CITATION: Tocco v. Bell Mobility Inc., 2019 ONSC 2916
COURT FILE NOs: CV-18-603803-00CP
DATE: 20190513

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Settimo Tocco, Travis Briggs, Roger Chasles and Kristopher Chasles, Plaintiffs

– AND –

Bell Mobility Inc., Respondent

BEFORE: E.M. Morgan J.

COUNSEL: *Ted Charney, David Robins, and Tina Yang*, for the Plaintiffs
Patricia Jackson, Andrew Bernstein, Molly Reynolds, and Emily Sherkey, for the Defendant

HEARD: March 22, 2019

CERTIFICATION MOTION

[1] This proposed class action alleges that the Defendant breached the privacy rights of the Plaintiff by using the personal information of its data service customers for its own marketing initiative called the Relevant Advertising Program ("RAP") without obtaining their consent.

[2] The putative class is composed of the Defendant's subscribers, or consumers of its data services. It encompasses all data service customers of the Defendant's from November 16, 2013, the date that the federal Office of the Privacy Commissioner ("OPC") commenced an investigation of whether the RAP violated the *Personal Information Protection and Electronic Documents Act,* SC 2000, c. 5 ("*PIPEDA*"), to April 14, 2015, the date of an OPC Report (the "Report") that detailed the investigation's findings that privacy had been breached and the Defendant announced an end to the RAP (the "Class Members" or the "Class").

[3] Section 5(1)(b) of the *Class Proceedings Act, 1992*, SO 1992, c 6 ("*CPA*") calls for there being two or more persons that can be represented by the representative plaintiff as being the class of claimants against the Defendant. The Class must be identified with sufficient clarity to allow for all persons that are entitled to notice, that are ultimately entitled to a remedy, and that will be bound by the Judgment if they do not opt out, to be identified up front: *Western Canadian Shopping Centres Inc. v Dutton*, [2001] 2 SCR 534, at para 38.

[4] The Defendant keeps records of its subscribers, and so the Class Members are not difficult to identify. The Class, as proposed by the Plaintiffs, satisfies the criteria set out in s. 5(1)(b) of the *CPA*.

[5] As for the representative Plaintiffs, there is no suggestion that they are anything but competent, committed representatives who are capable of advancing the interests of the Class as a whole. They have a workable litigation plan and have no known conflicts of interest. They therefore satisfy the criteria set out for class representatives in s. 5(1)(e) of the *CPA*.

[6] Counsel for the Plaintiffs have included in the certification record a substantial amount of evidence going to the merits of the claim. In fact, counsel for the Defendant suggests that the Plaintiffs have gone overboard in their inclusion of evidence, and make a point of saying that in this motion they did not fall for the bait of responding to or engaging in extensive cross-examination on the merits of the claim. Thus, although a great deal of what Plaintiffs' counsel has put forward appears to be unchallenged, I do not take that as any form of admission or concession by the Defendant.

[7] Defendant's counsel have, properly, adhered to the view that certification is a procedural step and that it should not engage the merits of the claim where it is not necessary to do so. As Perrell J. pointed out in *Waldman v Thomson Reuters Corporation*, 2012 ONSC 1138, at para 8, "certification is a technical and procedural legal phenomenon and the court's gatekeeper's role is limited to ensuring that the technical and procedural elements of the test are satisfied."

[8] The basic facts on which the Plaintiffs rely in seeking certification were set out as findings by the OPC. In the Report, the OPC found that:

(a) the collection, use and disclosure of the credit scores of the plaintiffs and Class Members was inappropriate and violated section 5(3) of *PIPEDA*;

(b) given the sensitivity of the information collected for the RAP, both individually and in the aggregate, and the reasonable expectations of the Defendant's customers, Bell Mobility was required to obtain their express consent to enroll them in the RAP, in accordance with Principle 4.3.6 of *PIPEDA*;

(c) The Defendant's opt-out options for the RAP did not allow customers to withdraw consent to the use of their information for profiling purposes, contrary to Principle 4.3.8 of *PIPEDA*;

(d) The Defendant did not clearly explain to its customers, either in its Privacy Policy or its RAP notifications, that opting out of the RAP would not stop the Defendant from continuing to use Personal Information collected from the RAP for profiling purposes; and

(e) The Defendant's notices about the RAP did not provide sufficient detail to allow for meaningful consent to the RAP and its Privacy Policy does not clearly explain or encompass the use of customers' Personal Information pursuant to the RAP.

[9] The OPC concluded in the Report that the Defendant should establish an opt-in procedure to solicit customers' consent to participate in the RAP. Subsequently, on April 13, 2015, the Defendant announced that it would cancel the RAP, delete all customer profiles generated from the RAP, and expressly solicit customers' opt-in consent before launching a similar program.

According to the Defendant, it stopped sorting customer network usage and account data on its internal database to create customer profiles with categories of interest on April 15, 2015.

[10] The Defendant, of course, denies that any damages were caused by the RAP or incurred by the Plaintiffs. That said, the parties agree that this action for the most part conforms with the requirements of section 5(1) of the *CPA*. The Defendant takes no issue with there being an identifiable class (s. 5(1)(b)) and appropriate representative Plaintiffs (s. 5(1)(e)). More to the point, the Defendant agrees that the action, or part of the action, should be certified as a class proceeding. Defendant's counsel concedes that the Statement of Claim discloses at least one or more causes of action (s. 5(1)(a)) and that the claims raise at least some common issues (s. 5(1)(c)).

[11] The parties part ways with respect to the requirement in s. 5(1)(d) of the *CPA* that a class proceeding be the preferable procedure for resolving the common issues. It is the Defendant's view that some of the causes of action pleaded by the Plaintiffs are redundant.

[12] As Defendant's counsel explains it, the Defendant does not contend that the causes of action pleaded by the Plaintiffs are not viable as causes of action. Rather, it is the Defendant's position that the laundry list of claims is repetitive and unnecessarily complicated given the realistic contours of the case, and that this redundancy has the consequence of making the class proceeding needlessly long and cumbersome. Defendant's counsel is of the view that the essential causes of action can be included in the common issues for certification, and that the causes of action that are, in their view, superfluous or redundant may be pursued by any given class member as individual actions.

[13] There are 7 common issues or questions that have been agreed upon by the parties, as follows:

> "Personal Information" is defined to mean information about an identifiable individual, as defined in s. 2(1) of *PIPEDA*.
>
> - Did the Defendant use Personal Information of the Class Members for the purposes of the RAP?
>
> - If the answer to the question above is yes, (a) what Personal Information of the Class Members did the Defendant use for the purposes of the RAP; (b) how did The Defendant make use of it; and (c) when did the Defendant make use of it?
>
> - If the answer to the question two above is yes, did the Defendant share with, or disclose to, third parties or affiliates, the Personal Information of the Class Members which was used by the Defendant for the purposes of the RAP or information derived from the Personal Information of the Class Members, including interest categories, network usage information, and account/demographic information?
>
> - If the answer to the question above is yes, (a) what Personal Information of the Class Members or information derived from the Personal Information of

the Class Members, did the Defendant share with, or disclose to, third parties or affiliates, for the purposes of the RAP; (b) to whom was the Personal Information disclosed or shared; (c) how was the Personal Information disclosed or shared; and (d) when was the Personal Information disclosed or shared?

- Did the contents of the notices (the "Notices") provided by the Defendant to the Class Members during the Class Period about the RAP accurately describe the Personal Information which the Defendant intended to collect in relation to the RAP, the purposes for which the Personal Information was being collected, or the intended disclosure of the Personal Information?

- Were the means of distribution of the Notices sufficient to constitute a means to obtain consent under *PIPEDA* by the Class Members, to the collection, use and/or disclosure of their Personal Information as set out in the Notices?

- By offering to exclude Class Members who opted out from having their Personal Information disclosed to third party advertisers, did the Defendant obtain the consent of those Class Members who did not opt out to collect, use, and/or disclose the Personal Information described in the Notices, in accordance with *PIPEDA*?

[14] Counsel for the Plaintiffs submits that the essence of the claim is that the Defendants in implementing the RAP breached the terms of *PIPEDA*. The agreed-upon common issues certainly support that characterization. The questions all centre upon the use and alleged misuse of "Personal Information" as defined in *PIPEDA*, whether the disclosure of this Personal Information in the RAP was done with consent and/or in accordance with *PIPEDA*, and whether the Notices complied with the terms of *PIPEDA*.

[15] That said, a large number of causes of action have been set out by the Plaintiffs. These have all found their way into the common issues proposed by Plaintiffs' counsel.

[16] In argument before me, counsel for the Defendant conceded that the cause of action in contract should properly be included in the common issues trial; in addition, Defendant's counsel agreed that the case law suggests that the cause of action framed in waiver of tort be certified and then its applicability dealt with at trial.

[17] At the same time, Defendant's counsel takes issue with the proposed common issues relating to the pleaded causes of action in negligence, breach of confidence, and breach of consumer protection legislation. They seek to exclude these questions and the causes of action to which they relate on the grounds either that they repeat matters already covered by breach of contract or breach of PIPEDA or they are secondary to those causes of action and will fail (or, presumably, succeed) where the primary causes of action fail (or succeed).

[18] The claim in contract explores the legal dimensions of the relationship between each class member and the Defendant. The existence of a contract and its relevant terms are necessary to

establish given of the Plaintiffs' claim for declaratory relief and damages. Likewise, the extent to which statutory protections flowing from PIPEDA and other consumer-oriented legislation impliedly form part of the contractual terms between the Defendant and its subscribers is a fundamental question of law shared by class members. It follows, therefore, that the question of whether the Defendant's conduct in collecting class members' Personal Information constitutes a breach of the terms of any contract needs to be determined on a class-wide basis.

[19] The Plaintiffs' proposed common issues touching on the breach of contract claim are framed as the following questions:

- Did the Defendant enter into a contract with Class Members in respect of the provision of mobile data services during the Class Period?

- If the answer to the question above is yes, was it an express or implied term of the contract that the Defendant would keep Class Members' Personal Information confidential and that the Defendant would not collect, use, retain, and/or disclose Class Members' Personal Information except as provided by the contract, the Defendant's privacy policy and by applicable statutes?

- If the answer to the question two above is yes, did the Defendant's collection, use, retention and/or disclosure of Class Members' Personal Information in relation to the RAP breach the contract? If so, how?

[20] The claim in breach of confidence raises the issue of the Defendant's conduct in its use of the Personal Information. The elements of the tort of breach of confidence are capable of being adjudicated with reference to the Defendant's conduct alone, since under the circumstances the implementation of the RAF was identical with respect to each Class mMember.

[21] The Plaintiffs' proposed common issues touching on the breach of confidence claim are framed as the following questions:

- What, if any, of the Class Members' Personal Information is confidential?

- If any of the Personal Information is confidential, was the Defendant obliged to maintain the confidentiality of the Personal Information during the Class Period?

- If the answer to the question above is yes, was the Defendant's use of the Class Members' Personal Information in relation to the RAP authorized by the Class Members?

- If the answer to the question two above is no, was the Defendant's use of the Class Members' Personal Information in relation to the RAP to the detriment of the Class Members?

[22] The cause of action in negligence raises a legal issue – whether a duty of care was owed by the Defendant to all class members. In addition, it raises an issue of the Defendant's conduct – whether the Defendant fell below the requisite standard of care. Both of these issues are shared among all Class Members, and no one Class Member is in a different situation than the other in respect of the negligence issues.

[23] There is ample evidence that the Defendant developed a system for the RAP to create personal profiles for all of its mobile data users regardless of whether any one of those users opted out of the RAP. This manner of using Class Members' Personal Information provides some basis in fact to establish a breach of duty of care.

[24] The Plaintiffs' proposed common issues touching on the negligence claim are framed as the following questions:

- Did the Defendant owe the Class Members a duty of care in its collection, use, retention and/or disclosure of the Class Members' Personal Information during the Class Period?

- If the answer to the question above is yes, did the Defendant breach its duty of care to the Class Members. If so, how?

[25] The cause of action in intrusion upon seclusion focuses primarily upon the Defendant's conduct in implementing the RAP. Specifically, this claim inquires into the level of intent of the Defendant in using the Personal Information. In addition, it seeks to establish the nature of the Class Members' privacy interest in their Personal Information, and the expectations and perspective of a reasonable person with respect to the handling and/or disclosure of the Personal Information.

[26] The Court of Appeal has described the elements of the tort of intrusion upon seclusion as being capable of being proved without an individualized assessment of damages: *Jones v. Tsige* (2012), 108 O.R. (3d) 241, at paras. 70-71. Accordingly, this cause of action is susceptible to analysis on a Class-wide basis.

[27] The Plaintiffs' proposed common issues touching on the intrusion against seclusion claim are framed as the following questions:

- Did the Defendant's collection, use, retention or disclosure of Personal Information in relation to the RAP willfully or recklessly invade the privacy or intrude upon the seclusion of the Class Members in a manner that would be highly offensive to a reasonable person?

- If the answer to the question above question is yes, did the Defendant have a lawful justification for invading the Class Members' privacy?

- If the answer to the question two above is yes and the answer to question immediately above is no, is the Defendant liable to the Class for damages for intrusion upon seclusion?

[28] The causes of action premised on allegations of breach of consumer protection legislation centre on two types of breaches: unfair practices/misrepresentations and unsolicited services. These claims are focused on the alleged representations by the Defendant, and ask specifically whether they are false, misleading or deceptive in a material sense.

[29] The Plaintiffs have produced some evidence that the Defendant represented in the Notice and on its website that Class Members could opt out of having their information used in the RAP, when that apparently was inaccurate. The Plaintiffs contend that the reality was that the Defendant would continue to collect and analyze Class Members' Personal Information regardless of whether they opted out of the RAP.

[30] The consumer protection claims also address the question of whether the RAP was an unsolicited good or service imposed by the Defendants on Class Members without consent. Again, as with similar class actions against cell phone service providers in the United States, the analysis of this question will focus on the Defendant's conduct and the nature of the RAP.

[31] The Plaintiffs' proposed common issues touching on the claims of breach of consumer protection legislation are framed as the following questions:

- Were the Defendant's representations concerning the RAP false and misleading contrary to ss. 14, 15 and 17 of the *Consumer Protection Act*, RSO 2002, c. 30, Sched A. ("Ontario *CPA*"), s. 219 of the *Consumer Protection Act*, CQLR c. P-40.1 ("Quebec *CPA*") and the equivalent provisions of the other Applicable Consumer Protection Legislation (as defined in the Statement of Claim)?

- Was the RAP an unsolicited good and/or service supplied by the Defendant pursuant to s. 13 of the Ontario *CPA* and the equivalent provisions of the other Applicable Consumer Protection Legislation? If yes, was the RAP imposed upon Class Members, who were consumers, without consent?

- If the answers to the question two above and/or the question immediately above is yes, is the Defendant liable to Class Members for breach of the Ontario *CPA*, Québec *CPA* and/or other Applicable Consumer Protection Legislation?

- If the answer to the question above is yes, is the Class entitled to punitive damages pursuant to the Ontario *CPA*, Québec *CPA*, the other Applicable Consumer Protection Legislation and/or the Quebec *Charter of Human Rights and Freedoms*?

[32] The Plaintiffs' claim is framed as a proposed national class action. Accordingly, separate from the common law claims and the claims advanced under the consumer protection statutes across the country, there are causes of action which arise under the *Civil Code of Quebec* and Quebec's *Charter of Rights and Freedoms* that are relevant to the proposed subclass of Class Members who are Quebec residents (the "Quebec Subclass").

[33] As with the parallel common law claims, the analysis of the questions raised under the *Civil Code of Quebec* focuses on the Defendant's conduct and the nature of the Class Members'

privacy interest in their Personal Information. The Plaintiffs submit that resolution of these issues will leave only the quantum of damages to be determined.

[34] The Plaintiffs' proposed common issues touching on the claims under the *Civil Code of Quebec* are framed as the following questions:

- With respect to the Quebec Subclass, did the Defendant's collection, use, retention and/or disclosure of the Class Members' Personal Information in relation to the RAP breach articles 35, 36, 37 and/or 1457 of the *Civil Code of Quebec*, or any of them?

- If the answer to the question above is yes, is the Defendant liable to the Quebec Subclass for damages for invasion of privacy pursuant to the *Civil Code of Quebec*?

- If the answer the question two above is yes, is the Defendant liable to the Quebec Subclass for damages for invasion of privacy pursuant to the Quebec *Charter of Human Rights and Freedoms*?

[35] The Amended Statement of Claim sets out alternative grounds of liability and avenues of redress given the nature of the allegations against the Defendant. Specifically, it alleges that, in the alternative, the Plaintiffs are entitled to waiver of tort and restitution of, and a constructive trust over, the gains reaped by the Defendant in respect of the RAP. These claims require proof of the elements of the causes of action in unjust enrichment and waiver of tort. In assessing these elements, the court will necessarily focus on the Defendant's conduct such that individual inquiry of Class Members is not required.

[36] Although waiver of tort remains a contentious cause of action, it is a restitutionary/unjust enrichment claim that generally relates to circumstances where, as here, the Defendant is alleged to have reaped commercial profit on the heels of its breach of the Plaintiffs' rights: P. Maddaugh and J. McCamus, *The Law of Restitution* (Aurora: Canada Law Book, 2009) at p. 24-1. Claims advanced on this basis have previously been determined to be sufficiently sound to pass the certification hurdle: see *Pro-Sys Consultants Ltd. v Microsoft Corporation*, [2013] 3 SCR 477, at paras 99-105.

[37] The Plaintiffs' proposed common issues touching on the claims of unjust enrichment and waiver of tort are framed as the following questions:

- Was the Defendant unjustly enriched by:

  i) the receipt of fees from Class Members for use of the Defendant's mobile services during the Class Period;

  ii) the collection, use, retention or disclosure of the Class Members' Personal Information; or

  iii) the knowledge gained from the collection, use, retention or disclosure of the Class Members' Personal Information?

- If the answer to the question above is yes, did the Class Members suffer a corresponding deprivation in the amount of fees collected by the Defendant from the Class Members or from any benefit derived by the Defendant from its use of the Class Members' Personal Information in relation to the RAP?

- Is there a juridical reason why the Defendant should be entitled to retain the fees collected from the Class Members or any revenue generated from the use of the Class Members' Personal Information during the Class Period?

- If the answer to the question two above is yes and the answer to the question immediately above is no, what restitution, if any, is payable by the Defendant to the Class Members based on unjust enrichment?

- If the answer to the question three above is yes and the answer to the question two above is no, is the Defendant liable to account to the Class Members for the wrongful profits, if any, that it obtained during the Class Period, based on the doctrine of waiver of tort?

- Is this an appropriate case for the Defendant to disgorge profits earned during the Class Period?

- If there is a finding of liability, can the amount of restitution be determined on an aggregate basis, and, if so, in what amount?

[38] Turning to the question of damages, section 24(1) of the *CPA* specifically contemplates aggregate awards of monetary relief where no proof of loss by individual class members is required. The Supreme Court of Canada has emphasized that aggregate damages are focused on "the assessment of damages and not proof of loss": *Pro-Sys* SCC, at para. 128. This would certainly apply to the claim of intrusion upon exclusion, which explicitly does not include proof of harm to a recognized economic interest as an element: *Jones*, at paras 70-71.

[39] In *Ramdath v George Brown College* (2014), 375 DLR (4th) 488, at para 44, aff'd 2015 ONCA 921, it was noted that aggregate damages are available so long as there is a method to find a reasonable quantum of damages:

> The key to understanding aggregate damages is in understanding that the measurement criterion is not what's accurate but what's reasonable. In striking a balance between accuracy (or as the OLRC put it, 'the risk of imposing liability upon the defendants for an amount that exceeds the injury actually inflicted') and access to justice ('the possibility of denying recovery to persons who have been injured') the legislature intentionally tilted the balance in favour of access to justice. Hence the focus in s. 24(1) on whether all or part of the defendant's monetary liability can reasonably be determined without proof by individual class members.

[40] As Plaintiffs' counsel points out, partitioning assessment of damages in this way between an aggregate assessment of all Class Members' base amount, with the option of further damages through individual assessment, promotes the fundamental policy goals of class proceedings: see *Hollick v. Toronto (City)*, [2001] 3 SCR 158 at para 15. Further, it is permitted by the very wording

of s. 24(1) the *CPA* that, "the court may determine the aggregate or a part of a defendant's liability to class members and give judgment".

[41] The court in *Ramdath* indicated that three factors should be considered in assessing whether there is a reasonable method to calculate damages on an aggregate basis: a) the reliability of the non-individualized evidence that is being presented by the plaintiffs; b) whether the use of this evidence will result in any unfairness or injustice to the defendant; and c) whether the denial of an aggregate approach will result in a denial of access to justice in the sense that "a wrong eluding an effective remedy": *Ramdath*, at para 44. As this process suggests, aggregate damages are available to determine a base amount on a Class-wide basis, even where individual evidence would be needed to determine a final award: see *Good v Toronto Police Services Board* (2014), 121 OR (3d) 413, at para 72 (Div Ct).

[42] The Court of Appeal has confirmed this approach. In *Good v Toronto (Police Services Board)* (2016), 130 OR (3d) 241, it approved the proposed methodology for aggregately assessing a base amount of non-pecuniary general damages, based on a sampling of the harm experienced by individual class members, that had been described by the Divisional Court, at para 73:

> It seems to me that if a trial judge were to conclude, with respect to any of the ...subclasses, that the answer to common issue #1 [i.e. the question of liability] was yes, it would be open to the common issues judge to determine that there was a base amount of damages that any member of the class was entitled to as compensation for the breach of their constitutional or common law rights. It does not require an individual assessment of each person's situation to determine that, if anyone is unlawfully detained in breach of their rights at common law or under s. 9 of the Charter, a minimum award of damages in a certain amount is justified.

[43] Partitioning assessment of damages between an aggregate assessment of all Class Members' base amount, with the option of further damages through individual assessment, promotes the goals of class proceedings of access to justice, judicial economy, and behaviour modification. It has previously been determined to be a suitable methodology in the context of a privacy breach class action: *Daniells v McLellan*, 2017 ONSC 3466, at para 43.

[44] In fact, even demonstrating that this methodology is viable may be more than the Plaintiffs need establish in order to include the damages question in the common issues. The British Columbia Supreme Court has suggested that establishing a "workable methodology" is unnecessary with regard to an aggregate assessment of damages for the Class Members' claims in tort. In *Ewert v Canada (Attorney General)*, 2017 BCSC 279 at para. 51, the Court reasoned that the "workable methodology" approach applies only in cases where damages are economic or essentially economic in nature, not where, as in the present case, damages sought are at large.

[45] As for punitive damages, in *Good*, at para 77, the Divisional Court, citing the Supreme Court of Canada in *Rumley v British Columbia*, [2001] 3 SCR 184, at para 34, observed that, "a great many class proceedings have included punitive damages as a common issue... Indeed, punitive damages is a common issue that is often not in dispute." As in those other cases, the Plaintiffs submit that appropriateness of punitive damages can here be determined on a Class-wide

basis because the issue depends on the conduct of the Defendants and will not be affected by individual issues relating to specific Class Members.

[46] Furthermore, the Court of Appeal has confirmed that where the common issues trial judge will be able to determine at least part of the monetary relief owed to the class without individual examinations of Class Members, that same judge will be in a position be able to make an informed decision about the quantum of punitive damages: *Good* (Div Ct), at para 81. It is sufficient that the common issues trial judge will at least know the likely level of compensatory damages.

[47] The Plaintiffs' proposed common issues touching on damages are framed as the following questions:

- Is the Defendant liable to the Class for damages (including punitive damages) for:

  i) breach of contract?

  ii) breach of applicable Consumer Protection Legislation?

  ii) with regard to the Quebec Subclass, breach of the *Civil Code of Quebec*?

  iv) breach of confidence?

  v) intrusion upon seclusion/invasion of privacy?

  vi) negligence?

- If the Defendant is liable to the Class for damages, can the court assess damages in the aggregate, in whole or in part, for the Class? If so, what is the amount of the aggregate damages assessment?

- If the court determines that the Defendant is liable to the Class Members, and if the court considers that the participation of individual Class Members is required to determine individual issues:

  i) are directions necessary?

  ii) should any special procedural steps be authorized?

  iii) should any special rules relating to admission of evidence and means of proof be made?

  iv) what directions, procedural steps or evidentiary rules ought to be given or authorized?

- Should the Defendant pay the costs of administering and distributing any amounts awarded under ss. 24 and 25 of the *Class Proceedings Act, 1992*? If so, what amount should be paid and to whom?

- Should the Defendant pay prejudgment and postjudgment interest? If so, at what annual interest rate? Should the interest be simple or compound?

[48] As indicated, the Defendant rests its response to the certification motion on s. 5(1)(d) of the *CPA*. Defendant's counsel argues that the causes of action and the proposed common issues questions that flesh out those causes of action are too numerous and repetitive. They identify the claims in negligence, breach of confidence, and breach of consumer protection statutes, as being "redundant causes of action" which make the action unduly complex and unmanageable as a class action. It is their view that, considering the principle of proportionality and its relationship to the goal of access to justice, these redundant claims make a class proceeding into a less than preferable procedure: See *Berg v Canadian Hockey League*, 2017 ONSC 2608, at para 196.

[49] I tend to agree that the Plaintiffs' certification record is overburdened with causes of action and evidence, and that this reflects a pleading that is repetitive and prolix: see *Cadieux v Cadieux*, 2016 ONSC 4446, at paras 14-15. It is what Justice Perrell has elsewhere called "a puerile exercise to analyze the substantive merits" of multiple, overlapping causes of action: *McDowell and Aversa v Fortress Real Capital Inc.*, 2017 ONSC 4791, at paras 71-72. Including the numerous causes of action referenced in the proposed common issues outlined above threatens to bury an interesting claim about the alleged misuse of personal data in a mountain of legal tedium.

[50] The argument put forward by Defendant's counsel builds on the motion court judgments in in *Magill v Expedia*, 2013 ONSC 683 and *Berg v Canadian Hockey League*, 2017 ONSC 2608. In both of those cases, Perrell J. reasoned that where the pleadings contain a variety of claims that make the action unnecessarily complex, a class action may not be appropriate. In reaching this conclusion in *Berg*, at para 200, he indicated that, "[t]he redundant causes of action cause enormous problems of manageability".

[51] Turning to the policies underlying the *CPA*, Justice Perell observed in *Berg*, at para 205, that the statutory regime "is designed to provide the class members with the access to justice that they need, and needs are different than wants." He therefore concluded that the preferable procedure was one which fostered judicial economy and excluded from the common issues those causes of action he saw as redundant or unnecessary.

[52] The Divisional Court has very recently cast doubt on the authority of a motions judge hearing a certification application to address this concern. As the unanimous panel put it in *Berg v Canadian Hockey League*, 2019 ONSC 2106, at para 47, "making the decision as to which causes of action are 'needed' at the certification stage (when pleadings may not yet been closed and the merits of the action are not the focus), there is a real concern that it is the judge, rather than plaintiffs' counsel, who is making the call as to how the action should be litigated."

[53] Generally speaking, civil litigation is party and pleadings driven. The court does not typically concern itself with attempting to edit or pare down claims containing recognized causes of action; it is first and foremost counsels' judgment that defines how the action is to be litigated, not the court's. The Plaintiffs are, as Justice Strathy put it in *Zurich Insurance Co. v Ison TH Auto Sales Inc.* (2011), 106 OR (3d) 201, at para 70, "in control of the litigation, or *dominus litis*". They are therefore afforded autonomy in how they structure their claims: see Paul M. Perell and John

W. Morden, *The Law of Civil Procedure in Ontario* (3d ed., Markham: LexisNexis, 2017) at 402-04.

[54] This tack was taken by the Alberta Court of Queen's Bench, who certified all of the causes of action pleaded by the plaintiff in *Walter v Western Hockey League*, 2017 ABQB 382, aff'd 2018 ABCA 188. *Walter* was the western Canada companion case to *Berg* that was pleaded and argued on virtually identical facts. The Alberta court's view was that it was for the plaintiff, not the motion judge, to pare down the pleading to a more effective litigation tool or for the defendant to seek to have superfluous causes of action dismissed on summary judgment. As the motions court judge put it, at para 46:

> If the pleadings disclose causes of action, then I consider that those causes of action should be permitted to proceed. While I recognize that the Court is to look at the preferable procedure question through the lens of access of justice, behaviour modification and judicial economy, and that redundant causes of action do not promote either access to justice or judicial economy, nevertheless, I am not prepared to strike causes of action which have been properly pleaded. I cannot do so in actions brought by a single plaintiff. Similarly I do not believe I can dispose of properly pleaded causes of action in a class action certification application.

[55] The certification decision in *Walter* was upheld by the Alberta Court of Appeal, 2018 ABCA 188, which now accords with the approach taken in Ontario by the Divisional Court. The appellate decision in *Walter* reasoned that the certification judge acted within the scope of his discretion in certifying a class action as presented to him, and by refusing to edit the statement of claim or to effectively dismiss causes of action for which the defendant had not yet brought a motion for summary judgment. The Alberta Court of Appeal stated, at para 15:

> While in general terms, litigation is often not well served by a proliferation of alternative and either redundant or inconsistent forms of claim, such as contract, fiduciary duty, statute-based causes of action, conspiracy and other torts, the certification stage is not necessarily an appropriate stage to assess whether the pleading of such alternatives creates problems, or engenders injustice.

[56] As already explained, the Defendant does not say that any one of the pleaded causes of action is not a proper cause of action in its own right. Rather, Defendant's counsel submit that the cumulative effect of so many overlapping causes of action undermines the judicial economy sought by the *CPA* and thereby fails the s. 5(1)(d) 'preferable procedure' criterion for certification. As drafted, however, each of the pleaded causes of action does contain a nuance of difference from the other, and no one can be struck out as improperly pleaded or unsupported by any evidence. The Defendant has not brought a pleadings motion or a summary judgment motion seeking to have any of the causes of action dismissed.

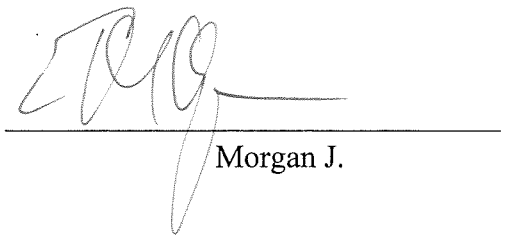
[57] Under the circumstances, it is not my role to interfere with the way the Plaintiffs have pleaded their case. The discretion that I enjoy under s. 12 of the *CPA* to decide the conduct of the case is not an unrestricted discretion; it must be exercised in accordance with the nature of certification as a preliminary, procedural motion: *CPA*, s. (5).

[58] As Plaintiffs' counsel submit in argument, a decision to eliminate one or more causes of action would not be a procedural decision, but rather would be a substantive one: see *Hryniak v Mauldin*, [2014] 1 SCR 87, at paras 27-29, 33. At the certification stage there is no oral discovery, *Mancinelli v Royal Bank of Canada*, 2017 ONSC 87, at para 41, and the argument is limited to the court's gatekeeping function in assessing commonality: *Pro-Sys*, at para 103. This is not the appropriate motion in which to second guess counsel's strategy in bringing multiple causes of action to address the same allegations.

[59] I find that a class proceeding is the preferable proceeding to adjudicate the common issues identified by the Plaintiffs.

[60] This action is hereby certified as a class proceeding. The common issues are as set out above in paragraphs 13, 19, 21, 24, 27, 31, 34, 37, and 47.

[61] The parties may make written submissions as to costs. I would ask that counsel for the Plaintiffs send their submissions to my assistant within two weeks of today and that counsel for the Defendant send their submissions to my assistant within two weeks thereafter. The submissions are to be no longer than 3 pages plus a Costs Outline or Bill of Costs.



Morgan J.

Date: May 13, 2019