

CITATION: Carter v. LifeLabs Inc., 2023 ONSC 4331
COURT FILE NO.: CV-20-00636642-00CP
DATE: 20230725

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
 ALITA MARIE CARTER,) *Bryan C. McPhadden, Jean-Marc Leclerc,*
 ANNA BELLE THARANI, and) *Andrew Stein, and Peter I. Waldmann for the*
 ALBERT OTOTÉ) *Plaintiffs*
 Plaintiffs)
)
 - and -)
)
 LIFELABS INC., LIFELABS BC INC.,) *Dana M. Peebles and Amanda D. Iarusso for*
 LIFELABS BC LP, and LIFELABS LP) *the Defendants*
)
 Defendants)
)
) **HEARD:** July 25, 2023
)

PERELL, J.

REASONS FOR DECISION

[1] This is a proposed privacy law class action under the *Class Proceedings Act, 1992*.¹ The Plaintiffs Alita Marie Carter, Anna Belle Tharani, and Albert Ototé sue LifeLabs Inc., LifeLabs BC Inc., LifeLabs BC LP, and LifeLabs LP (collectively “LifeLabs”) with respect to a data breach that potentially affected the personal information of 8.6 million customers.

[2] The parties have agreed to settle the action subject to court approval. In this motion, the Plaintiffs seek an Order: (a) certifying the action for settlement purposes; (b) approving the publication, Short Form and Long Form Notices of the settlement and of the approval motion; (c) approving a plan for the dissemination of the notice; and (d) incidental relief including the appointment of a claims administrator.

[3] For the reasons that follow the motion is granted. I schedule the settlement approval hearing for October 25, 2023 (virtual hearing, 1.0 hours).

[4] The factual background to this motion is as follows:

1. LifeLabs operates Canada’s largest medical laboratory testing and analytic and diagnostic service.
2. The Plaintiffs commenced this action by Statement of Claim issued on **February 20, 2020**.

¹ S.O. 1992, c. 6.

3. On **May 6, 2020**, after a carriage motion, the Plaintiffs were granted carriage.²
4. There are or were related proceedings in British Columbia. On **December 16, 2020**, a national consortium agreement was signed between counsel in this action and B.C. counsel. The national consortium consists of twelve law firms from Ontario and B.C. With the exception of *Holt et al. v. LifeLabs BC Inc. et al.*, (BCSC No. S-201131), the British Columbia actions have been discontinued. The *Holt* action has not been actively prosecuted in favour of the action in Ontario.
5. On **February 24, 2021**, Ms. Tharani and Dr. Ototé became co-plaintiffs in an Amended Statement of Claim. The Plaintiffs advance causes of action in negligence, breach of contract, consumer protection remedies, statutory privacy violations, and unjust enrichment, and they seek damages and disgorgement of profits, among remedies.
6. Following protracted arm's length settlement negotiations, in **July 2023**, the parties achieved a settlement agreement.
 - a. Under the Settlement Agreement, LifeLabs has agreed to pay \$4.9 million in guaranteed settlement funds, and \$4.9 million in contingent settlement funds.
 - b. Under the Settlement Agreement, each claimant will be paid a minimum amount of \$50 or there will be a *pro rata* distribution.
 - c. If the total number of claims filed does not equal the \$4.9 million in guaranteed funds, the amount paid to each claimant will be increased to \$150.
 - d. If the total number of claims filed exceeds the \$4.9 million in guaranteed funds (after taking into account class counsel fees and disbursements approved by the court), the \$4.9 million in contingent settlement funds will be used to top-up payments to ensure that claimants are paid a net \$50 amount.
 - e. If the total number of claims for \$50 exceeds the total of \$4.9 million in guaranteed funds and \$4.9 million in contingent funds, class members will be paid on a *pro rata* basis, net of class counsel fees and disbursements.
 - f. Under the Settlement Agreement, LifeLabs is responsible for all fees and expenses of the claims administrator, including notice costs, with the exception of social media and press release costs, which will be requested to be charged as a disbursement to the settlement funds.
 - g. Under the settlement, the Plaintiffs are advancing only their claim in negligence.
 - h. The parties have agreed on the following class definition:

any person living as of the date of Settlement Approval who is a current or former user of LifeLabs' services whose Personal Information is known to have

² *MacBrayne v. LifeLabs Inc.*, 2020 ONSC 2674.

been exfiltrated as part of the Data Breach, excluding any officer, director, or executive-level employee of the Defendants.

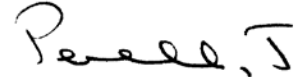
- i. The common issue for settlement purposes is: “Did the Defendants owe the Plaintiffs and Class Members a duty of care in respect of the Data Breach?”
7. The parties have agreed on the style and content of the Long Form Notice to Class Members and the Long Form Notice includes all pertinent information required by s. 17 of the *Class Proceedings Act, 1992*.
8. The parties have also agreed on the Short Form Notice. It contains the critical information for Class Members and directs them to sources for further information. This notice is a single page, identifies potential members of the class, rights to opt out, the date of the hearing, contact information for Class Counsel, and sets out a link to a website which will contain further information, including the Long Form Notice. The Short Form Notice will be used for social media notices and posting in LifeLabs’ laboratory locations.
9. The parties have agreed on a plan of dissemination of the notices.
 - a. The parties have agreed on KPMG LLP as claims administrator. It is an experienced class action administrator.
 - b. The parties request an order permitting LifeLabs to disclose to the claims administrator personal information of class members solely for the purposes of supporting the dissemination of the notices.
 - c. Under the plan, the Long Form Notice will be disseminated by regular mail to the 131,957 class members whose personal health information was accessed in the data breach.
 - d. Under the plan, the Long Form Notice will be emailed to every Class Member for whom LifeLabs has an e-mail address (approximately 3,011,138 Class Members).
 - e. Under the plan, LifeLabs will post a link to the Long Form Notice on its website.
 - f. Under the plan, LifeLabs will post a copy of the Short Form Notice in a prominent location at each LifeLabs customer laboratory location.
 - g. Under the plan, there will a national press release.
 - h. For the approximately 5 million class members who will not receive direct mail or e-mail notice, Class Counsel will use their firm social media to maximize distribution of the Short Form Notice.

[5] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (1) the pleadings disclose a cause of action; (2) there is an identifiable class; (3) the claims or defences of the class members raise common issues of fact or law; (4) a class proceeding would be the preferable procedure; and (5) there is a representative plaintiff or defendant who would adequately represent the interests of the class without conflict of interest and there is a workable litigation plan.

[6] The fact that an action is certified on consent for settlement purposes does not dispense with the need to meet the certification criteria, but the criteria may be less rigorously applied in a settlement context.³

[7] I am satisfied that all the criteria for certification are satisfied in the immediate case and that it is appropriate to grant the ancillary relief.

[8] For the above reasons, the motion is granted.

A handwritten signature in black ink, appearing to read "Perell, J.", with a stylized flourish at the end.

Perell, J.

Released: July 25, 2023

³ *Osmun v. CadburyAdams Canada Inc.*, [2009] O.J. No. 5566 at para. 21 (S.C.J.).

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ANNA BELLE THARANI, and ALBERT OTOTÉ**

Plaintiffs

- and -

**LIFELABS INC., LIFELABS BC INC., LIFELABS
BC LP, and LIFELABS LP**

Defendants

REASONS FOR DECISION

PERELL J.

Released: July 25, 2023