophies to hand out. All we have are awards of money. An honorarium is not income for someone who is making class action litigation a side hustle. It is a recognition that a representative plaintiff has taken on risks and obligations to an extent that he was not required to do, for the purpose of benefitting others, and of holding a defendant to account. There is nothing tawdry about recognizing that contribution to access to justice, behaviour modification, and judicial economy through the only means available to the court —an award of money. Finally, I do not see why awarding honoraria in one case leads inevitably to grading representative plaintiffs' contributions in one case against those in another. Every case turns on its own facts, as it should.

[113] In conclusion, not only would I continue the practice of awarding honoraria, but in my view, the approach adopted by the British Columbia Court of Appeal, and which has been creeping into Ontario in cases like *Miller*, *Romita*, and *Pabla*, better recognizes the role that honoraria can play in advancing the objectives of the *CPA*.

[114] In summary, therefore, I would award an honorarium where a representative plaintiff, or other involved class member, has provided competent service coupled with positive results to the class. In assessing the quantum of the honorarium, I would consider the factors laid out in *Hodge*, plus additional factors. For convenience, I set out all of these factors below:

a. Did the representative plaintiff have active involvement in the initiation of the litigation and retainer of counsel?

b. Was the representative plaintiff exposed to a real risk of costs?

c. Did the representative plaintiff suffer significant personal hardship or inconvenience in connection with the litigation?

d. Did the representative plaintiff suffer direct financial losses or incur out-of-pocket costs that she would not have incurred as an individual litigant?

e. Did the representative plaintiff take on a role that was extraordinarily onerous, or potentially traumatic, or that put her at risk of suffering additional harms?

f. How much time did the representative plaintiff spend, and what activities did she undertake in advancing the litigation?

g. How did the representative plaintiff communicate and interact with other class members?

h. What was the extent of the representative plaintiff's participation at various stages in the litigation, including discovery, settlement negotiations and trial?

i. How does the settlement or judgment benefit the class?

j. Is the proposed honorarium an amount that does not create an actual or perceived conflict with the class?

k. Are there objectors to the proposed honorarium and if so, what are the nature of their objections?

[115] I now turn to consider the evidence before me about the contributions of the representative plaintiffs in this case.

[116] The record establishes that Mr. Redublo identified the wrong that forms the basis for the claim. He stepped forward to act as a representative plaintiff when the limitation period was about to expire. Without his willingness to do so, there would have been no action. By publicly identifying himself as someone whose data was stolen, he risked further intrusion into his privacy, which allowed class members to obtain access to justice while guarding their own privacy. He discharged his duties to the class in a competent manner and rendered necessary assistance to class counsel.

[117] Ms. Moher volunteered to act as a representative plaintiff to represent the employee sub-class after she learned about the proceeding. She also risked further intrusion into her privacy and helped class members access justice while guarding their own privacy. She discharged her duties to the class in a competent manner and rendered necessary assistance to class counsel.

[118] Both representative plaintiffs had an indemnity from class counsel, limiting their personal exposure to costs and disbursements. Nothing about the role they took on in this litigation was particularly onerous or traumatic. Neither sustained any financial losses or incurred costs relating to the litigation.

[119] The resolution of this claim came at an early stage in the litigation, benefitting the class. As I have found, the settlement was reasonable and provides compensation to the class in line with similar cases.

[120] The representative plaintiffs request a modest honorarium of $5,000 each. In the context of this case, I am unconcerned about any actual or perceived conflict of interest if the representative plaintiffs are awarded this amount. In view of the competent service they have provided the class, I conclude that an honorarium of $5,000 to each representative plaintiff is appropriate.

Conclusion

[121] The plaintiffs' motions are granted. I certify the class for the purposes of settlement, and I approve of the settlement. I approve the requested class counsel fees, disbursements, and honoraria.

[122] Orders to go in accordance with the drafts I have signed.

J.T. Akbarali J.

Date: March 2, 2022