IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tucci v. Peoples Trust Company,*
2017 BCSC 1525

Date: 20170829
Docket: S138544
Registry: Vancouver

Between:

Gianluca Tucci

Plaintiff

And:

Peoples Trust Company

Defendants

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment

Counsel for the Plaintiff:	T.P. Charney A. Greenwood
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Place and Dates of Trial/Hearing:	Vancouver, B.C. June 27-29, 2016 August 5, 2016 November 4, 2016
Place and Date of Judgment:	Vancouver, B.C. August 29, 2017

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I. INTRODUCTION

[1] These Reasons deal with an application for an order certifying this action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "*CPA*").

[2] The essence of the action is that the defendant, Peoples Trust Company ("Peoples Trust"), did not adequately secure personal information collected on its online application portal and stored in online databases. As a result, it is asserted that unauthorized persons were able to access the personal information, putting the proposed class members at risk of identity theft, cybercrime, and "phishing". The action is founded on (a) breach of contract, (b) negligence, (c) breach of confidence, (d) breach of privacy and intrusion upon seclusion, and, in the alternative, (e) unjust enrichment and waiver of tort.

[3] The proposed class, estimated at 11,000–13,000 members, is described as:

> All persons residing in Canada who completed an online account application with PTC and whose personal information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet.

[4] There are two sub-classes proposed:

> i. The "Resident Sub-Class":
>
> All persons residing in British Columbia who completed an online account application with PTC and whose Personal Information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet; and
>
> ii. The "Non-Resident Sub-Class":
>
> All persons resident outside of British Columbia who completed an online account application with PTC and whose Personal Information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet.

[5] Subsequent to the filing of the application, Mr. Taylor was added as a plaintiff to this action. His qualifications are dealt with later in these Reasons. These Reasons refer to Mr. Tucci and Mr. Taylor collectively as the plaintiff or the applicant, unless the context requires otherwise.

II. BACKGROUND

A. The parties

1. The defendant Peoples Trust

[6] The defendant Peoples Trust is a federally regulated trust company incorporated pursuant to the *Trust and Loan Companies Act*, S.C. 1991, c. 45. As such, it is subject to federal privacy legislation, as overseen by the Office of the Privacy Commissioner of Canada (the "Privacy Commissioner"). Peoples Trust's head office is in Vancouver and it has branch offices in Vancouver, Toronto, and Calgary. It provides financial products and services such as savings accounts, mortgages, and credit cards across Canada. Many of its services are provided online.

2. The plaintiffs

[7] The plaintiff Mr. Tucci is an individual residing in Windsor, Ontario. In about October 2012, he applied online for a Peoples Trust tax-free savings account. Peoples Trust approved his application and opened his account.

[8] The plaintiff Mr. Taylor is a retiree residing in Richmond, B.C. In about March 2009, he applied online for a savings account at Peoples Trust.

[9] Both plaintiffs were notified by Peoples Trust that they may be at risk of identity theft because an online database containing personal information they provided had been accessed over the interest by unauthorized individuals located in the People's Republic of China.

B. The online applications

[10] The plaintiff, like all applicants for deposit services, provided personal information including name, address, telephone number, email address, date of birth, Social Insurance Number, and occupation. Applicants for Peoples Trust credit card and other services must provide the same personal information and their mother's maiden name.

[11] According to the plaintiff, the plaintiff and proposed class members entered agreements with the defendant related to the use of the defendant's website and the defendant's collection, retention, use, and disclosure of personal information. The terms of the agreements incorporated Peoples Trust's "Website Terms & Conditions" and "Terms & Conditions".

[12] The Website Terms & Conditions included the following:

> 7. Privacy and Security
>
> PTC is committed to ensuring that personal information you have provided to us is accurate, confidential, and secure. Our privacy policies and practices have been designed to comply with the Personal Information Protection and Electronic Documents Act (Canada) or corresponding provincial privacy acts, as applicable (collectively, "Privacy Laws").
>
> 14. Applicable Law
>
> These terms and conditions, your access to and use of the Website, and all related matters are governed solely by the laws of British Columbia and applicable federal laws of Canada, excluding any rules of private international law or the conflict of laws that would lead to the application of any other laws. Any dispute between PTC and you or any other person arising from, connected with, or relating to the Website, this Agreement, or any related matters (collectively, "Disputes") must be resolved before the Courts of the Province of British Columbia, Canada, sitting in the City of Vancouver, and you hereby irrevocably submit and attorn to the original and exclusive jurisdiction of those Courts in respect of all Disputes. Any proceeding commenced by you or on your behalf regarding a Dispute must be commenced in a court of competent jurisdiction in Vancouver, British Columbia within six months after the Dispute arises, after which time any and all such proceedings regarding the Dispute are barred.

[13] The Terms & Conditions included:

> 1.24 Privacy Policy
>
> We are committed to ensuring that the personal information you have provided to us is accurate, confidential, and secure. PTC's privacy policies and practices have been designed to comply with the federal Personal Information Protection and Electronic Documents Act ("PIPEDA") or corresponding provincial privacy legislation, as applicable (collectively "Privacy Laws").

[14] Finally, Peoples Trust's privacy policy stated:

> 7. The security of your personal information is a priority for Peoples Trust
>
> We take steps to safeguard your personal information, regardless of the format in which it is held, including:
>
> Physical security measures such as restricted access facilities and locked filing cabinets;
>
> Shredding of documents containing personal information;
>
> Electronic security measures for computerized personal information such as password protection, database encryption and personal identification numbers;
>
> Organizational processes such as limiting access to your personal information to a selected group of individuals;
>
> Requiring third parties given access to your personal information to protect and secure your personal information.

C. The security breach

[15] In about September 2013, cybercriminals gained unauthorized access to the defendant's databases and stole website users' personal information. As a result, unsolicited text messages were sent to users of the defendant's website purporting to be from the defendant. The messages asked the recipients to call a telephone number based in the state of Utah. According to the plaintiff, these text messages were attempts at "phishing": soliciting money or information from individuals by pretending to be a trusted company.

D. Defendant's investigation and notification of authorities

[16] The defendant says it became aware of a possible breach in the week of October 7, 2013. The defendant initiated a forensic investigation that confirmed that a database had been compromised in the attack, which originated from China. According to the plaintiff, the investigator informed the defendant of this on October 11, 2013.

[17] The defendant notified the Vancouver Police Department, the RCMP, and affected patrons of the security breach. The defendant reported the security breach to the Privacy Commissioner on October 15, 2013.

E. Defendant's notification of customers

[18] By letter dated October 25, 2013, the defendant informed all potentially affected persons of the security breach and of steps the defendant had taken to mitigate the risk of fraud and theft. The plaintiff estimates that the letter was sent to 11,000–13,000 individuals, including himself.

[19] The letter advised that the defendant had arranged for flags to be placed on the customers' credit files to alert companies that the customers' data may have been compromised and that the companies should take additional steps to verify their identity. The letter stated that the flags would stay on the credit files for six years unless cancelled earlier by the customer.

[20] The letter advised the customers to:

(a) never respond to unsolicited requests for banking or personal information;

(b) treat as fraudulent emails or text messages purporting to be from the defendant asking for account or other information;

(c) monitor for and report suspicious activity in their Peoples Trust accounts; and

(d) obtain a copy of their credit report to ensure there has been no fraudulent use of their credit information.

F. Privacy Commissioner of Canada's investigation

[21] As noted, the defendant reported the breach to the Privacy Commissioner on October 15, 2013. The Privacy Commissioner also received several complaints from affected individuals.

[22] On January 7, 2014, the Privacy Commissioner initiated a complaint pursuant to s. 11(2) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 [*PIPEDA*]. The Commissioner's findings were reported on April 13, 2015. The Commissioner's findings were reported in the Office of the Privacy

Commissioner's 2014 annual report to Parliament: *Privacy Protection:* A Global Affair*, Annual Report to Parliament 2014, Report on the* Personal Information Protection and Electronic Documents Act (Gatineau: Minister of Public Works and Government Services Canada, 2015).

[23] The Annual Report addressed the security breach as follows (at p. 19):

> Our investigation observed that the company did not implement sufficiently strong safeguards in developing its online application web portal in order to protect the sensitive personal information being collected from customers. As well, when the breach occurred, the company lacked a comprehensive information security policy.
>
> There was also a lack of ongoing monitoring and maintenance to identify and address evolving digital vulnerabilities and threats. As a result, unbeknownst to the organization, a copy of the customer information—a duplicate of data held in the company's internal database—was being stored unnecessarily, unencrypted, and in perpetuity, on a web server that had not been updated to address a well-known vulnerability. Had this unnecessary duplicate not been on the web server in the first place, it would not have been compromised during the breach.
>
> We also noted that during our investigation, Peoples Trust was very cooperative with our Office and demonstrated a timely and comprehensive breach response. For example, it immediately hired a consultant to identify the breach's cause and "plug the leak." It also implemented new measures to help affected individuals and reduce the risk of a future breach.
>
> These included:
>
> - providing clear and comprehensive notifications and offering credit alerts to those affected by the breach;
> - ending the unnecessary retention of customers' personal information on the web server;
> - enhancing technological safeguards to protect information collected online; and
> - developing procedures and associated internal communications to support privacy protection practices, such as requiring greater diligence in selecting and hiring third parties for developing information management systems.
>
> As a result, we concluded that the matter was well-founded and resolved.

G. History of this proceeding

[24] The plaintiff's notice of civil claim was filed on November 18, 2013 and an amended notice of civil claim was filed on March 26, 2015.

[25] The defendant served a notice of application to strike the claim under Rule 9-5 on July 30, 2014. The defendant filed this application on April 24, 2015.

[26] For Reasons dated July 11, 2015, and indexed at 2015 BCSC 987, I ordered that the application to strike the claim be heard concurrently with the certification application, which at that time was scheduled to begin on April 18, 2016.

[27] Subsequent amendments to the pleadings have been filed by the applicant. The pleadings reviewed are the plaintiff's Third Amended Notice of Civil Claim.

III. DISCUSSION

[28] The goals of the *CPA* are access to justice, behaviour modification and judicial economy. These goals are to be kept in mind in the certification process. The requirements for obtaining certification are set out in s. 4(1) of the *CPA*:

> 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[29] In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters, including the following (s. 4(2)):

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[30] The onus is on the party seeking certification to meet the requirements. The burden is not an onerous one. The cause of action requirement in s. 4(1)(a) is satisfied unless, assuming all the pleaded facts are true, it is plain and obvious that the claim cannot succeed: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980; *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25. With respect to the other four requirements in s. 4(1), the applicant need only provide a minimum evidentiary basis that shows some basis in fact for each of them; the certification hearing is procedural and not the forum where the merits of the action are decided: *Hollick* at paras. 24–25; *Dow Chemical Company v. Ring, Sr.*, 2010 NLCA 20 at para. 14, leave to appeal refused 2010 CanLII 61130 (S.C.C.). The "some basis in fact" standard does not require the court to resolve conflicting facts and evidence at the certification stage. The authorities on this point have reiterated that at the certification stage the court is ill-equipped to resolve such conflicts: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102 [*Microsoft*].

[31] In this respect, I note (as I have in the past) the observation of Rothstein J., for the Court, in *Microsoft* at para. 105:

> Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. Consequently, the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the *CPA* is

> the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).

[32] While not deciding the merits of the action, the court must equally avoid only symbolic scrutiny of the adequacy of the evidence. The court acting as a gatekeeper is to use the certification process as a meaningful screening device: *Microsoft* at para. 103.

[33] If the five requirements under s. 4(1) have been established the court must certify the action.

A. Cause of action

[34] The plaintiff pleads (a) breach of contract, (b) negligence, (c) breach of confidence, (d) breach of privacy and intrusion upon seclusion, and, in the alternative, (e) unjust enrichment and waiver of tort.

[35] The defendant says that the civil claim does not disclose a cause of action. The defendant takes issue with each individual cause of action, saying that the plaintiff's pleadings suffer from numerous deficiencies. The defendant also says that its liability is limited by terms in the contracts the plaintiff seeks to rely on.

[36] There are two issues that touch on multiple causes of action, and which I will address first: (1) forum selection and choice of law, and (2) whether *PIPEDA* is a complete code that precludes common law claims for breach of privacy.

1. Forum selection & choice of law

(a) Plaintiff's position

[37] The plaintiff says that this proceeding is brought in this Court based on the forum selection clause in the contract (stated at para. 11 above), which provides that disputes concerning the contract or the website must be brought in this Court.

[38] The plaintiff says that "the federal laws of Canada, including the common law" are available to found the class members' claims because (a) Peoples Trust is a federally-licenced trust company; (b) the choice of law clause provides that federal

common law applies; (c) Peoples Trust is subject to *PIPEDA*; and (d) Peoples Trust entered into contracts with class members across Canada.

[39] In the alternative, the plaintiff says that the choice of law clause is invalid for ambiguity or "the circumstances" are such that the Court should disregard it, and that the laws of British Columbia apply to all claims other than intrusion upon seclusion. The plaintiff does not specify what "the circumstances" may be. The plaintiff says in the further alternative that the law of the place in which the class member resided applies to intrusion upon seclusion (although as the plaintiff did not plead a primary alternative for intrusion upon seclusion I do not think this is a "further" alternative).

(b) Defendant's position

[40] The defendant does not take issue with the plaintiff's choice of forum and does not expressly counter the plaintiff's submissions on choice of law. However, as will be seen, the defendant submits that the common law of British Columbia, not "federal common law", applies to the plaintiff's common law claims. The defendant also submits that the Applicable Law clause is "invalid and inapplicable" because it would result in contracting out of *PIPEDA*, which is binding public interest legislation.

(c) Analysis

[41] In my view, it is not plain and obvious that there are no reasonable causes of action available under federal common law.

[42] The choice of law provision refers to "applicable federal laws". This is certainly broad enough to potentially include federal common law. The real issue is whether there exists any "applicable" federal common law with respect to any of the claims: breach of contract, negligence, breach of confidence, intrusion upon seclusion, unjust enrichment, and waiver of tort. On this point I note that although the plaintiff asserts that the federal common law founds the claims, nowhere in the submissions is any cause of action differentiated from provincial common law other than the tort of intrusion upon seclusion.

[43] There is no doubt that some federal common law exists: *Roberts v. Canada,* [1989] 1 S.C.R. 322 at 339-340. Defining what is and is not federal common law for the purpose of determining whether any applicable federal common law exists is more difficult. Most recently, in *Windsor (City) v. Canadian Transit Co.,* 2016 SCC 54*,* the Supreme Court of Canada referred, at para. 41, to federal law as including "a rule of the common law dealing with a subject matter of federal legislative competence".

[44] Counsel's submissions on this point were limited. The plaintiff referred to *Condon v. Canada*, 2014 FC 250, varied 2015 FCA 159, as an example of the application of the federal common law of intrusion upon seclusion. However, the mere fact that the Federal Court applied a common law doctrine does not mean that that doctrine constitutes federal common law. *Condon* was not concerned with whether the tort of intrusion upon seclusion was part of federal common law. Although the Federal Court's jurisdiction is limited to administering the "laws of Canada", there was no challenge to its jurisdiction in *Condon*, and in any event "[w]here a case is in 'pith and substance' within the court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issues presented by the parties": *ITO-Int'l Terminal Operators v. Miida Electronics,* [1986] 1 S.C.R. 752 at 781.

[45] The case law discloses a number of examples of federal common law: the law of aboriginal title: *Roberts* at 339-340; federal crown liability: *Quebec North Shore Paper v. C.P. Ltd.*, [1977] 2 S.C.R. 1054 at 1063; the execution of Federal Court judgments: *British Columbia (Deputy Sherriff) v. Canada*, [1992] 4 W.W.R. 432 (B.C.C.A.); and even, perhaps, a federal common law of contributory negligence: *Gottfriedson v. Canada*, 2013 FC 545, aff'd 2014 FCA 55 (finding it unnecessary to express an opinion on this issue, however), at paras. 33-35.

[46] The case law does not, however, disclose much in the way of method. A "rule of the common law dealing with a subject matter of federal legislative competence" cannot include every rule of the common law that Parliament could modify: *Roberts* at 338-339. It has been speculated by some that the test is

exclusive legislative competence: *R v. Prytula,* [1979] F.C. 516 at 523-525 (C.A.), aff'd in *Rhine v. The Queen*, [1980] 2 S.C.R. 442 (SCC not expressing an opinion on this point). I do not purport to express a definitive opinion on the merits of this test.

[47] As a rule of thumb, it may be true that common law torts are "matters of provincial law": *Canadian Transit Company v. Windsor (Corporation of the City)*, 2015 FCA 88, rev'd in *Windsor* though not on this point. But "legal institutions, such as 'tort' cannot be invariably attributed to sole provincial legislative regulation or be deemed to be, as common law, solely matters of provincial law": *Rhine* at 447.

[48] It appears at least arguable, then, that the federal common law is available.

[49] With respect to intrusion upon seclusion in particular, although a number of decisions have held that there is no common law tort of breach of privacy in British Columbia, those decisions cannot fairly be read as addressing whether such a cause of action is recognized under federal common law: *Hung v. Gardiner,* 2002 BCSC 1234, aff'd 2003 BCCA 257*,* at para. 110; *Bracken v. Vancouver Police Board,* 2006 BCSC 189 at paras. 28; *Mohl v. University of British Columbia,* 2009 BCCA 249, leaved to appeal ref'd [2009] S.C.C.A. No. 340, at para. 13; *Demcak v. Vo,* 2013 BCSC 899 at para. 8; *Ari v. Insurance Corporation of British Columbia,* 2013 BCSC 1308 at para. 63 [*Ari BCSC*]; *Ari v. Insurance Corporation of British Columbia,* 2015 BCCA 468 at para. 9 [*Ari BCCA*]; *Cook v The Insurance Corporation of British Columbia,* 2014 BCSC 1289 at paras. 48, 72*.*

[50] The issue simply does not appear in any of these cases. While provincial superior courts may address federal common law, the reasons behind not recognizing a common law privacy tort in British Columbia appear to arise mainly from concerns about the legislative intention behind provincial legislation such as the BC *Privacy Act,* R.S.B.C. 1996, c. 373, or the *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165. Whether the provincial legislature intended to abolish or preclude the development of federal common law, and if it did whether it is constitutionally capable of doing so, appear to me to be very different issues from whether the provincial common law recognizes this tort.

[51] The absence of consideration of the federal common law is significant, as although the tort of negligence, for example, may in general be a matter of provincial law, maritime negligence falls within exclusive federal legislative competence: *Ordon Estate v. Grail,* [1998] 3 S.C.R. 437. It is therefore possible for a cause of action to be characterized as federal common law in one context and not in others.

[52] The question remains open whether there may be applicable federal common law. In my view, such a novel claim involving the resolution of complex and undecided questions of constitutional law should be allowed to proceed.

[53] The facts pleaded on this point are somewhat thin. The fact that Peoples Trust entered into contracts across Canada is irrelevant. By this logic, when Peoples Trust entered into its first contract concerning the matters at issue, federal common law could not apply; but once it entered into a second (or perhaps, third, or hundredth) similar contract with a person somewhere else in the country, federal common law became applicable. To hold that the law applicable to a contract changes because an unrelated third party enters into a similar contract in a different location does not make sense. Further, as described above, being within federal legislative competence is not, on its own, sufficient to ground federal common law. Reading the pleadings generously, however, being federally licensed and subject to *PIPEDA* appear to advert to more than simple legislative competence. Given the uncertainty around the test for federal common law, and the lack of argument on this point, I cannot conclude that this is bound to fail. Further, it seems at least arguable to me that the choice of law provision has incorporated federal common law.

[54] For these reasons, it is not plain and obvious to me that there is no reasonable cause of action under federal common law.

[55] The defendant's submissions on the applicability and validity of the choice of law term appear to conflate forum selection with choice of law. The clause may or may not be valid to the extent that it might bar recourse to the procedures under *PIPEDA*, but that has nothing to do with what law applies.

[56] Turning to the plaintiff's alternative argument, it appears that if this is the case, the parties will be essentially in agreement on what law applies except for the law related to the tort of intrusion upon seclusion. I note, however, that the plaintiff has not made the ambiguity or validity of the choice of law provision a common issue. In my view, if this alternative argument is to proceed, that will need to be an issue as it affects many of the claims. I address the choice of law submissions on intrusion upon seclusion below.

2. Is *PIPEDA* a complete code?

(a) Defendant's position

[57] The defendant says that *PIPEDA* is a complete code that ousts common law claims for breach of privacy. As the substance of the plaintiff's complaint is that the defendant failed to take reasonable steps to maintain the security of the plaintiff's data, the plaintiff can only pursue his complaint using the remedies and procedures provided by *PIPEDA*. In other words, the plaintiff's civil causes of action are foreclosed by *PIPEDA* "because it is the only statute which applies to the alleged causes of action and it constitutes a complete code to the substance of the plaintiff's complaint".

(b) Plaintiff's position

[58] The plaintiff says that *PIPEDA* is not a complete code that ousts common law breach of privacy claims. He points to three cases that concluded that *PIPEDA* was not a complete code: *Condon* at para. 115; *Chandra v. CBC*, 2015 ONSC 5303 at para. 33; *Romana v. The Canadian Broadcasting Corporation et al*, 2016 MBQB 33 at paras. 22–24.

[59] The plaintiff also notes that in *Hopkins v. Kay*, 2015 ONCA 112, leave to appeal refused 2015 CanLII 69422 (S.C.C.), the Court held that the Ontario *Personal Health Information Protection Act*, S.O. 2004, c. 3, Sch A ("*PHIPA*") is not a complete code that ousts common law breach of privacy claims. The plaintiff says that *PIPEDA* is similar to *PHIPA* because both statutes only permit a complainant to seek damages in court after the Commissioner has made a report or an order. One

reason the Court gave for finding that *PHIPA* is not a complete code is that a complainant cannot seek damages under *PHIPA* absent a Commissioner's order (I note that a person may also seek damages following a conviction under *PHIPA,* but I do not think this would alter the argument).

[60] Further, according to the plaintiff even if *PIPEDA* were a complete code, it would not oust the plaintiff's breach of contract or negligence claims.

[61] With respect to the breach of contract claim, the plaintiff alleges that the contracts between the class members and the defendant incorporated certain statutory provisions from *PIPEDA* and provincial privacy legislation by reference. The exhaustive code doctrine "cannot apply to a breach of contract" because "[t]he parties are free to make a contract including a contract to provide security and privacy measures" that incorporates statutory provisions.

[62] As to negligence, the plaintiff says that "the allegations of negligence do not arise from *PIPEDA*"; rather, "[t]he framework for the negligence claim is the defendant's failure to adhere to its own privacy policy and the security measures set out in the contract". The plaintiff says that *PIPEDA* merely informs the standard of care, and that "negligence actions in the common law provinces for breach of an organization's own privacy policies and security measures have unanimously been allowed to proceed and certified as common issues", citing *Condon*; *John Doe*, 2015 FC 916 at paras. 33–36; *Hynes v. Western Regional Integrated Health Authority*, 2014 NLTD(G) 137 at paras. 27–30; *Evans v. The Bank of Nova Scotia*, 2014 ONSC 2135 at paras. 31–34.

(c) Analysis

[63] I agree with the plaintiff's submissions that *PIPEDA* is not a complete code and therefore no claims are barred.

[64] The "complete code" doctrine is described in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada, 2014) at 537, 554:

> The key feature of a code is that it is meant to offer an exhaustive account of the law in an area; it occupies the field in that area, displacing existing common law rules and cutting off further common law evolution.
>
> […]
>
> Legislation constitutes a complete code if it provides a comprehensive regulation of the matter in question, leaving no room for the operation of the common law. A code may take the form of a series of rules set out in a statute or it may confer powers on an institution or office to establish, administer and enforce a program.

[65] For helpful considerations in determining whether and to what extent legislation is a complete code, Sullivan refers to *Pleau v. Canada (Attorney General),* 1999 NSCA 159 at paras. 50-52:

> [50] First, consideration must be given to the process for dispute resolution established by the legislation…. Relevant to this consideration are, of course, the provisions of the legislation…particularly as regards the question of whether the process is expressly or implicitly regarded as an exclusive one. Language consistent with exclusive jurisdiction, the presence or absence of privative clauses and the relationship between the dispute resolution process and the overall legislative scheme should be considered.
>
> [51] Second, the nature of the dispute and its relation to the rights and obligations created by the overall scheme of the legislation...should be considered. In essence, this involves a determination of how closely the dispute in question resembles the sorts of matters which are, in substance, addressed by the legislation…. What is required is an assessment of the "essential character" of the dispute, the extent to which it is, in substance, regulated by the legislative…scheme and the extent to which the court's assumption of jurisdiction would be consistent or inconsistent with that scheme.
>
> [52] Third, the capacity of the scheme to afford effective redress must be considered. Simply put, the concern is that where there is a right, there ought to be a remedy.
>
> [Emphasis in original.]

[66] The Court of Appeal addressed this issue recently in the context of its jurisprudence regarding the *Competition Act*, R.S.C. 1985, c. C‑34 in *Godfrey v. Sony Corporation*, 2017 BCCA 302 at paras. 164-186. The essential distinction in the jurisprudence appears to be that while a simple breach of the *Competition Act*

could not in itself ground relief in restitution, a breach could nonetheless form an element of a distinct cause of action, such as conspiracy.

[67] Legislation, if it forms a complete code, does so not at large but in respect of some matter. Depending on how that matter is defined, legislation may be a complete code with respect to the specific rights it grants but not with respect to all common law principles with which it may overlap to any extent. Thus legislation may preclude restitution based on a simple statutory breach but not civil causes of action, an element of which involves breach of a statute. Even more broadly, it may not preclude a cause of action which involves facts which may also establish a breach of statute, although no element of the cause of action involves establishing a statutory breach.

[68] The fundamental concern is respect for the division of powers, which is achieved by accurately determining legislative intent. That task is guided by two principles: the legislature is presumed not to intend to alter the common law but is also presumed not to intend to create a parallel cause of action where legislation contains an adequate enforcement regime for the rights it grants. Ultimately, the legislation must be examined as a whole in accordance with the modern principle of statutory interpretation.

[69] Dealing with breach of contract first, in my view the “complete code” doctrine cannot apply to this cause of action in any event.

[70] The defendant refers to two cases in support of the proposition that *PIPEDA* is a complete code, excluding all claims, including breach of contract: *Ari BCCA* and *Macaraeg v. E Care Contact Centers Ltd.,* 2008 BCCA 182.

[71] *Ari BCCA* concerns the enforcement of a statutory breach by way of an action in negligence. In my view it is not applicable here. As set out below, this case is not about the enforcement of *PIPEDA* through civil causes of action, and this case does not address the permissibility of incorporating legislation into a contract.

[72] *Macaraeg* does not stand for the asserted proposition. It deals with whether the rights granted by the *Employment Standards Act*, R.S.B.C. 1996, c. 113 are implied by law into employment contracts. The Court of Appeal holds at para. 73 that "the general rule is there is no cause of action at common law to enforce statutorily-conferred rights", except where the legislature intends those rights to be enforceable by civil action. The Court of Appeal goes on to find that the terms of the *ESA* are not implied by law into employment contracts because the legislation provides an adequate enforcement regime. The Court of Appeal says nothing about whether parties may agree to incorporate statutory requirements into a contract.

[73] The rights here are distinct from those in *Macaraeg* as they are not alleged to be "statutorily-conferred". Rather, they are alleged to be conferred by the agreement between the parties. The plaintiff alleges various express or implied terms, referring to various express provisions of the contract. While the pleadings could have been drafted more clearly, as I read them, the plaintiff is not alleging that the provisions of *PIPEDA* are implied by law into all contracts between entities regulated by *PIPEDA* and persons to whom they owe a duty under *PIPEDA*. Rather, it is alleged that the contracts contained a number of freestanding obligations relating to the protection of privacy, and in addition that by express incorporation, and/or by necessary implication, the contracts contained certain terms related to the protection of privacy, some of which required compliance with *PIPEDA*. It is always open to parties to incorporate legislative requirements into their contracts, absent of course some defence such as illegality.

[74] Further, the effect of the defendant's argument with respect to breach of contract would be to turn *PIPEDA* into a statutory ceiling. Parties would not be able to contract for protections other than those already provided by statute. I can find nothing in the legislation that would suggest such an intention.

[75] For these reasons, it is not plain and obvious to me that *PIPEDA* forecloses a claim for breach of contract.

[76] Turning to negligence, it is also not plain and obvious to me that *PIPEDA* forecloses this type of claim.

[77] In my view there is no suggestion in the legislation of any intention to preclude common law claims with respect to the violations of a company's own policies and contractual security measures which result in reasonably foreseeable harm. The same set of facts may or may not result in a violation of both those policies and *PIPEDA*, but that is not the test. The source of the duty and the nature of the inquiry are distinct. Further, the legislation expressly provides at s. 12(1)(b) for the Privacy Commissioner to decline to investigate in favour of other procedures where:

> the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under the laws of Canada, other than this Part, or the laws of a province[.]

[78] I do note that, in my view, the enforcement regime is adequate.

[79] The legislation provides for a hearing *de novo* in the Federal Court, where among other remedies damages may be claimed, including for humiliation: ss. 14, 16; *Englander v. Telus Communications Inc.,* 2004 FCA 387 at para. 48. While a person may only apply after first filing a complaint with the Commissioner, they may then apply to the Federal Court regardless of the disposition of the complaint and even if the investigation was discontinued: s. 14(1). There is a narrow set of circumstances where a person seemingly will not be entitled to a hearing because the investigation will never start. *PIPEDA s.* 12(1) states that the Commissioner shall investigate a complaint unless:

> (a) the complainant ought first to exhaust grievance or review procedures otherwise reasonably available;
>
> (b) the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under the laws of Canada, other than this Part, or the laws of a province; or
>
> (c) the complaint was not filed within a reasonable period after the day on which the subject matter of the complaint arose.

[80] None of these render the enforcement regime in any way inadequate. Subsection (a) merely delays an investigation by requiring a person to *first* access reasonably available review procedures. It does not permanently deprive a person of access to a remedy. Under subsection (b), allowing matters to be dealt with under other more appropriate procedures similarly does not deprive a person of access to a remedy - on the contrary, it facilitates access. Finally, penalizing unreasonable delay cannot be seen as so unfair as to render the enforcement regime inadequate.

[81] The plaintiff has referred to a number of cases which address the adequacy of the enforcement regime in *PIPEDA* in the context of the tort of intrusion upon seclusion. In my view none of them assist the plaintiff.

[82] First is the statement of the Ontario Court of Appeal in *Jones v. Tsige*, 2012 ONCA 32 at para. 50:

> [50] *PIPEDA* is federal legislation dealing with "organizations" subject to federal jurisdiction and does not speak to the existence of a civil cause of action in the province. While BMO is subject to *PIPEDA*, there are at least three reasons why, in my view, Jones should not be restricted to the remedy of a *PIPEDA* complaint against BMO. First, Jones would be forced to lodge a complaint against her own employer rather than against Tsige, the wrongdoer. Second, Tsige acted as a rogue employee contrary to BMO's policy and that may provide BMO with a complete answer to the complaint. Third, the remedies available under *PIPEDA* do not include damages, and it is difficult to see what Jones would gain from such a complaint.

[83] None of the reasons referred to by the Ontario Court of Appeal can justify a finding in this case that *PIPEDA* is inadequate. Peoples Trust is the alleged wrongdoer here and it is an organization to which *PIPEDA* applies. There is no suggestion in the pleadings or anywhere else of a rogue employee. Finally, the remedies available under *PIPEDA* do include damages: s. 16(c).

[84] In *Chandra v. Canadian Broadcasting Corp.,* 2015 ONSC 5303 at para. 33, the court held that *PIPEDA* did not oust the Ontario common law privacy tort:

> [33] Under *PIPEDA*, upon completion of the Privacy Commissioner's investigation, he or she issues a report containing recommendations on how to resolve the complaint. But, as already noted, the legislation specifically leaves open to a complainant the option of bringing a civil proceeding.

> Because of that feature, PIPEDA does not, in my view, constitute the "complete code" which the CBC defendants advocate it does.

[85] I respectfully cannot agree with this reasoning. It seems rather to support the opposite conclusion: *PIPEDA* provides for an enforcement regime that involves civil proceedings in the Federal Court which can result in monetary damages for a breach of privacy. Such a process cannot be seen as inadequate, though it does not provide for proceedings in other courts. More significant to the case, I think, is that *PIPEDA* does not apply to the collection of information for journalistic purpose as noted by the court at paras. 32-37.

[86] In *Romana*, Master Berthaudin held, in the context of a motion to strike pleadings, that it was not plain and obvious that a claim pursuant to *The Privacy Act*, C.C.S.M., c. P125 was precluded by *PIPEDA* or the federal *Privacy Act*, R.S.C. 1985, c. P-21. This case essentially followed *Chandra* and for that reason is not assistive.

[87] The final case referred to is *Condon. Condon* concerned the federal *Privacy Act*. Further, the portion referred to by the plaintiff was discussing the issue of preferable procedure, not whether the enforcement regime of the federal *Privacy Act* was adequate. It is simply not relevant.

[88] Nonetheless, given the distinct source of the duty at issue, the distinct nature of the interest protected, and the express provision for other procedures to deal with matters which may also constitute a violation of *PIPEDA*, I am not prepared to infer from an adequate enforcement regime that parliament intended to abolish all common law remedies which may overlap to any extent.

[89] Given my conclusion above, it is also not plain and obvious to me that *PIPEDA* forecloses any other type of claim.

3. Breach of contract

(a) Plaintiff's position

(i) Contract terms

[90] The plaintiff alleges that he and the proposed class plaintiffs entered identical or substantially similar contracts with the defendant for the provision of services and use of the defendant's website and with respect to the collection, retention, and disclosure of personal information. As part of the agreement, the plaintiff was required to provide the personal information to the defendant. The plaintiff says that the Website Terms & Conditions of Use and the Terms & Conditions posted on the defendant's website are incorporated into the agreement.

[91] The plaintiff says that the contract contained the following express or implied terms:

a. PTC would comply with all relevant statutory obligations regarding the collection, retention, and disclosure of the Plaintiff's and Class Members' Personal Information, including the obligations set out in (collectively, the "Statutes"):
   i. *PIPEDA*;
   ii. The *Personal Information Protection Act*, SBC 2003, c 63 ("BC *PIPA*"); and
   iii. The *Personal Information Protection Act*, SA 2003, C P-6.5 ("AB *PIPA*").
b. PTC would not collect, retain, or disclose the Personal Information except in the manner and for the purposes expressly authorized by the Contract or the Statutes;
c. PTC would keep the Personal Information of the Plaintiff and the Class Members secure and confidential;
d. PTC would take steps to prevent the Personal Information from being lost, disseminated, or disclosed to unauthorized persons;
e. PTC would not disclose the Personal Information without consent;
f. PTC would protect the Personal Information from compromise, disclosure, loss, or theft;
g. PTC would delete, destroy, or not retain the Personal Information and would not disclose the Personal Information when the Plaintiff or Class Members no longer required PTC's services, except as required by law, and

h. PTC would exercise care and caution in selecting its outside technology providers or vendors to ensure that the Personal Information would be protected from compromise, disclosure, or theft.

[92] The plaintiff then cites s. 5(1) of *PIPEDA*. Section 5 provides:

> Compliance with obligations
>
> 5 (1) Subject to sections 6 to 9, every organization shall comply with the obligations set out in Schedule 1.
>
> (2) The word *should*, when used in Schedule 1, indicates a recommendation and does not impose an obligation.
>
> Appropriate purposes
>
> (3) An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.
>
> [Emphasis in original.]

[93] The plaintiff then cites the following portions of Schedule 1 to *PIPEDA*:

> 4.5 Principle 5 —Limiting Use, Disclosure, and Retention
>
> Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfilment of those purposes.
>
> …
>
> 4.5.3
>
> Personal information that is no longer required to fulfil the identified purposes should be destroyed, erased, or made anonymous. Organizations shall develop guidelines and implement procedures to govern the destruction of personal information.
>
> …
>
> 4.7 Principle 7 — Safeguards
>
> Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.
>
> 4.7.1
>
> The security safeguards shall protect personal information against loss or theft, as well as unauthorized access, disclosure, copying, use, or modification. Organizations shall protect personal information regardless of the format in which it is held.
>
> 4.7.2
>
> The nature of the safeguards will vary depending on the sensitivity of the information that has been collected, the amount, distribution, and format of the information, and the method of storage. More sensitive information

should be safeguarded by a higher level of protection. The concept of sensitivity is discussed in Clause 4.3.4.

4.7.3

The methods of protection should include

(a) physical measures, for example, locked filing cabinets and restricted access to offices;

(b) organizational measures, for example, security clearances and limiting access on a "need-to-know" basis; and

(c) technological measures, for example, the use of passwords and encryption.

…

4.7.5

Care shall be used in the disposal or destruction of personal information, to prevent unauthorized parties from gaining access to the information (see Clause 4.5.3).

[94] The plaintiff cites ss. 34–35 of BC *PIPA*:

Protection of personal information

34 An organization must protect personal information in its custody or under its control by making reasonable security arrangements to prevent unauthorized access, collection, use, disclosure, copying, modification or disposal or similar risks.

Retention of personal information

35 (1) Despite subsection (2), if an organization uses an individual's personal information to make a decision that directly affects the individual, the organization must retain that information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it.

(2) An organization must destroy its documents containing personal information, or remove the means by which the personal information can be associated with particular individuals, as soon as it is reasonable to assume that

(a) the purpose for which that personal information was collected is no longer being served by retention of the personal information, and

(b) retention is no longer necessary for legal or business purposes.

[95] Finally, the plaintiff cites portions of AB *PIPA*:

> Compliance with Act
>
> 5 (1) An organization is responsible for personal information that is in its custody or under its control.
>
> (2) For the purposes of this Act, where an organization engages the services of a person, whether as an agent, by contract or otherwise, the organization is, with respect to those services, responsible for that person's compliance with this Act.
>
> …
>
> (5) In meeting its responsibilities under this Act, an organization must act in a reasonable manner.
>
> (6) Nothing in subsection (2) is to be construed so as to relieve any person from that person's responsibilities or obligations under this Act.
>
> Policies and practices
>
> 6 (1) An organization must develop and follow policies and practices that are reasonable for the organization to meet its obligations under this Act.
>
> …
>
> Protection of information
>
> 34 An organization must protect personal information that is in its custody or under its control by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure, copying, modification, disposal or destruction.
>
> …
>
> Retention and destruction of information
>
> 35 (1) An organization may retain personal information only for as long as the organization reasonably requires the personal information for legal or business purposes.
>
> (2) Within a reasonable period of time after an organization no longer reasonably requires personal information for legal or business purposes, the organization must
>
> (a) destroy the records containing the personal information, or
>
> (b) render the personal information non-identifying so that it can no longer be used to identify an individual.

(ii) Breach

[96] The plaintiff says that the defendant breached the contract by:

> a. Recklessly and improperly maintaining, securing, disseminating, disclosing, or releasing the Personal Information of the Plaintiff and the Class Members;

b. Failing to comply with the obligations set out in the Statutes;

c. Retaining the Personal Information of Class Members who did not require PTC's products or services and who are not PTC customers, and for no proper purpose;

d. Failing to implement sufficiently strong safeguards in developing its online application web portal;

e. Failing to treat security as its most important priority;

f. Failing to ensure that the online banking site was secure;

g. Failing to strictly manage access to its online databases;

h. Failing to implement, manage and/or update systems for ongoing monitoring and maintenance to address evolving digital vulnerabilities and threats and specifically to ensure that security was not breached;

i. Failing to encrypt the breached database containing the Personal Information; and

j. Failing to destroy the online applications of Class Members who did not open a PTC account.

[97] In written submissions, the plaintiff adds that Peoples Trust also breached the contract by not adhering to its own internal policy for the protection of personal information, and in particular the Privacy Policy, and by not destroying the personal information as required by contract. The Privacy Policy states, in part:

> **7. The security of your information is a priority for Peoples Trust**
>
> We take steps to safeguard your personal information, regardless of the format in which it is held, including:
>
> Physical security measures such as restricted access facilities and locked filing cabinets.
>
> Shredding of documents containing personal information.
>
> Electronic security measures for computerized personal information such as password protection, database encryption and personal identification numbers.
>
> Organizational processes such as limiting access to your personal information to a selected group of individuals.
>
> Requiring third parties given access to your personal information to protect and secure your personal information.

(iii) Limitation of liability clauses

[98] The plaintiff says that a defence based on limitation of liability clauses "cannot be raised to determine if the pleadings disclose a reasonable cause of action" and,

at most, the clauses "may form a proposed common issue of contract interpretation", citing *Charlton v. Abbott*, 2013 BCSC 1712 at paras. 64–65, rev'd 2015 BCCA 26.

[99] The plaintiff says it will be up to the trial judge to construe the clauses. However, the plaintiff adds that:

(a) the contract is one of adhesion and must be interpreted strictly against the defendant, citing *Manulife*, [1996] 3 S.C.R. 415 at paras. 7–9, 15 and others;

(b) clause 8 in the Website Terms & Conditions does not mention a security breach or theft of personal information and is therefore of no assistance to the defendant; and

(c) clause 1.22 assists the plaintiff because it allows for claims for direct damages resulting from "gross negligence, fraud or wilful misconduct", does not prohibit civil actions or claims arising from the agreement, and is "under inclusive, vague, ambiguous and unworkable".

(b) Defendant's position

[100] The defendant says that the plaintiff's breach of contract claim is bound to fail because:

(a) the plaintiff has not pleaded material facts that would constitute a breach of contract;

(b) the plaintiff has not suffered compensable damages, in part because the alleged damages are too remote from the alleged breach; and

(c) the limitation of liability clauses precludes the plaintiff's claims.

(i) Breach

[101] The defendant says that the plaintiff has not pleaded material facts that would constitute a breach of contract. The defendant says that, assuming the pleaded

facts are true, the defendant agreed to take reasonable steps to protect personal information. However, the plaintiff has not pleaded that the contract contained a term that there were be no unauthorized access to the information; thus, "[t]he mere fact that the plaintiff's security was breached cannot constitute a breach of a contractual (or statutory) commitment to take reasonable steps to prevent such a security breach". According to the defendant, the plaintiff has merely pleaded that a security breach occurred and has not pleaded any material facts to support the conclusion that Peoples Trust did not take reasonable steps to prevent a security breach.

[102] The defendant says that the plaintiff's pleading that the defendant breached the contracts by "recklessly and improperly maintaining…the Personal Information of the Plaintiff" and "[f]ailing to comply with the obligations set out in the Statutes" are not material facts but are conclusions of law, citing *Watson*, 2015 BCCA 362 at para. 10; *Operation Dismantle*, [1985] 1 S.C.R. 441 at 491.

[103] The defendant summarizes its argument as follows:

> 102. The plaintiff has, in essence, pleaded only the following material facts in relation to his claims for breach of contract or warranty: the defendant had a contractual commitment to take reasonable steps to prevent a security breach; and a security breach occurred. This is not a pleading that the contractual commitment at issue was actually breached. Taking the factual (not legal) pleadings as true, it is submitted that the plaintiff has not pleaded the specific facts that would establish that the security steps taken by the defendant were unreasonable. This is a necessary element of establishing a breach of contract or warranty. As there are no such material facts pleaded it is plain and obvious that the claims in contract and warranty must fail and should not be certified.

[104] Finally, the defendant says that paragraphs 54(a)–(b) of the plaintiff's certification submissions are not properly pleaded and do not disclose a cause of action.

(ii) Compensable damages & remoteness

[105] With respect to remoteness, the defendant cites *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30 at paras. 59–62, leave to appeal refused 2015 CanLII 56681 (S.C.C.). The defendant says that the alleged damages "are elusive because

they are too remote to have been contemplated by the alleged class members at the time they provided their personal information".

[106] The defendant also says that the "plaintiff's claim of damages for breach of contract fail for the same reasons explained … regarding damages for negligence". These reasons are discussed below under the "Damages" heading.

(iii) Limitations of liability

[107] With respect to limitations of liability, the defendant points to a portion of the Website Terms & Conditions of Use, attached as Exhibit C to Mr. Tucci's affidavit, including in part:

> 8. Warranties and Limitation of Liability
>
> …
>
> Your use of this Website is at your own risk. In no event will PTC, its Affiliates and Providers, and any other parties involved in creating and delivering this Website's contents be liable for any damages, losses or expenses of any kind arising from or in connection with this Website or its use.
>
> …
>
> PTC is not responsible in any manner for direct, indirect, special or consequential damages, howsoever caused, arising out of use of this Website including but not limited to, damages arising from or related to the installation, use, or maintenance of personal computer hardware, equipment software, or any Internet access services.

[108] The defendant also refers to the "Terms and Conditions", which are Exhibit D to Mr. Tucci's affidavit and provide in part:

> **1.22 Limitation of Liability**
>
> You understand and agree that, except as specifically provided by these Agreement Terms, PTC will be liable to you only for direct damages resulting from gross negligence, fraud or willful misconduct of PTC arising directly from the performance by PTC of its obligations under these Agreement Terms and PTC will not be liable to you for any other direct damages. In addition, PTC will not under any circumstances be liable to you for any other damages, including without limitation, indirect, incidental, special, punitive or consequential losses or damages, even if PTC was advised of the possibility of damages or was negligent.

[109] Thus, the defendant says that even if the contractual damages are not too remote, the plaintiff must demonstrate that these limitation of liability clauses "do not exclude any possible contractual liability", citing *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at paras. 121–123; *Felty v. Ernst & Young LLP*, 2015 BCCA 445 at paras. 45–52.

(c) Analysis

[110] First, I do not think it is plain and obvious that there is no cause of action for breach of contract here, particularly if the plaintiff's pleadings are amended to further particularize the alleged obligations and breaches thereof. The material facts pleaded include a failure to have a comprehensive information security policy, the lack of ongoing monitoring and maintenance, storage of an unencrypted, perpetual copy of personal information, and a failure to immediately notify class members of the breach. These could all arguably support a claim in breach of contract for the obligations alleged.

[111] I do not agree with the defendant's submissions on compensable damages. Proof of damages is not a required element of a breach of contract claim: *Fraser Park South Estates Ltd v. Lang Michener Lawrence & Shaw*, 2001 BCCA 9 at para. 46, leave to appeal to SCC refused [2001] S.C.C.A. No. 72.

[112] Regarding the limitation of liability clause: according to *Tercon*, there is a three-step analysis for exclusion of liability clauses: (1) interpret the contract to see if it the clause applies; (2) if it does apply, determine if it was unconscionable and therefore invalid at the time of contract formation; (3) if it was valid at formation, determine if overriding public policy factors make the clause unenforceable. These questions are not for determination at this stage. It is not plain and obvious that the clause excludes the defendant's liability here. In my view, given that this may affect so many aspects of this litigation, the interpretation of the limitation of liability clause ought to be a common issue as well.

4. Negligence

(a) Plaintiff's position

[113] The plaintiff says that the defendant owed a duty of care that required the defendant to: (a) store the personal information securely; (b) not to disclose the personal information except as permitted by the contract; and (c) to destroy the personal information securely and in a timely manner.

[114] The plaintiff says that the defendant knew or ought to have known of the serious risk of disclosure of personal information but took inadequate steps to prevent disclosure. The plaintiff particularizes the acts and omissions that he says constitute a breach of the standard of care at para. 9 of Part 3 of the notice of civil claim.

[115] The plaintiff says that damages are properly pleaded, and that the plaintiff need only "specify the nature of the damages claimed" citing *Condon FCA* at para. 20.

[116] The plaintiff says that similar negligence claims have been certified in the past, such as *Rowlands v. Durham Health Region, et al.*, 2011 ONSC 719.

(b) Defendant's position

[117] The defendant says that the plaintiff's negligence claim is premised on a negligent breach of privacy, and that there is no such tort in British Columbia, cite *Ari BCCA* at para. 63; *Ari BCSC* at paras. 80–86; *Cook* at paras. 144–156. Therefore, it is plain and obvious that the plaintiff's negligence claim does not disclose a reasonable cause of action.

[118] The defendant goes on to say that the plaintiff has not sufficiently pleaded material facts with respect to damages. The defendant's submissions on this point are discussed below. Since damage is an essential element of any negligence claim, the defendant says that it is plain and obvious that this claim will fail: *Davidson v. Lee, Roche and Kelly*, 2008 ONCA 373 at para. 6.

(c) Analysis

[119] In my view, it is not plain and obvious that the claim in negligence is bound to fail.

[120] The plaintiff alleges the duty of care in this case arises from the defendant's own policies and the contracts, not from its statutory obligations. That distinguishes this case from others involving a claim based in a duty of care said to arise from a statutory duty, such as *Ari BCCA* and *Cook*, as well as *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, which sets out the more general framework for assessing statutory breaches in the context of civil liability.

[121] As no duty of care appears to have been recognized in this context, the appropriate framework is the test from *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) as refined in *Cooper v. Hobart*, 2001 SCC 79 at para. 30:

> At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.

[122] The issue here is whether it is plain and obvious that Peoples Trust did not owe the class a duty of care respecting their personal information.

[123] In my view it is not plain and obvious that the first stage of the *Anns/Cooper* test is not met. The plaintiff has pleaded sufficient facts capable of establishing that harm was reasonably foreseeable. The information collected by Peoples Trust was sensitive and collected in the course of online applications for financial services. It is arguably reasonably foreseeable that harm such as identity theft could result if such information were disclosed or not securely stored, and it was again arguably foreseeable to Peoples Trust given the various policies and contractual terms it

developed. Further, the plaintiff has pleaded sufficient facts that could establish a close and direct relationship between Peoples Trust and individuals who applied to it for financial services.

[124] The more difficult issue is whether there are countervailing policy concerns.

[125] In *Ari BCCA,* the Court of Appeal held that ICBC, a public entity, did not owe a duty of care to the plaintiff. The duty of care in this case was said to arise based solely on the statutory duty imposed on public entities by s. 30 of *FIPPA* see e.g. paras. 2, 6, 12, 50.

[126] The Court of Appeal held that a duty of care was negated based on four policy considerations. First, the alleged duty of care raised the spectre of indeterminate liability because:

> the source of the alleged duty or obligation arises solely out of *Freedom of Information and Protection of Privacy Act, s.* 30, [so] every public body collecting personal information could be subject to the same private law duty of care.
>
> (para. 50)

[127] Second, the legislation was drafted in a purposive manner, raising issues around the exercise of discretion, policy decisions, indeterminacy of the standard of care, and the extent to which the legislation could be said to suggest it should found a private law duty of care:

> Other reasons arise out of the broad and purposive manner in which s. 30 is drafted. Section 30 does not legislate a specific standard of care. The duty is to "make reasonable security arrangements". "Reasonableness" denotes a range of acceptable conduct. This suggests a public body may make its own policy decisions as to the manner in which it fulfills this statutory obligation. The duty is therefore a contextual one, and would no doubt vary depending on the nature of the business of the particular body. Furthermore, there is nothing in the broad wording of the section that suggests it should found a new private law duty of care to an individual, as opposed to the public at large.
>
> (para. 51)

[128] Third, the claim related to policy rather than operational decisions of ICBC, and "policy decisions of public bodies are not actionable in negligence": para. 52.

[129] Finally, "the availability of administrative remedies under [*FIPPA*] militate[d] against the recognition of a duty of care"; *FIPPA* provided a:

> comprehensive complaint and remedy scheme for violations of s. 30 (or violations of a public body's duty to make reasonable security arrangements to protect personal information). Where a statute comprehensively regulates the matter at issue by, for example, establishing an institution or office administering and enforcing a regulatory program, it is proper to infer that the legislature did not intend common law remedies to exist[.]
>
> (para. 53)

[130] In *Cook*, Steeves J. similarly rejected a duty of care respecting the collection, use and disclosure of personal information. The basis of his rejection was that the substance of the plaintiff's claim was violations of *FIPPA* (para. 153), and "[i]t would be conjecture to conclude that the legislature intended to include a private right (and private damages) in *FIPA*" (para. 154). Further, the plaintiff's claim concerned policy rather than operational decisions:

> In general, the respondent here claims that the applicants were negligent when they collected, used and disclosed his personal information. As discussed above, the Commissioner is authorized by FIPA to investigate and make decisions (including reviews) about these matters. In his claim the respondent urges this court to make them. Applying the case law discussed above, that is not the role of this court. Once those decisions are made by the proper authority there may be claims in negligence about how they are implemented but that is not the claim here; those decisions have not yet been made.
>
> (para. 155)

[131] In my view, this case is distinguishable from both *Ari BCCA* and *Cook*. This case involves a duty of care said to arise from the organization's own privacy policies and security measures rather than a duty of care said to arise from a legislated standard applicable to public authorities. I agree with the statement of Crawford J. that the finding that the duty of care in *Ari BCCA* was based on a statutory breach which was "[f]undamental to Madam Justice Garson's reasons": *McIvor v. M.L.K. Pharmacies Ltd.,* 2016 BCSC 2249 at para. 16.

[132] It is for that reason that the same concerns about indeterminate liability do not arise. The same duty is not legislated for all private entities. Similarly, concerns about purposive drafting do not arise because there is no legislative provision at

issue, nor does the policy/operational distinction because Peoples Trust is not a public entity.

[133] The only policy concern potentially at play is the availability of administrative remedies. In my view, this does not negate a duty of care, for the reasons already set out above.

[134] The parties directed my attention to *McIvor*, in which Crawford J. declined to strike out a claim in negligence for the wrongful disclosure of pharmacy records. The plaintiff framed her allegation of negligence as follows:

> The Incident was caused or contributed [to] by the Defendant MLK, or its servants, agents or employees and/or the Defendant Kidd, and the Defendant [sic, Plaintiff] pleads the provisions of *PIPA* and other statues in alleging the Defendants were negligent in disclosing the Plaintiff's personal information.

[135] Crawford J. found that medical professionals owed a duty of care to keep client information in confidence under the common law (para. 26), and even a fiduciary duty to do so (paras. 27-28). *PIPA* did not remove those duties for the individual pharmacist defendant, Mr. Kidd (para. 29). However, *PIPA* did cover the field with respect to the corporate defendant (para. 31).

[136] The basis for the distinction between Kidd and the corporate defendant is not expressly stated, but the plaintiff framed the negligence claim as a breach of a statutory duty, and the bulk of Crawford J.'s discussion of the law is concerned with *Ari BCSC* and *Facilities Subsector Bargaining Assn. v. British Columbia Nurses' Union*, 2009 BCSC 1562. Both of those cases involved duties of care said to arise from statutory duties. In my view, this case is again distinguishable as the corporate defendant's duty of care was said to arise from a statutory duty, whereas Crawford J. found that Kidd's duty instead arose from his professional duties.

5. Breach of confidence

(a) Plaintiff's position

[137] The plaintiff says breach of confidence has been properly pleaded. It requires that confidential communication be communicated in confidence and that the information communicated was misused by the party receiving it to the detriment of

the plaintiff: *Lac Minerals v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 608, 635; *Rodaro v. Royal Bank of Canada*, 2002 CanLII 41834 (Ont. C.A.) at para. 48.

(b) Defendant's position

[138] The defendant says that "misuse" for the purpose of this tort requires the intentional use for the purpose of obtaining a benefit, and the defendant cannot be said to have intentionally been victimized by cybercriminals: *Alberta (Information and Privacy Commissioner) v. Alberta Federation of Labour*, 2005 ABQB 927 at para. 28.

[139] The defendant also says that damage is an essential element of this tort, and that for the reasons given for the negligence claim the plaintiff has not pleaded material facts that constitute compensable damages in relation to breach of confidence: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 at paras. 52–54; *No Limits Sportswear Inc. v. 0912139 B.C. Ltd.*, 2015 BCSC 1698 at paras. 30–31.

(c) Analysis

[140] The key issue here seems to be whether the information was "misused". In *Lac Minerals*, La Forest J. said "[a]ny use other than a permitted use is prohibited" (at p. 642). As stated at 638-639, this cause of action focuses not on the manner of use, but the purpose:

> The receipt of confidential information in circumstances of confidence establishes a duty not to use that information for any other purpose than that for which it was conveyed. If the information is used for such a purpose, and detriment results, the confider will be entitled to a remedy.
>
> [Emphasis added.]

[141] While this cause of action is not so narrowly defined as the defendant argues in that the non-permitted purpose need not be specifically to obtain a profit, it is clear that in order for there to be misuse, there must be use for a non-permitted purpose. The plaintiff has not pleaded any facts capable of establishing that the information was used for a non-permitted purpose.

[142] As to damages, it appears that whether or not "detriment" is a necessary element of breach of confidence is not entirely clear: see *No Limits*. However, in *Cadbury*, Binnie J. said at para. 53 that "La Forest J. [in *Lac Minerals*] regarded detriment as a broad concept, large enough for example to include the emotional or psychological distress that would result from the disclosure of intimate information". I think the plaintiff has pleaded a "detriment" here.

[143] As the misuse element has not been properly pleaded, this cause of action must fail and is therefore struck.

6. Breach of privacy and intrusion upon seclusion

(a) Plaintiff's position

[144] The plaintiff says that *Jones* confirmed the existence of the tort of intrusion upon seclusion. The plaintiff cites the elements in paras. 70-71 of *Jones*:

> [70] I would essentially adopt as the elements of the action for intrusion upon seclusion the Restatement (Second) of Torts (2010) formulation which, for the sake of convenience, I repeat here:
>
> > One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.
>
> [71] The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

[145] The plaintiff says that the Court in *Jones* said that the breach need not be wilful, and recklessness will suffice. Here, the plaintiff says that the defendant's conduct was reckless. Further, the plaintiff says that he need not prove harm to an economic interest.

[146] The plaintiff also cites *Hynes* at para. 25, where the court certified a claim for intrusion upon seclusion because the *Privacy Act*, R.S.N.L. 1990, c. P-22 did not occupy the field.

[147] The plaintiff acknowledges that the common law tort of breach of privacy has not been recognized in British Columbia but says that the choice of law clause "adopts federal common law". The plaintiff points to *Condon*, where the Federal Court certified a claim for the tort of intrusion upon seclusion after the defendant lost a hard drive containing the personal information of student loan recipients.

[148] Alternatively, the plaintiff says that if "federal common law" does not apply, the applicable law for this claim is the law of the place where the injury occurred, and that a sub-class should be created for class members from provinces that recognize a common law breach of privacy tort, citing *Ladas v. Apple Inc.*, 2014 BCSC 1821.

[149] Finally, the plaintiff urges this Court to "keep in play" the intrusion upon seclusion claim in British Columbia, saying "there has not yet been a disposition by the court as to whether intrusion upon seclusion should be recognized in British Columbia.

(b) Defendant's position

[150] The defendant says that "it is indisputable that there is no common law tort of invasion of privacy or intrusion upon seclusion in British Columbia": *Ari BCCA* at para. 9 and others, and accordingly the plaintiff's claims for this tort do not disclose a cause of action. The plaintiff does not plead the statutory tort under the B.C. *Privacy Act*, s. 1.

(c) Analysis

[151] Dealing first with the plaintiff's primary submissions, for the reasons given above I have concluded it is not plain and obvious that there is no federal common law tort of intrusion upon seclusion.

[152] Further, if the federal common law recognizes the tort of intrusion upon seclusion, the plaintiff has pleaded all the required elements. While it may be a

stretch to call the disclosure here reckless, it is not plain and obvious that this must fail. It is also a stretch to say that the defendant invaded the plaintiff's private affairs, as that was done by a third party. However, it does not appear plain and obvious to me at this stage that being sufficiently reckless may not result in that conduct in effect being attributed to the defendant. This is a relatively new tort and it should be allowed to develop through full decisions. The information concerned here is also the type of information identified in *Jones* the disclosure of which might be regarded by the reasonable person as highly offensive.

[153] Turning next to the submissions that the tort should be allowed to proceed under B.C. common law, it is plain and obvious that there is no reasonable cause of action under B.C. common law.

[154] I agree with the plaintiff that the statements in the case law respecting the availability of this cause of action have been, in the main, conclusory: *Hung v. Gardiner,* 2002 BCSC 1234 at para. 110, aff'd 2003 BCCA 257; *Bracken v. Vancouver Police Board,* 2006 BCSC 189 at para. 13; *Mohl v. University of British Columbia,* 2009 BCCA 249 at para. 13; *Demcak v. Vo,* 2013 BCSC 899 at para. 8. It is also true that these cases did not specifically consider the tort of intrusion upon conclusion. I do not however consider that either of these factors make it other than plain and obvious that there is no reasonable cause of action for breach of privacy or intrusion upon seclusion in British Columbia.

[155] The rationale is obvious: British Columbia already has an intentional privacy tort in the B.C. *Privacy Act*: *Foote v. Canada (Attorney General)*, 2015 BCSC 849 at para. 116. The plaintiff argues that intrusion upon seclusion is "an important one to keep in play" because while the B.C. *Privacy Act* prohibits intentional conduct, the tort of intrusion upon seclusion includes reckless conduct within its definition of intention. But defining the elements of the tort was a policy decision the legislature was entitled to make, and one which ought not to be undercut by this Court's development of a substantially identical but slightly broader common law tort. If, as the plaintiff argues, the B.C. *Privacy Act* requires updating to deal with societal changes, that is a task for the legislature.

[156] On the plaintiff's alternative choice of law submission, it is plain and obvious that there is no cause of action based on the residence of class members.

[157] There is a flaw in the plaintiff's submissions: residence does not necessarily correspond to where harm is experienced. Even if I were to accept that the applicable law was the law of the location where class members experienced harm, and I decline to comment on that point, it would only be by coincidence that this was the law of their residence. Without deciding what the predominant element of the tort is, I can see no element that would result in the choice of law rule being the law of a person's residence.

[158] The plaintiff argued in the alternative that the choice of law rule for intrusion upon seclusion was a novel issue and should go forward on that basis. It is indeed a novel issue. But the plaintiff has pleaded that the law of the class members' residences give them a cause of action. This is bound to fail based on the present assertion.

7. Unjust Enrichment and waiver of tort

(a) Plaintiff's position

[159] In the alternative, the plaintiff waives the torts and claims restitution of and a constructive trust over the defendant's unlawful gains.

[160] The plaintiff says that the issue of whether waiver of tort is an independent cause of action or merely a remedy for unjust enrichment should not be resolved at the certification stage and, as a benefits-based claim, the claim may be established without proof of any loss by the plaintiff, citing *Serhan Estate v. Johnson & Johnson*, (2006), 85 O.R. (3d) 665 at para. 68 (Div. Ct.); *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at para. 31, leave to appeal refused 2010 CanLII 32435 (S.C.C.); *Pro-Sys* at paras. 93–97.

[161] The plaintiff says, citing *Steele v. Toyota Canada Inc.*, 2011 BCCA 98 at paras. 45–52, leave to appeal refused 2011 CanLII 69654 (S.C.C.), that at the certification stage:

(a) waiver of tort can be framed as an independent cause of action;

(b) the plaintiff does not need to plead all the elements of an action in unjust enrichment; and

(c) damages are not an essential element of a claim in waiver of tort.

[162] The plaintiff says that the pleadings allege all three elements of a claim in unjust enrichment. With respect to the lack of juristic reason, the plaintiff seems to say that the due to the defendant's breach of contract, the contract is not a juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*,, 2004 SCC 25 at para. 57; *Tracy (Representative ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2009 BCCA 110 at paras. 16–17, leave to appeal refused [2009] S.C.C.A. No. 194; *Buckley v. Tutty* (1971), 125 C.L.R. 353 at 376, [1971] HCA 71.

[163] The plaintiff says he has properly pleaded waiver of tort both as an independent cause of action and as a remedy.

[164] The plaintiff also says he has pleaded the elements of a constructive trust based on wrongful conduct and a constructive trust based on unjust enrichment, citing *Infineon* at paras. 31–33; *Garland* at para. 30; *ICBC v. Lo*, 2006 BCCA 584 at paras. 59–63; Donald M. Waters, ed., *Waters' Law of Trusts in Canada,* 3d ed (Toronto: Carswell, 2005) at 461.

(b) Defendant's position

[165] The defendant reiterates its submission that *PIPEDA* is a complete code and forecloses a claim in waiver of tort. I have already rejected this argument. The defendant says *PIPEDA s.* 16 clearly limits recovery to actual damages: *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310 at paras. 64, 80, varying 2010 BCSC 650, leave to appeal refused [2012] S.C.C.A. No. 398; *Low v. Pfizer Canada Inc.*, 2015 BCCA 506 at paras. 93–97, leave to appeal refused [2016] S.C.C.A. No. 55.

[166] The defendant also says that there is no connection between the alleged wrongful conduct and the alleged benefit flowing to the defendant. Thus, no

"sufficient causal connection exists[s] between the wrongful conduct and the amount for which the defendants could be ordered to account": *Heward v. Eli Lilly & Company*, 2007 CanLII 2651 (Ont. S.C.J.) at para. 101, aff'd 2008 CanLII 32303 (Div. Ct.); cf. *Hill v. Canada (Attorney General)*, 2007 CanLII 11729 (Ont. S.C.J.) at para. 6, aff'd 2008 ONCA 132, leave to appeal refused [2008] S.C.C.A. No. 167. There is no causal connection between the alleged inadequate security measures and "the gross revenue … or alternatively the net income" received by the defendant "as a result of the fees, interest, and service charges generated on products or services" it provided: *Wakelam v. Johnson & Johnson*, 2014 BCCA 36 at para. 69, leave to appeal refused [2014] S.C.C.A. No. 125.

[167] The defendant disputes the plaintiff's argument that damages are not an essential element for a claim of waiver of tort, saying that *Steele v. Toyota Canada Inc.*, 2011 BCCA 98 has been overtaken by more recent SCC and BCCA jurisprudence: *Charlton v. Abbott Laboratories Ltd.*, 2015 BCCA 26 at paras. 119–124; *Koubi CA*, at paras. 64–77; *Pro-Sys*, at paras. 130–135.

[168] With respect to unjust enrichment, the defendant says the pleadings do not establish a deprivation that corresponds with the alleged enrichment. Further, the defendant says that the contract is a juristic reason for any enrichment and the plaintiff cannot simultaneously bring unjust enrichment and breach of contract claims: *Pro-Sys* at para. 85; *Garland* at para. 44.

[169] Finally, the defendant says that there is no basis to impose a constructive trust because the claim is purely monetary and there is no referential property: *Pro-Sys* at paras. 91–92.

(c) Analysis

[170] The elements required to establish unjust enrichment are: (1) an enrichment to the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment: *Garland* at para. 30.

[171] I agree with the defendant that there is no unjust enrichment claim here. A contract is a juristic reason for payment under the contract; an action in unjust

enrichment fails if the contract explains the transfer. The plaintiff does not allege that the contract, or any part of it, is void or unenforceable (this distinguishes *Garland* and *Tracy*, which involved payments that were illegal under the *Criminal Code*).

[172] In *Watson v. Bank of America Corporation,* 2014 BCSC 532, the Court certified the claim in waiver of tort and said the following:

> [158] Waiver of tort is a doctrine that allows a plaintiff to disgorge a defendant's gains from tortious conduct rather than recover his or her own loss. It is a benefit-based claim as opposed to a loss-based claim. The doctrine is the subject of substantial judicial and academic debate (*Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 at para. 579 [*St. Jude*]):
>
> > [579]…the primary debate about waiver of tort has been whether the doctrine exists as an independent cause of action in restitution (the independence theory) or is parasitic of an underlying tort (the parasitic theory). Under the parasitic theory, waiver of tort may only be invoked where all of the elements of the underlying tort have been proven, including damage to the plaintiff if that is an element of the tort. If, however, waiver of tort exists as an independent cause of action, by invoking the doctrine, a plaintiff can claim the benefits that accrued to the defendant as a result of the defendant's wrongful conduct, even if the plaintiff suffered no harm. It is also noteworthy that the independence theory of waiver of tort is not the same as an action for unjust enrichment, as the plaintiff does not have to demonstrate a deprivation that corresponds to the defendant's enrichment.
>
> As a result, it may not be necessary for a plaintiff to establish every element of the underlying tort, including proof of loss.
>
> [159] Given this controversy, courts have generally refused to strike the claim at the pleadings stage; usually in favor of deferring the decision to a trial judge with the benefit of a full factual record (*Koubi* at paras. 15-40; *St. Jude* at paras. 578-582). However, it is doubtful that a full factual record is necessary, or even helpful, when considering the debate (*St. Jude* at paras. 584-587). The Court in *Koubi* did impose a minimal constraint on the doctrine at the certification stage (at paras. 79-80). Nevertheless, the Court in *Microsoft*, despite being presented with an opportunity, held that the appeal was not the proper place to resolve the debate and instead merely found that it was not plain and obvious that the claim would fail (at paras. 93-97).
>
> [160] I echo the comments in *Koubi* and *St. Jude* that the debate needs to be resolved, but if *Microsoft* was not a proper venue for resolution then neither is this certification motion where the debate has received little attention from the parties. The plaintiff has pled and argued for a very standard waiver of tort claim based on the alleged overcharges; the kind that has been certified in many other class actions. …

[161] Accordingly, the plaintiff has properly pled a claim in waiver of tort.

[173] I do not agree with the defendant's submission that the debate regarding whether loss must be proven for waiver of tort has been resolved by more recent jurisprudence. *Koubi CA* and *Charlton* simply state that neither the *Business Practices and Consumer Protection Act,* SBC 2004, c. 2, nor the *Sale of Good Act,* R.S.B.C. 1996, c. 410, can ground a claim in waiver of tort. *Pro-Sys* states that aggregate damages cannot stand in for proof of loss.

[174] Nonetheless, it is my view that this claim is bound to fail whether it is a remedy or a cause of action. As a cause of action, it would require a legal wrong by the defendant and a benefit flowing to the defendant as a result: *Koubi CA* at para. 41. Here, the plaintiff has not pleaded that a benefit flowed to the defendant as a result of its failure to secure the personal information. The fees, service charges, etc. collected by Peoples Trust are not connected to the legal wrong. As a remedy, the plaintiff would recover the benefit the defendant obtained from the underlying wrong. But again, the underlying wrong is unconnected to the benefits that the plaintiff asserts.

8. Damages

(a) Plaintiff's position

[175] The plaintiff says that the proposed class members' damages include (a) damage to credit reputation; (b) mental distress; (c) costs incurred in preventing identity theft; (d) out-of-pocket expenses; (e) wasted time, inconvenience, frustration, and anxiety associated with taking precautionary steps to address the breach; (f) time lost taking these steps; and (g) likely, or a real and substantial possibility, of future damages due to identity theft and phishing attempts.

[176] The plaintiff says that damages are properly pleaded, and that the plaintiff need only "specify the nature of the damages claimed": *Condon FCA* at para. 20.

[177] The plaintiff Tucci says he and the proposed class suffered damages "including time-consuming, inconvenient, frustrating measures required to determine

whether their Personal Information was involved in the Breach, and further steps to protect themselves from identity theft".

[178] The plaintiff Tucci says he spent at least five hours taking steps to "address" the breach by calling the defendant and credit reporting agencies, taking the steps recommended by the defendant, and additional steps to protect against identity theft. He says that "thousands of [c]lass [m]embers" had similar experiences and wasted countless hours due to the privacy breach. The plaintiff says their losses should not go unremedied.

[179] The plaintiff says that the contract offered peace of mind in that "in exchange for applying for [the defendant's] products and services, the [P]ersonal [I]nformation would not be lost, disseminated, or disclosed to unauthorized persons". Therefore, the proposed class members are entitled to damages for emotional upset, disappointment, and anxiety resulting from the breach: *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 at paras 38–49.

[180] The plaintiff also says that the class is entitled to damages to pay for active credit monitoring services rather than the passive monitoring provided by the credit flags. The plaintiff says this recognizes the increased risk of identity theft resulting from the breach. The plaintiff cites Vincent R. Johnson, *Credit-Monitoring Damages in Cybersecurity Tort Litigation* (2011) 19:1 Geo. Mason L. Rev. 113.

[181] The plaintiff points to U.S. cases where the court has awarded damages for credit monitoring or has ordered defendants to provide adequate credit monitoring services: *1-800-E. W. Mortg. Co. v. Bournazian*, No. 09CV2123, 2010 WL 3038962 at *1-3 (Mass. Super. Ct., July 18, 2010); *Allstate Ins. Co. v. Linea Latina De Accidentes, Inc.*, No. 09-3681 (JNE/JJK), 2010 WL 5014386, at *2-4 (D. Minn. Nov. 24, 2010). It is submitted that these damages are analogous to damages for medical monitoring due to increased risk caused by the defendant, citing *Johnson* at 152, which have been certified as common issues: *Andersen v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136 at paras. 45, 63 (S.C.J.), leave to appeal refused [2005] O.T.C. 50 (Div. Ct.) (certifying as a common issue "Should the defendants be

required to implement a medical monitoring regime and, if so, what should that regime comprise and how should it be established?") and *Banerjee v. Shire Biochem Inc. et al.*, 2010 ONSC 889 at paras. 28, 33, 55 (certifying the same question).

[182] The plaintiff also says they are entitled to nominal damages for breach of contract even if the breach did not cause them economic damages, citing *Fraser Park South Estates Ltd. v. Lang Michener Lawrence & Shaw*, 2001 BCCA 9 at para. 46. The plaintiff also points to *Neil v. Equifax Canada Inc.*, 2005 SKPC 105 at para. 29; *Stasiuk v. Boisvert*, 2005 ABQB 798 at para. 18; and *Tanglewood (Sierra Homes) Inc. v. Bell Canada*, 2010 CarswellOnt 7687, [2010] O.J. No. 2344 at paras. 71–78 (S.C.J.) as examples of damages of this nature to recognize a variety of non-quantifiable harms.

[183] With respect to the breach of privacy tort claims, the plaintiff says that damage should be awarded to remedy "intangible harm such as hurt feelings, embarrassment or mental distress, rather than damages for pecuniary losses", citing *Jones* at para. 77. The plaintiff says "[m]arking the wrong that has been done is especially important in … actions for invasion of privacy that involve violations of the *PIPEDA*, which has quasi-constitutional status *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at paras. 24–25.

[184] The plaintiff cites *Nammo v. TransUnion of Canada Inc.*, 2010 FC 1284 at paras. 71 and 77, for the proposition that damages may be awarded for *PIPEDA* breaches even where the plaintiff cannot quantify the harm suffered, and that damage awards should assessed with a view to vindicating the right violated and deterring future breaches, in addition to compensation.

(b) Defendant's position

[185] The defendant says that the plaintiff has not properly pleaded the damages element of his claims in breach of contract, negligence, and breach of confidence:

(a) The defendant says that the "plaintiff's claim of damages for breach of contract fail for the same reasons explained… regarding damages for negligence".

(b) The defendant says that the plaintiff has not sufficiently pleaded material facts with respect to damages. Since damage is an essential element of any negligence claim, it is plain and obvious that this claim will fail: *Davidson* at para. 6.

(c) The defendant says that damage is an essential element of the tort of breach of confidence, and that for the reasons given for the negligence claim the plaintiff has not pleaded material facts that constitute compensable damages in relation to breach of : *Cadbury*, at paras. 52–54; *No Limits* at paras. 30–31.

[186] The defendant says that the damages pleaded by the plaintiff in paras. 20–21 of Part 1, and paras. 14–15 of Part 3, of the Notice of Civil Claim are not material facts supporting a claim for damages but are mere conclusory assertions that damages exist. The remainder of the damages claims are for, in essence, damages for lost time, inconvenience, and the risk of identity theft.

[187] The defendant cites *Mazonna c. DaimlerChrysler Financial Services Inc./Services financiers DaimlerChrysler Inc.*, 2012 QCCS 958, in which the Court refused to certify a proposed class action arising from the defendant's loss of a data tape containing personal information. In *Mazonna*, the Court concluded that the plaintiff failed to meet the threshold of showing *prima facie* the existence of compensable damages:

> [56] In the Court's view, the Petitioner fails to meet the test that she has suffered damages.
>
> [57] She did indeed suffer anxiety; she has had to change, minimally, some of her habits. However, these inconveniences were negligible, so much so that she never felt the need to take any steps to alleviate her anxiety. The most she did was to keep the minimum amount of money in the account from which her lease payments were made and to check, twice a month, rather than once a month, on the Internet, whether her account had been tampered with.
>
> [58] This is not enough to meet the threshold, however *prima facie*, of the existence of "compensable" damages.

[188] The defendant cites *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 9:

> [9] This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42; *Page v. Smith*, at p. 189; Linden and Feldthusen, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (C.A.): "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute personal *injury*, and hence do not amount to damage.

[189] The defendant says that, as in *Mazonna*, the plaintiff's pleaded damages are "in the nature of ordinary annoyances and anxieties and do not constitute compensable damages".

[190] The defendant says that the mental distress and wasted time and inconvenience amount to psychological upset, anxiety, or agitation that are not compensable injury: *Koubi BCSC* at paras. 131–146; *Healey v. Lakeridge Health Corporation*, 2011 ONCA 55 at paras. 60–66.

[191] With respect to the risk of identity theft, the defendant says that the claim is entirely speculative.

[192] With respect to out-of-pocket expenses, the defendant says that the nature of these expenses is "entirely unclear" and that the plaintiff has not pleaded any material facts suggesting that such expenses were actually incurred. The defendant cites *Perestrello E Companhia Limitada v. United Paint Co. Ltd.* (1968), [1969] 1 W.L.R. 570 (C.A.), leave to appeal refused [1969] 1 W.L.R. 580 (H.L.), and in particular the Court's statement at 579:

> The same principle gives rise to a plaintiff's undoubted obligation to plead and particularise any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as

> special damage or special damages but is no more than an example of damage which is "special" in the sense that fairness to the defendant requires that it be pleaded.
>
> The obligation to particularise in this latter case arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible.

[193] In response to the plaintiff citing *Rowlands*, the defendant says that in the reasons for approving the settlement (2012 ONSC 3948) the Court "highlighted its approval of [*Mazonna*] in concluding that the pleaded damages were minor, transient and non-compensable".

[194] The defendant says that the plaintiff's pleadings on punitive damages are conclusion of law; and the only remedies available for a breach of *PIPEDA* are those provided on *PIPEDA*: *Koubi CA* at paras. 63–65; *Wakelam* at para. 66; *Unlu v. Air Canada,* 2015 BCSC 1453 at para. 63.

(c) Analysis

[195] In my view, the plaintiff's pleadings are sufficient for the cause of action requirement in respect to breach of contract. Proof of damages, as stated above, is not a requirement for breach of contract. Similarly, the element of detriment for breach of confidence was adequately pleaded, although that claim failed on the misuse element.

[196] Turning to negligence, the plaintiff has pleaded sufficient material facts capable of establishing damages. I will deal with each type of loss alleged in turn.

[197] In my view, it is not plain and obvious that damage to credit reputation cannot constitute a compensable harm.

[198] I agree with the defendant that the types of mental distress alleged by the plaintiff do not rise to the level of harm which is "serious and prolonged and rise[s] above the ordinary annoyances" referred to in *Mustapha* at para. 9. Inconvenience, frustration and anxiety are part of normal life. More importantly, there are no material facts alleged which could rise to the required level.

[199] Out of pocket expenses are clearly a type of compensable harm. The defendant appears to have conflated the loss element of negligence with principles regarding pleading certain heads of damages. It may be that the plaintiff ought to particularize the expenses claim further, but that is not an element of the tort of negligence. Costs incurred in preventing identity theft appear to be substantially similar to this.

[200] It is also not plain and obvious that wasted time and inconvenience associated with taking precautionary steps to address the breach are not compensable harms. I consider that the issue of anxiety and frustration are better dealt with under mental distress, above. I note that the court in *Rowlands* did not, in fact, "approve" *Mazonna*, but simply noted it was useful for assessing the risks of the action. Further, the finding in *Mazonna* was based on an examination of the representative plaintiff in advance of the certification hearing. That is not the case here. The plaintiff cannot be faulted for not having provided detailed evidence of this kind of damages when such was never required. This may need to be further particularized later, however.

[201] The likelihood of the risk of identity theft is not a matter that can be determined at this stage. The plaintiff has pleaded that there is a "real and substantial chance" that the information will be used to engage in a number of forms of identity theft. Given that the information is said to have been stolen by cybercriminals, it is certainly not plain and obvious that this risk will not be proven to be a sufficiently significant risk to be compensable in some manner. The analogy to medical risks does not appear to me to be so lacking in merit that this must fail. Further, the novel issue of credit monitoring services as a remedy does not appear bound to fail.

[202] For these reasons the plaintiff has sufficiently pleaded the loss element of negligence.

[203] As to punitive damages, no damages are claimed for a violation of *PIPEDA* and so the defendant's submissions are misdirected on this point. Even if they were

not misdirected, however, they would still be wrong. All of the cases referred to (*Koubi CA, Wakelam* and *Unlu*) concerned statutory regimes that prescribed specific remedies. *PIPEDA,* on the other hand, provides a wide discretion as to remedy:

> 16 The Court may, in addition to any other remedies it may give,
>
> (a) order an organization to correct its practices in order to comply with sections 5 to 10;
>
> (b) order an organization to publish a notice of any action taken or proposed to be taken to correct its practices, whether or not ordered to correct them under paragraph (a); and
>
> (c) award damages to the complainant, including damages for any humiliation that the complainant has suffered.
>
> [Emphasis added.]

[204] It is nonetheless plain and obvious to me that there is no claim for punitive damages here. Punitive damages are awarded for misconduct which is high-handed, malicious, or which otherwise merits condemnation: *Whiten v. Pilot Insurance Co.,* 2002 SCC 18. The pleadings here do not allege anything remotely approaching that level. I agree with the defendant that the pleadings on punitive damages also essentially plead conclusions of law rather than material facts.

B. Identifiable class

[205] Section 4(1)(b) of the *CPA* requires an identifiable class of two or more persons to certify a class proceeding. Defining the scope of the class is crucial: it identifies individuals who have a possible claim against the defendant, it identifies those individuals entitled to notice of the certification and, if relief is rewarded, it identifies those who are bound by the judgment: *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46 at para. 38.

[206] A class should be defined so that it is not overly broad; all attempts to narrow the class, without doing so arbitrarily, should be made: *Hollick* at para. 21. Where the scope of the class is not obvious, it is the putative representative of the class who bears the burden of ensuring the scope is appropriately narrowed. The Court in *Hollick* also noted that implicit in the “identifiable class” requirement is the

requirement that there be some rational relationship between the class and common issues: para. 20.

[207] The class definition must state objective criteria from which class members could be identified: *Western Canadian Shopping Centres* at para. 38.

[208] The proposed class is stated as:

> All persons residing in Canada who completed an online account application with PTC [Peoples Trust Company] and whose Personal Information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet.

[209] The plaintiff proposes two sub-classes:

> i. The "Resident Sub-Class":
>
> All persons residing in British Columbia who completed an online account application with PTC and whose Personal Information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet; and
>
> ii. The "Non-Resident Sub-Class":
>
> All persons resident outside of British Columbia who completed an online account application with PTC and whose Personal Information was contained on a database in the control of PTC which was compromised and/or disclosed to others on the internet.

[210] In the notice of application, the plaintiff asks that the class be certified in an opt-out basis for B.C. class members and on an opt-in basis for non-resident class members. However, in submissions the plaintiff asks that it be certified on an opt-out basis for both subclasses.

1. Plaintiff's position

(a) 2 or more persons

[211] The plaintiff estimates that the class contains about 11,000 to 13,000 members and points to the following:

(a) Mr. Hislop's admission that there was an unauthorized intrusion into a database containing the personal information of about 11,000 persons.

(b) the Privacy Commissioner's report which states that the personal information of "some 12,000 customers was compromised" by the breach.

(c) a November 9, 2013 Toronto Star article stating that "about 12,000 to 13,000 customers have been notified in writing" of the breach.

[212] The plaintiff says that the defendant sent the letter to about 12,000–13,000 individuals and that Peoples Trust has records about the class members to whom it sent the letter advising of the breach, which can be made available in document discovery and therefore the identity of the other class members can be determined from the defendant's records.

(b) Objectively identifiable

[213] The plaintiff says that the class is defined by reference to objective criteria: the class includes those who completed an online account application with Peoples Trust and whose personal information was in a database in Peoples Trust control that was compromised and/or disclosed to others on the internet by the breach.

(c) Opt-out class for non-resident members

[214] The plaintiff acknowledges that normally, class members residing outside of British Columbia must opt-in to a B.C. class proceeding. However, the plaintiff says that this case is exceptional because, by entering into their contracts with the defendant, the non-resident class members agreed that the contract would be governed by B.C. law and submitted and attorned to the jurisdiction of this Court and/or agreed to be bound by a decision of this Court.

[215] The plaintiff citing *Bisaillon v. Concordia University*, 2006 SCC 19 at para. 16; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 109 submits, that a flexible and generously interpretation of the *CPA* militates in favour of certifying a national opt-out class. Specifically, it is argued that:

(a) members of the non-resident subclass have agreed to be bound by judgments of this Court and therefore future suits will be *res judicata,* citing *Harrington v. Dow Corning Corp.,* 2000 BCCA 605 at para. 74;

(b) jurisdictional issues do not arise (*Lee v. Direct Credit West Inc.*, 2014 BCSC 462 at para. 52) because, in addition to there being a real and substantial connection between the proceeding and this jurisdiction, all proposed class members submitted and attorned to the jurisdiction of this Court;

(c) requiring non-residents to opt-in after they have already attorned to the exclusive jurisdiction of the B.C. courts works to their disadvantage and is contrary to the goals of the *CPA*: *Lee* at para. 58.

[216] The plaintiff points to *Lee* at paras. 59–65, where Griffin J. certified a non-resident class on an opt-out basis for the class members who agreed that any claims would be brought in B.C. and governed by B.C. law. I also note that in *Lee*, the representative plaintiff was not a B.C. resident.

2. Defendant's position

[217] The defendant says the class definition does not meet the requirements because:

(a) there is insufficient evidence of two or more class members

(b) it is merits based because it is based on an individual's subjective experience and/or it is overbroad because it includes individuals who have suffered no compensable damage;

(c) it is a national opt-out class, contrary to s. 16 of the *CPA*.

(a) Two or more persons

[218] As noted, the defendant says that there is insufficient evidence of two or more class members. In particular, the defendant says that this requirement is not met because "[t]here is no direct evidence from any person other than Mr. Tucci that has allegedly been affected in this case" and "[n]o affidavit evidence has been put forward setting out the grievances of any other potential class member".

[219] The defendant cites *Ladas* at paras. 163–168, and says that the first affidavit of Mr. David Robins, sworn March 20, 2015, "suffers from deficiencies like Ms. Marcia's Affidavit #5 referred to in *Ladas* at paras. 153–157" and "offers no substantive evidence proving who could be part of the proposed class".

(b) Objectively identifiable & merits based

[220] The defendant says that it is not possible to objectively identify class members because the proposed class is merits based: *Frohlinger v. Nortel Networks Corporation,* 2007 CanLII 696 (Ont. S.C.J.) at paras. 19-23; *Ragoonanan v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (S.C.J.).

[221] At one point, the defendant submits that the class is defined based on whether a class member has suffered damages: *Cotter v. Levy*, [2000] O.T.C. 140 at paras. 6-7 (S.C.J.); *Chadha v. Bayer* (2001), 54 O.R. (3d) 520, 200 D.L.R. (4th) 309 (Div. Ct.).

[222] However, the defendant also argues that the proposed class definition is unnecessarily broad because it includes individuals who have suffered no damages. The defendant provides this example: *Unlu* at para. 80, *Jiang v. Peoples Trust Company*, 2016 BCSC 368 at paras. 114-117, *Ladas*, 2014 BCSC 1821 at paras. 144–146; *Hollick* at para. 21; and *Ileman v. Rogers Communications Inc.*, 2014 BCSC 1002 at paras. 122-128, aff'd 2015 BCCA 260, leave to appeal refused 2016 CanLII 6850 (S.C.C.):

> Suppose a person whose information was breached is simply unaffected. That person spent no time reviewing their credit records and suffered no stress as a result of the cyberattack. That person has suffered no damages. The class definition, however, would include this person.

[223] The defendant points to *Ileman* at paras. 122–128, saying the Court "found it was not possible to objectively identify, at the outset, who met the definition. In other words, the proposed class definition sought to broadly capture all those individuals based on the subjective merits of their individual claims." The defendant says that this reasoning was adopted in *Unlu* at paras. 81–84 and *Jiang* at paras. 96–103, 114–117. The defendant says that the class definition here suffers from a similar problem.

(c) Opt-out class for non-resident members

[224] The defendant says that the plaintiff's request that both B.C. residents and non-residents be required to opt-out of the proceeding offends a basic requirement of the *CPA*, namely, that provided in s. 16(2):

> 16(2) … a person who is not a resident of British Columbia may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.

[225] The defendant says that non-residents cannot be automatically included in a B.C. class proceeding because the *CPA* does not authorize "national" classes. The defendant contrasts this with the Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6, and the Alberta *Class Proceedings Act*, S.A. 2003, c C-16.5.

[226] The defendant says that this court "should not unnecessarily extend its authority over residents of other provinces who have taken no steps to bring themselves before it". The defendant also makes a policy argument: to avoid unnecessary conflicts between courts, "when there is concurrent jurisdiction between provinces, certification should be limited to permitting non-residents to opt-in": *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Meeking v. Cash Store Inc.*, 2013 MBCA 81, leave to appeal granted 2014 CanLII 8254 (S.C.C.).

[227] The defendant seeks to distinguish *Lee* on the basis that the claims cannot be adjudicated by this court, i.e. there is no cause of action because *PIPEDA* is a

complete code. The defendant says that non-residents should pursue their complaint through *PIPEDA* or, if the class is certified, on an opt-in basis.

3. Analysis

[228] I agree with the plaintiff's submissions. The class is objectively identifiable and there is some basis in fact that there are two or more members. With respect to the non-resident opt-out class, I follow Griffin J.'s reasoning at paras. 48-67 in *Lee*. The plaintiff is however incorrect on the point of *res judicata.* Attorning to a jurisdiction is not the same as agreeing to be bound by a suit in that jurisdiction to which one is not a party. It is only when the class is certified that the principle of *res judicata* applies beyond the plaintiff, and then only to members of the defined class.

[229] I am not persuaded by defendant's submissions on this topic. The defendant seems to say that the proposed class membership is limited to those who suffered damage as a result of the privacy breach, and that the issue of damage in this case is "entirely dependent on a subjective analysis". Thus, says the defendant, the definition is subjective and merits-based.

[230] The defendant seems to conflate "subjective" and "merits-based" and seems to misread *Jiang*, *Ileman* and *Unlu*. The defendant says that in *Ileman*, the Court "found it was not possible to objectively identify, at the outset, who met the definition. In other words, the proposed class definition sought to broadly capture all those individuals based on the subjective merits of their individual claims". But *Ileman*, *Jiang*, and *Unlu* were BPCPA cases where the class definition problems were related to subjectivity (regarding consumer transactions), <u>not</u> to being merits-based.

[231] Further, even if there were not now direct evidence of two or more persons by way of the two plaintiffs, the first Robins affidavit in no way resembles the affidavit in *Ladas*. There, the affidavit was a mere three paragraphs. It attached two exhibits, one a list of individuals interested in being part of the class and the other a number of signed retainer agreements. It did not specify how the former was compiled or that the affiant had had any contact with them. The retainers provided no information about the operating system used on various devices, and the case was

based around a certain application used by a certain operating system. Thus, the information in the affidavit could not even be logically connected with the proposed class definition.

[232] The requirement is some basis in fact. Here, the first Robins affidavit points to a *Toronto Star* article stating that 12,000-13,000 people were notified by Peoples Trust of the breach, and a website set up by the affiant's law firm, through which 109 individuals have registered and submitted responses to a questionnaire about the impact of the breach on them. While on its own the article may have been insufficient, in my view the website and questionnaire responses suffice to bring this into the "some basis in fact" territory.

C. Common issues

[233] At the heart of any class proceeding is the resolution of common issues: *Thorburn v. British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480 at para. 35. The critical factors and considerations in determining whether an issue is common to the proposed class members are:

(a) whether resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres* at para. 39;

(b) the common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each member's claim: *Western Canadian Shopping Centres* at para. 39; *Hollick* at para. 18; and

(c) success for one class member on a common issue need not mean success for all, but success for one member must not mean failure for another: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45; *Watson BCCA* at para. 151.

[234] In general, the threshold to meet the commonality requirement is low; there must be a rational connection between the class and the proposed common issues

and each common issue must be a triable legal or factual issue. An issue can be common even if it is a very limited aspect of the liability question. The issue need not dispose of the litigation but rather; whether it has a reasonable prospect of advancing the litigation through its determination. Commonality may be satisfied "whether or not common issues predominate over issues affecting only individual members": s. 4(1)(c). While the plaintiff must show "some basis in fact" to satisfy the commonality requirement, this only requires evidence establishing that these questions are common to the class: *Microsoft* at para. 110.

1. Proposed common issues

[235] The common issues proposed by the plaintiff are set out in Schedule A to the plaintiff's notice of application as follows:

> **Breach of Contract and Warranty**
>
> 1. Did the Class Members enter into a Contract with the Defendant regarding the collection, retention and disclosure of Personal Information?
> 2. Did the Contract between the Defendant and the Class Members contain terms that the Defendant would:
>   a. Keep the Personal Information confidential;
>   b. Take steps to secure the Personal Information and prevent it from being lost, stolen, disseminated, or disclosed except as provided by the Contract or applicable statutes;
>   c. Not disclose the Personal Information except as provided by the Contract and applicable statutes;
>   d. Ensure third parties given access to the Personal Information also secured the Personal Information and ensured that it would not be lost, stolen, disseminated, or disclosed except as provided by the Contract and applicable statutes;
>   e. Delete, destroy, or otherwise not retain the Personal Information when the Class Members no longer required the Defendant's services, except as provided by the Contract and applicable statutes?
> 3. As a result of its collection, retention, loss, or disclosure of the Personal Information, did the Defendant breach any of the terms of the Contract or Warranty particularized in paragraph 2? If yes, why?
>
> **Negligence**
>
> 4. Did the Defendant owe the Class Members a duty of care in its collection, retention, loss, or disclosure of the Personal Information?

5. If the answer to #4 is yes, did the Defendant breach its duty of care in its collection, retention, loss, or disclosure of the Personal Information? If yes, why?

Breach of confidence

6. Did the Class Members communicate the Personal Information to the Defendant?
7. Did the Defendant misuse the Personal Information in its collection, retention, loss, or disclosure of the Personal Information, and was that misuse to the detriment of the Class Members?
8. If the answers to #6 and #7 are yes, did the Defendant breach the confidence of the Class Members in its collection, retention, loss, or disclosure of the Personal Information? If yes, why?

Invasion of privacy and intrusion upon seclusion

9. Did the Defendant willfully or recklessly invade the privacy of or intrude upon the seclusion of the Class Members in its collection, retention, loss, or disclosure of the Personal Information in a manner that would be highly offensive to a reasonable person?
10. If the answer to #9 is yes, did the Defendant commit the tort of invasion of privacy? If yes, why?

Unjust enrichment

11. Was the Defendant unjustly enriched by its receipt of fees, interest, and service charges from the Class Members?

Damages

12. Is the Defendant liable to pay damages to the Class Members for:
    a. Breach of contract or warranty?
    b. Negligence?
    c. Breach of confidence?
    d. Invasion of privacy or intrusion on seclusion?
    e. Unjust enrichment?
13. Can the Class Members' damages be assessed in the aggregate pursuant to section 29 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50? If so, in what amount?
14. Does the Defendant's conduct justify an award of punitive damages? If so, why and in what amount?
15. Are the Class Members entitled to pre- and post-judgment interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996 c. 79? If so, at what rate?

2. Plaintiff's position

[236] The plaintiff's claim raises a number of issues that are common to the class.

(a) Common issues: breach of contract (1–3)

[237] The plaintiff says that questions relating to the interpretation and enforceability of standard form contracts are regularly certified as common issues and that this case should be no exception. The plaintiff says the question of what obligations were imposed by the contracts can be determined on a class-wide basis because the agreements are of a standard form that is essentially the same for all the class members. With respect to breach, the plaintiff says that the alleged privacy breach relates to one incident that affected all class members. Therefore, the court can answer these questions by reference to the People Trust application process, the contract language, the statutory provisions, and the defendant's conduct. No evidence or participation from the class members will be required.

[238] The plaintiff points out that the answer to the common questions need not be identical for each class member, and the answer can be nuanced to account for variations over time or across the class, citing *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 46; *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260 at paras. 14-15, citing *Rumley v. British Columbia*, 2001 SCC 69 at para. 32.

(b) Common issues: negligence (4-5)

[239] The plaintiff says that negligence issues are regularly certified as common issues, including in data breaches or loss of personal information claims. As examples, the plaintiff points to *Rowlands* at para. 6(a) (the defendant lost a USB key containing personal information) and *Larose c. Banque Nationale du Canada*, 2010 QCCS 5385: personal information was stored unencrypted by the defendant and subsequently stolen.

[240] The plaintiff says that the existence of a duty of care, the standard of care, and the existence of a breach can be answered in common for the class because they focus on the defendant's conduct.

(c) Common issues: breach of confidence (6-8)

[241] The plaintiff says proposed issues 6–8 can be considered by reference to the defendant's conduct, which was identical with respect to each proposed class member.

(a) Question 6 considers whether the class members' provision of the personal information, which was done pursuant to a contract and application process that was substantially the same for all members, constitutes a "communication" for the purposes of this tort.

(b) Question 7 can be assessed by considering the defendant's use of the personal information, the nature of the information itself, and whether the breach caused detriment to the class members; and

(c) Question 8 considers whether communication and misuse to the class members' detriment amount to a breach of confidence.

(d) Invasion of privacy and intrusion upon seclusion (9-10)

[242] The plaintiff says that these questions can be answered on a class-wide basis and that the answer depends solely on the defendant's conduct, the nature of the class members' privacy interest, and on the expectations of a reasonable person. He says that a similar question was certified in *Rowlands* at para. 6(d). He says that proof of damage is not a required element of the cause of action, citing *Jones* at para. 71.

(e) Unjust enrichment (11)

[243] The plaintiff claims in the alternative "waiver of tort and restitution of and a constructive trust over the unlawful gains" of the defendant. The plaintiff says this question focuses solely on the defendant's conduct.

[244] The plaintiff points to prior certification of unjust enrichment claims: *Infineon*; *Steele v. Toyota Canada Inc.*, 2011 BCCA 98; *Serhan*.

(f) Damages (12–15)

[245] The plaintiff says that these questions consider whether damages are an appropriate remedy for each cause of action, and that "basic entitlement to an award does not require evidence from individual [c]lass [m]embers" and can be done on a common basis.

[246] With respect to aggregate damages, the plaintiff points out that an aggregate damage assessment does not require "mathematical accuracy". The plaintiff quotes from *Story Parchment Co. v. Paterson Parchment Paper Co.* (1931), 282 U.S. 555 at 563:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts. In such cases, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. …[T]he risk of uncertainty should be thrown upon the wrongdoer instead of the injured party.

[247] The plaintiff says a nominal award, in recognition of time wasted, inconvenience, frustration, anger, or stress, is "well-suited to aggregate calculation or partial aggregate calculation" because it is a general recognition of harm suffered rather than a calculation of the financial value of a loss. The plaintiff says that a nominal award for an individual "can be easily extrapolated to the class as a whole". The plaintiff says that this assessment can be aided by information from the defendant's "database of information from putative [c]lass [m]embers they have maintained, which could be queried to determine the typical experience of [c]lass [m]embers as far as telephone calls to contact the [d]efendant, time spent on hold, time spent dealing with banks and credit reporting agencies, and so on".

[248] The plaintiff also says that class proceedings are "particularly well-suited for the hearing of a claim for punitive damages", citing *Chace v. Crane Canada Inc.*,

1997 CanLII 4058 (B.C.C.A.) at para. 24 because it reflects the overall culpability of the defendant and need not be linked to the harm caused to any particular claimant: *L.R. v. British Columbia*, 1999 BCCA 689 at para. 48, aff'd 2001 SCC 69. For this reason, the plaintiff says punitive damages are regularly certified as common issues: *Jones v. Zimmer GMBH*, 2011 BCSC 1198, aff'd 2013 BCCA 21; *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057, aff'd 2012 BCCA 260; *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148 at para. 152, aff'd 2012 ONCA 443, leave to appeal refused [2012] S.C.C.A. No. 326. The plaintiff says that the defendant's conduct is more important to the assessment than the impact on any individual class members.

[249] The plaintiff says that court order interest is a common issue.

3. Defendant's position

[250] The defendant says that the plaintiff has not proposed appropriate common issues.

(a) Cause of action issues (1–11)

[251] The defendant says there are no valid causes of action. The defendant also says that, even if there are causes of action, there are no compensable damages and hence "a common issues trial still cannot proceed". Further, even if compensable damages could be determined, "the problems arising from assessing a merits based class definition are encountered again because of the subjective inquiries that would be required to consider the proposed common issues": *578115 Ontario Inc. v. Sears Canada Inc.*, 2010 ONSC 4571 at para. 43; *Chadha v. Bayer* (2003), 63 O.R. (3d) 22 at para. 52 (C.A.); *Pro-Sys* at para. 118.

[252] The defendant says that the generality with which the common issues are framed "masks the complexity and substance of the underlying factual issues necessary for their adjudication". "In order to properly address the alleged causes of action, there would need to be a much more detailed series of questions regarding the impact upon each putative class member and the damages actually experienced".

(b) Damages and remedies (12–14)

[253] The defendant says that "[i]n the absence of a common issue and success for the plaintiff and the class on that issue, a common issue about remedies is unfounded". The defendant says that as there is no cause of action disclosed, the damage and remedy issues are not common.

[254] The defendant says that the aggregate damage issue should not be certified because the plaintiff has not put forth any basis in fact as to methodology for determining aggregate damage: *Charlton BCCA* at para. 112; *Clark v. Energy Brands Inc.*, 2014 BCSC 1891 at paras. 95–113. As there is no proposed methodology, there is no basis to certify this issue.

[255] With respect to punitive damages, the defendant says that the plaintiff frames the question "too broadly, attempting to capture the defendant for any conduct arising out of response to the security breach". The defendant quotes the following from *Koubi BCSC* at para. 155 (also citing *Jiang* at para. 136):

> [155] There is an absence of commonality necessary for a common issue. The results of the inquiry as to whether, in any particular circumstances, the defendants acted in a highhanded or reprehensible manner cannot be extrapolated to the experiences of other members of the proposed class. Therefore, in the particular circumstances of this case, the question of whether punitive damages would serve a rational purpose cannot be determined until after individual issues of causation and compensatory damages.

[256] Finally, the defendant says that the court-order interest issue is parasitic and does not meaningfully advance the action in the absence of substantive common issues, citing *Jiang* at para. 137; *Clark* at para. 138.

4. Analysis

[257] In my view, common issues 1-3 meet the threshold for commonality. Common issues 4 and 5 are approved as they deal mainly with the defendant's conduct. While issue 4 is stated quite generally, in my view the issue of the reasonable foreseeability of harm and proximity between the defendant and class members can be adjudicated based on facts sufficiently common to all class

members. Issues 6-8 are not approved as breach of confidence has been struck. Issues 9 and 10 are approved, albeit only with respect to the potential federal common law tort. Issue 11 is not approved as unjust enrichment and waiver of tort have been struck. Issues 12 (a) and (d) are approved, but damages for negligence cannot go forward as loss and causation must be proven before damages are owed, damages for unjust enrichment cannot go forward as that cause of action was struck, and damages for invasion of privacy/intrusion upon seclusion is an individualized inquiry. With respect to aggregate damages, it seems that the plaintiff has only proposed a method to calculate aggregate nominal damages, not aggregate compensatory damages: querying a database to determine class members' typical experience in terms of time wasted, inconvenience, etc. Given the nature of nominal damages, this seems appropriate, and expert evidence is unnecessary for such a method. Without a method for compensatory damages, the common issue for compensatory aggregate damages is not certified. Issue 13 is approved with respect to nominal damages only. The common issue relating to punitive damages is not approved. Common issue 15 is also certified.

D. Preferable procedure

[258] Section 4(1)(d) of the *CPA* states that the court must determine whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues.

[259] Section 4(2) of the *CPA* identifies specific criteria that must be considered in assessing preferability:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;

> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[260] The preferability analysis should be conducted through the lens of the three principal aims of class actions: judicial economy, access to justice, and behaviour modification: *Hollick* at para. 27.

[261] The test for preferability is two-fold: first, a court must assess whether the class action would be a fair, efficient and manageable method of advancing the claim; second, the court must determine whether the class action would be preferable to other reasonably available means of resolving the claims of class members: *Hollick* at paras. 27–28; *Knight v. Imperial Tobacco Canada Limited*, 2006 BCCA 235 at para. 24.

[262] In *AIC Limited v. Fisher*, 2013 SCC 69, Cromwell J., for the Court, wrote:

> [21] In order to determine whether a class proceeding would be the preferable procedure for the "resolution of the common issues", those common issues must be considered in the context of the action as a whole and "must take into account the importance of the common issues in relation to the claims as a whole": *Hollick*, at para. 30. McLachlin C.J. in *Hollick* accepted the words of a commentator to the effect that in comparing possible alternatives with the proposed class proceeding, "it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court": para. 29, citing W. K. Branch, *Class Actions in Canada* (loose-leaf 1998, release 4), at para. 4.690.

1. Defendant's position

[263] The plaintiff has failed to show that a class action in this case would be the "preferable procedure" for the fair and efficient resolution of the common issues (*CPA*, s. 4(1)(d)). Here, any attempted common trial would flounder under inevitably individual issues and inquiries. This would not promote judicial economy or improve access to justice.

[264] The defendant says that this action will quickly break down into individual enquiries into individual-specific issues; in particular, regarding each class member's entitlement to actual damages. The defendant cites the following from *Kumar v.*

Mutual Life Assurance Company of Canada, 2003 CanLII 48334 (Ont. C.A.) at para. 54:

> [54] I am not persuaded that the appellant has shown that allowing a class action would serve the interests of access to justice. … More importantly, it seems to me that since resolution of the common issue would play such a minimal role in resolution of the individual claims, the potential members of the class would be faced with the same costs to litigate their claim as if they were bringing the claims as individuals and not members of the class.

[265] The defendant says the vague, general common questions of law would not meaningfully advance the litigation: citing *MacKinnon v. National Money Mart Company*, 2005 BCSC 271 at para. 28.

[266] The defendant says that there are other ways for the class to enforce their rights and, even if there were not, this is insufficient because a class proceeding would not be fair, efficient, and manageable: *Caputo v. Imperial Tobacco Ltd.*, 2004 CanLII 24753 (Ont. S.C.J.) at paras. 62, 67–68; *Marshall v. United Furniture Warehouse Limited Partnership,* 2013 BCSC 2050 at para. 235, aff'd 2015 BCCA 252; *Clark* at paras. 137–138; *Unlu* at para. 93. The defendant says that a class proceeding "does not adequately address the individual issues and it would curtail the defendant's right to adequately defend itself, particularly on the issues of individual class member's entitlement to, and quantum of, any damages".

2. Plaintiff's position

[267] Pursuing this action as an individual action would likely entail substantial costs that the plaintiffs would be unable to afford. The plaintiff has proposed a workable methodology for the determination of the claims advanced in this action. There are no other preferable means to resolve the claims of the class members.

[268] As to s. 4(2)(a), the plaintiff says that the proposed common issues are at the heart of the litigation. In particular, the issue of whether the defendant "is liable for the Breach" is the predominant liability issue. The plaintiff points out that the application process, contracts, and security breach were substantially the same for all class members. The plaintiff notes that, even if damages cannot be determined

in the aggregate, s. 7(a) of the *CPA* provides that this cannot itself be a basis to refuse certification.

[269] With respect to s. 4(2)(b), the plaintiff says that there is no evidence that any class members have an interest in controlling separate actions and, given the small amount of damages for each member, it is unlikely that any class member would have a valid interest in individually prosecuting an action. The plaintiff lists many advantages of a class proceeding, such as the tolling of the limitation period for the entire class, the availability of class counsel through contingency arrangements, the ability of class members to participate in the litigation if desired, protection from adverse costs rulings, and the fact that any order or settlement will accrue to the benefit of the entire class without resorting to estoppel.

[270] As to s. 4(2)(c), the plaintiff says that neither he nor class counsel are aware of any other proceedings in Canadian courts in relation to the breach, the only other process being undertaken is the Privacy Commissioner's investigation.

[271] With respect to s. 4(2)(d), the plaintiff says that individual litigation is the only real alternative to a class proceeding and, given the cost of litigation compared to the low value of individual claims, that is an "illusory alternative". Thus, the other means of resolving the claims are less practical or efficient.

[272] Finally, as to s. 4(2)(e), the plaintiff submits that there is no indication that a class proceeding will create greater difficulties than alternative means of seeking relief, especially if the aggregate damage provisions are available or if the Court adopts the proposed automated distribution method for distributing the monetary award: *Heward*; *Nanaimo Immigrant Settlement Society v. British Columbia*, 2001 BCCA 75 at para. 20. The plaintiff says that all of the same issues would need to be considered in individual litigation, but in a less controlled procedural environment.

3. Analysis

[273] I am persuaded by the applicant's submissions and find that class proceeding is the preferable procedure. I agree that there will be a need for individual inquiries here. However, the fact that individual inquiries will be required is not determinative

of the question of preferability. In this case, my view is that the individual inquiries can be satisfactorily dealt with in a post-common issues process, should the case proceed to that stage.

E. Representative plaintiff

[274] Section 4(1)(e) of the *CPA* mandates that the representative plaintiff must be able to fairly and adequately represent the class, must have developed a plan for proceeding, and must not have a conflict with the class on the common issues. The representative plaintiff must be prepared and able to vigorously represent the interests of the class.

[275] Section 2(1) provides that "[o]ne member of a class of persons who are resident in British Columbia may commence a proceeding in the court on behalf of the members of that class."

1. Defendant's position

[276] The defendant submits that the plaintiff is not an appropriate representative plaintiff and has not proposed a workable litigation plan. The plaintiff is not a resident of British Columbia, as required by the *CPA*. Nor is the plaintiff's boilerplate litigation plan workable, as it fails to explain, and simply assumes away, how the critical and determinative individual issues will be adjudicated.

[277] Since the commencement of the hearing, counsel for the plaintiff has identified Mr. Andrew Taylor, a resident of British Columbia. He is a retiree who formerly worked in operations and customer service in the airline industry. His affidavit indicates that he has retained counsel to advance the within action on his behalf and the proposed class members. Having read the materials I am satisfied as to his ability to serve as a representative plaintiff.

[278] With respect to the litigation plan, the defendant says that the proposed litigation plan is not workable. The defendant says that the plan does not address how the individual issues would be resolved: *Koubi BCSC* at para. 195; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 223; *Miller v. Merck Frosst*

Canada Ltd., 2013 BCSC 544 at para. 217, aff'd 2015 BCCA 353, leave to appeal refused [2015] S.C.C.A. No. 431. The defendant says that "there will be significant individual issues regarding the nature and scope of harm allegedly suffered by each class member. These issues will require full discovery and mini-trials will be required on an individual basis to provide a fair procedure for the determination of the individual issues".

[279] The defendant says that only individual issues dealt with in the litigation plan relate to quantification of damages by a court-appointed administrator; the defendant says that a claims form will not address "substantive individual issues". The defendant says it has the right to challenge class members' evidence and lead responsive evidence before the court decides the questions at issue, and that the litigation plan assumes that liability and entitlement to damages will be established on a class-wide basis. The defendant says that "forms alone" cannot deal with the individual issues that will arise in this case and that the plaintiff proposes that "procedural fairness relevant to the defence of his claims be sacrificed for expediency". The defendant says that entitlement to and the quantum of damages cannot be left to an administrator even with an arbitrator as an avenue of an appeal and amounts to an inappropriate delegation of the court's adjudicative powers, citing *Keatley Surveying Ltd. v. Teranet Inc.*, 2012 ONSC 7120 at paras. 244–246, rev'd 2014 ONSC 1677 at paras. 122–123.

2. Plaintiff's position

[280] The plaintiff is prepared to represent the interests of the class members. He is familiar with the substance of the claim and the role of the representative plaintiff. The plaintiff is not aware of conflicts with other members of the class with respect to the proposed common issues.

[281] The plaintiff says the proposed litigation plan is a workable method for advancing the litigation. It addresses the issues and demonstrates that the plaintiff and class counsel have thought through the proceeding and its complexities, particularly if proof of damage and the quantum of restitution can be determined on an aggregate basis. The plaintiff says that this proceeding will proceed in two

phases: the first will involve interpretation of the contracts and determination of the defendant's liability. If aggregate damages are determined, a "systematic computer method" can be used to determine and deliver the individual entitlements to the class members.

[282] The plaintiff says he has a viable notification plan and that he does not anticipate that any class members will opt out of the proceeding.

3. Analysis

[283] The addition of Mr. Taylor as a plaintiff addresses the issue raised by the defendant in respect to residency. I am also satisfied that the other qualifications have been met by Mr. Taylor.

[284] On the question of addressing individual inquiries, the plan does not reflect a method. My view is that this aspect can be dealt with in an efficient and fair way. Individual inquiries are a frequent aspect of class proceedings. The plaintiff is required to file a proposal for dealing with this as a condition to certification. Otherwise, I find the plan satisfactory at this stage. Class proceeding are flexible and dynamic, and a litigation plan need only be a workable framework for moving the case forward: *Godfrey* at para. 255.

IV. CONCLUSION

[285] For these reasons:

1. This action is certified as a class proceeding;
2. The class is approved on an opt-out basis, and defined as: All persons residing in Canada who completed an online account application with People Trust and whose personal information was contained on a database in the control of Peoples Trust which was compromised and/or disclosed to others on the internet.

3. Two subclasses are approved, defined as:

    i. The “Resident Sub-Class”: All persons residing in British Columbia who completed an online account application with People Trust and whose Personal Information was contained on a database in the control of People Trust which was compromised and/or disclosed to others on the internet; and

    ii. The “Non-Resident Sub-Class”: All persons resident outside of British Columbia who completed an online account application with People Trust and whose Personal Information was contained on a database in the control of People Trust which was compromised and/or disclosed to others on the internet;

4. The common issues approved are 1-5, 9-10 for the purposes of the federal common law only, 12(a) and (d), 13 for nominal damages only, and 15;

5. A common issue regarding the effect of the Limitation of Liability clause is to be added;

6. The representative plaintiffs are approved;

7. The litigation plan is approved, subject to the requirement that the plaintiff file a revised litigation plan in the manner described above.

“The Honourable Mr. Justice Masuhara”